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THE
ENGLISH AND EMPIRE DIGEST

WITH

COMPLETE AND EXHAUSTIVE

ANNOTATIONS.

VOLUME III.

THE ENGLISH AND EMPIRE DIGEST

WITH

COMPLETE AND EXHAUSTIVE

ANNOTATIONS

BEING

A COMPLETE DIGEST OF EVERY ENGLISH CASE REPORTED FROM EARLY TIMES TO THE PRESENT DAY, WITH ADDITIONAL CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE OF INDIA, AND THE DOMINIONS BEYOND THE SEAS,

AND INCLUDING

COMPLETE AND EXHAUSTIVE ANNOTATIONS GIVING ALL THE SUBSEQUENT CASES IN WHICH JUDICIAL OPINIONS HAVE BEEN GIVEN CONCERNING THE ENGLISH CASES DIGESTED.

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In this Volume English Cases reported up to 1st January, 1919, are included, and other cases are included so far as the Reports of the same were available in London on that date.

TABLE OF CONTENTS

AND

TABLE OF CROSS-REFERENCES

PAGE

Reports included in this Work and their Abbreviations - - - - xv

Abbreviations used in this Work - - - - - - - - xxxi

Meaning of Terms used in Classifying Annotating Cases - - - xxxv

Table of Cases - - - - - - - - - - xxxvii

AUCTION AND AUCTIONEERS - - - - - - - - 1—48

[*For detailed Table of Contents and Table of Cross-References, see* pages 1, 2.]

AUDITOR.

See Companies ; Local Government.

AUTHOR.

See Copyright and Literary Property ; Libel and Slander ; Press and Printing.

AUTREFOIS ACQUIT AND AUTREFOIS CONVICT.

See Criminal Law and Procedure.

AVERAGE.

See Insurance ; Shipping and Navigation.

AVOWRY.

See Distress.

BAIL.

See Admiralty ; Criminal Law and Procedure ; Crown Practice ; Execution ; Magistrates ; Sheriffs and Bailiffs.

BAILIFF.

See Copyholds ; Sheriffs and Bailiffs.

PAGE

BAILMENT - - - - - - - - - - - - - 51—117

[*For detailed Table of Contents and Table of Cross-References, see* pages 51, 52.]

BAKEHOUSES.

See FACTORIES AND SHOPS.

BALLOT.

See ELECTIONS.

BANKERS AND BANKING - - - - - - - - - 119—309

[*For detailed Table of Contents and Table of Cross-References, see* pages 119—122.]

BANKRUPTCY AND INSOLVENCY. [*Owing to it not being practicable to include cases relating to the above subject to any useful extent in this Volume, the Title commences in Volume IV.*]

BANNS.

See HUSBAND AND WIFE.

BAPTISM.

See ECCLESIASTICAL LAW; EVIDENCE.

BARBED WIRE.

See BOUNDARIES, FENCES, AND PARTY WALLS.

BARONETS.

See PEERAGES AND DIGNITIES.

BARRATRY.

See ACTION; CRIMINAL LAW AND PROCEDURE; SHIPPING AND NAVIGATION.

BARRING ENTAILS AND REMAINDERS.

See REAL PROPERTY AND CHATTELS REAL.

PAGE

BARRISTERS - - - - - - - - - - - 313—355

[*For detailed Table of Contents and Table of Cross-References, see* pages 313, 314.]

BASE FEE.

See REAL PROPERTY AND CHATTELS REAL.

BASTARDY - - - - - - - - - - - 357—407

[*For detailed Table of Contents and Table of Cross-References, see* pages 357, 358.]

BATHS AND WASHHOUSES.

See PUBLIC HEALTH AND LOCAL ADMINISTRATION.

BATTERY.

See CRIMINAL LAW AND PROCEDURE; TRESPASS.

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See ECCLESIASTICAL LAW.

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See BUILDING SOCIETIES; FRIENDLY SOCIETIES; INDUSTRIAL, PROVIDENT, AND SIMILAR SOCIETIES.

BETTING.

See GAMING AND WAGERING.

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BILLETING.

See ROYAL FORCES.

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See GAMING AND WAGERING; INTOXICATING LIQUORS; THEATRES AND OTHER PLACES OF ENTERTAINMENT.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (*e.g.*, [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeals	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809—1841	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1834—1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893—(current)	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822—1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813—1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832—1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1646—1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb.	Ambler's Reports, Chancery, 2 vols., 1725—1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535—1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737—1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792—1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875—1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846—1848	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840—1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838—1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840—1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870—(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736—1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830—1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817—1822	Eng.
B. & C.	Barnewall and Cresswell's Reports, King's Bench, 10 vols., 1822—1830	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918—(current) (*e.g.*, [1918—19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861—1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907—(current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.

Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852—1854 ...	Eng.
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.) ...	Eng.
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807—1814...	Ir.
Bankr. & Ins. R. ...	Bankruptcy and Insolvency Reports, 2 vols., 1853—1855 ...	Eng.
Bar. & Arn.	Barron and Arnold's Election Cases, 1 vol., 1843—1846 ...	Eng.
Bar. & Aust.	Barron and Austin's Election Cases, 1 vol., 1842	Eng.
Barn. Ch.	Barnardiston's Reports, Chancery, fol., 1 vol., 1740—1741 ...	Eng.
Barn. K. B.	Barnardiston's Reports, King's Bench, fol., 2 vols., 1726—1734...	Eng.
Barnes	Barnes' Notes of Cases of Practice, Common Pleas, 1 vol., 1732—1760	Eng.
Batt.	Batty's Reports, King's Bench (Ireland), 1 vol., 1825—1826 ...	Ir.
Beat.	Beatty's Reports, Chancery (Ireland), 1 vol., 1813—1830 ...	Ir.
Beav.	Beavan's Reports, Rolls Court, 36 vols., 1838—1866	Eng.
Beav. & Wal.	Beavan and Walford's Railway Parliamentary Cases, 1 vol., 1846	Eng.
Beaw.	Beawes's Lex Mercatoria	Eng.
Bell, C. C.	T. Bell's Crown Cases Reserved, 1 vol., 1858—1860	Eng.
Bell, Ct. of Sess. ...	R. Bell's Decisions, Court of Session (Scotland), 1 vol., 1790—1792	Scot.
Bell, Ct. of Sess. fol. ...	R. Bell's Decisions, Court of Session (Scotland), fol., 1 vol., 1794—1795	Scot.
Bell, Dict. Dec. ...	S. S. Bell's Dictionary of Decisions, Court of Session (Scotland), 2 vols., 1808—1833	Scot.
Bell, Sc. App.	S. S. Bell's Scotch Appeals, House of Lords, 7 vols., 1842—1850	Scot.
Bellewe...	Bellewe's Cases *temp.* Richard II., King's Bench, 1 vol. ...	Eng.
Belt's Sup.	Belt's Supplement to Vesey Sen., Chancery, 1 vol., 1746—1756	Eng.
Ben. & D.	Benloe and Dalison's Reports, Common Pleas, fol., 1 vol., 1357—1579	Eng.
Benl.	Benloe's (or Bendloe's) Reports, King's Bench and Common Pleas, fol., 1 vol., 1515—1627	Eng.
Ber.	New Brunswick Reports (Berton)	Can.
Bing.	Bingham's Reports, Common Pleas, 10 vols., 1822—1834 ...	Eng.
Bing. N. C.	Bingham's New Cases, Common Pleas, 6 vols., 1834—1840 ...	Eng.
Biss. & Sm.	Bisset and Smith's Digest	S. Af.
Bitt. Prac. Cas. ...	Bittleston's Practice Cases in Chambers under the Judicature Acts, 1873 and 1875, 1 vol., 1875—1876	Eng.
Bitt. Rep. in Ch. ...	Bittleston's Reports in Chambers (Queen's Bench Division), 1 vol., 1883—1884...	Eng.
Bl. Com.	Blackstone's Commentaries...	Eng
Bl. D. & Osb.	Blackham, Dundas, and Osborne's Reports, Practice and Nisi Prius (Ireland), 1 vol., 1846—1848	Ir.
Bli.	Bligh's Reports, House of Lords, 4 vols., 1819—1821	Eng.
Bli. N. S.	Bligh's Reports, House of Lords, New Series, 11 vols., 1827—1837	Eng.
Bluett	Bluett's Isle of Man Cases	I. of M.
Bom.	Bombay High Court Reports	Ind.
Bom. A. C.	Bombay Reports, Appeal Cases	Ind.
Bom. O. C.	Bombay Reports, Oudh Cases	Ind.
Bos. & P.	Bosanquet and Puller's Reports, Common Pleas, 3 vols., 1796—1804	Eng.
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Bourke	Bourke's Reports	Ind.
Br. & Col. Pr. Cas. ...	British and Colonial Prize Cases, 3 vols., 1914—1919	Eng.
Bract.	Bracton De Legibus et Consuetudinibus Angliæ	Eng.
Bro. Abr.	Sir J. Brooke's Abridgment...	Eng.
Bro. C. C.	W. Brown's Chancery Reports, 4 vols., 1778—1794	Eng.
Bro. Ecc. Rep.... ...	W. G. Brooke's Ecclesiastical Reports, Privy Council, 1 vol., 1850—1872	Eng.
Bro. N. C.	Sir R. Brooke's New Cases, 1 vol., 1515—1558	Eng.
Bro. Parl. Cas.... ...	J. Brown's Cases in Parliament, 8 vols., 1702—1800	Eng.
Bro. Supp. to Mor. ...	M. P. Brown's Supplement to Morison's Dictionary of Decisions, Court of Session (Scotland), 5 vols.	Scot.
Bro. Synop.	M. P. Brown's Synopsis of Decisions, Court of Session (Scotland), 4 vols., 1532—1827	Scot.
Brod. & Bing.	Broderip and Bingham's Reports, Common Pleas, 3 vols., 1819—1822	Eng.
Brod. & F.	Broderick and Fremantle's Ecclesiastical Reports, Privy Council, 1 vol., 1705—1864	Eng.
Broun	Broun's Justiciary Reports (Scotland), 2 vols., 1842—1845 ...	Scot.
Brown. & Lush. ...	Browning and Lushington's Reports, Admiralty, 1 vol., 1863—1866...	Eng.
Brownl....	Brownlow and Goldesborough's Reports, Common Pleas, 2 parts, 1569—1624...	Eng.
Bruce	Bruce's Decisions, Court of Session (Scotland), 1714—1715 ...	Scot.
Buch.	Buchanan's Reports of the Supreme Court of the Cape of Good Hope, 1868—1879...	S. Af.

Buch. A. C.	Buchanan's Reports of Appeal Court (Cape)	S. Af.
Buchan.	Buchanan's Reports, Court of Session and Justiciary (Scotland), 1806—1813	Scot.
Buck	Buck's Cases in Bankruptcy, 1 vol., 1816—1820	Eng.
Bull. N. P.	Buller's Nisi Prius (published, London, 1772)	Eng.
Bulst.	Bulstrode's Reports, King's Bench, fol., 3 parts in 1 vol., 1610—1626	Eng.
Bunb.	Bunbury's Reports, Exchequer, fol., 1 vol., 1713—1741	Eng.
Burr.	Burrow's Reports, King's Bench, 5 vols., 1756—1772	Eng.
Burr. S. C.	Burrow's Settlement Cases, King's Bench, 1 vol., 1733—1776	Eng.
Burrell	Burrell's Reports, Admiralty, ed. by Marsden, 1 vol., 1648—1840	Eng.
C. A.	Court of Appeal Reports, 3 vols., 1867—1877	N.Z.
C. & P.	Carrington and Payne's Reports, Nisi Prius, 9 vols., 1823—1841	Eng.
C. B.	Common Bench Reports, 18 vols., 1845—1856	Eng.
C. B. N. S.	Common Bench Reports, New Series, 20 vols., 1856—1865	Eng.
C. C. Ct. Cas.	Central Criminal Court Cases (Sessions Papers), 1834—(current)	Eng.
C. L. Ch.	Common Law Chambers	Can.
C. L. J.	Cape Law Journal	S. Af.
C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	Can.
C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864	Can.
C. L. R.	Common Law Reports, 3 vols., 1853—1855	Eng.
C. L. R.	Commonwealth Law Reports	Aus.
C. L. R.	Calcutta Law Reporter	Ind.
C. L. R.	Cape Law Reports	S. Af.
C. L. T.	Canadian Law Times	Can.
C. L. T. Occ. N.	Canadian Law Times, Occasional Notes	Can.
C. P.	Upper Canada Common Pleas	Can.
C. P. D.	Law Reports, Common Pleas Division, 5 vols., 1875—1880	Eng.
C. P. D.	Cape Provincial Division Reports	S. Af.
C. R. [date] A. C.	Canadian Reports, Appeal Cases	Can.
C. T. R.	Cape Times Reports of the Supreme Court of the Cape of Good Hope	S. Af.
C. W. N.	Calcutta Weekly Notes	Ind.
Cab. & El.	Cababé and Ellis's Reports, Queen's Bench Division, 1 vol., 1882—1885	Eng.
Cald. Mag. Cas.	Caldecott's Magistrates' Cases, 1 vol., 1776—1785	Eng.
Calth.	Calthrop's City of London Cases, King's Bench, 1 vol., 1609—1618	Eng.
Cam. Cas.	Cameron's Supreme Court Cases	Can.
Cam. Prac.	Cameron's Supreme Court Practice	Can.
Camp.	Campbell's Reports, Nisi Prius, 4 vols., 1807—1816	Eng.
Can. Com. Cas.	Commercial Law Reports of Canada	Can.
Can. Crim. Cas.	Canadian Criminal Cases, Annotated	Can.
Can. Ry. Cas.	Canadian Railway Cases	Can.
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, 3 vols., 1843—1853	Eng.
Car. & M.	Carrington and Marshman's Reports, Nisi Prius, 1 vol., 1841—1842	Eng.
Carp. Pat. Cas.	Carpmael's Patent Cases, 2 vols., 1602—1842	Eng.
Cart.	Carter's Reports, Common Pleas, fol., 1 vol., 1664—1673	Eng.
Cart.	Cases on British North America Act (Cartwright)	Can.
Carth.	Carthew's Reports, King's Bench, fol., 1 vol., 1687—1700	Eng.
Cary	Cary's Reports, Chancery, 1 vol.	Eng.
Cas. in Ch.	Cases in Chancery, fol., 3 parts, 1660—1697	Eng.
Cas. Pract. K. B.	Cases of Practice, King's Bench, 1 vol., 1655—1775	Eng.
Cas. Sett.	Cases of Settlements and Removals, 1 vol., 1685—1727	Eng.
Cas. *temp.* Finch	Cases *temp.* Finch, Chancery, fol., 1 vol., 1673—1680	Eng.
Cas. *temp.* King	Select Cases *temp.* King, Chancery, fol., 1 vol., 1724—1733	Eng.
Cas. *temp.* Talb.	Cases in Equity *temp.* Talbot, fol., 1 vol., 1730—1737	Eng.
Cass. Dig.	Cassells' Digest	Can.
Ch. (preceded by date).	Law Reports, Chancery Division, since 1890 (*e.g.*, [1891] 1 Ch.)	Eng.
Ch. App.	Law Reports, Chancery Appeals, 10 vols., 1865—1875	Eng.
Ch. Cas. in Ch.	Choyce Cases in Chancery, 1557—1606	Eng.
Ch. Ch.	Upper Canada Chancery Chambers Reports	Can.
Ch. D.	Law Reports, Chancery Division, 45 vols., 1875—1890	Eng.
Ch. Rob.	Christopher Robinson's Reports, Admiralty, 6 vols., 1798—1808	Eng.
Char. Cham. Cas.	Charley's Chamber Cases, 1 vol., 1875—1876	Eng.
Char. Pr. Cas.	Charley's New Practice Reports, 3 vols., 1875—1876	Eng.
Chip.	New Brunswick Reports (Chipman)	Can.
Chit.	Chitty's Practice Reports, King's Bench, 2 vols., 1770—1822	Eng.
Cl. & Fin.	Clark and Finnelly's Reports, House of Lords, 12 vols., 1831—1846	Eng.
Cl. & Sc. Dr. Cas.	Clark and Scully's Drainage Cases	Can.
Clay.	Clayton's Reports and Pleas of Assises at Yorke, 1 vol., 1631—1650	Eng.
Clif. & Rick.	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	Eng.
Clif. & Steph.	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	Eng.
Co. A.	Cook's Lower Canada Admiralty Court Cases	Can.
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Co. Litt.	Coke on Littleton (1 Inst.)	Eng.
Co. Rep.	Coke's Reports, 13 parts, 1572—1616	Eng.
Cochran	Nova Scotia Law Reports	Can.
Cockb. & Rowe	Cockburn and Rowe's Election Cases, 1 vol., 1833	Eng.
Coll.	Collyer's Reports, Chancery, 2 vols., 1844—1846	Eng.
Coll. Jurid.	Collectanea Juridica, 2 vols.	Eng.
Colles	Colles' Cases in Parliament, 1 vol., 1697—1713	Eng.
Colt.	Coltman's Registration Cases, 1 vol., 1879—1885	Eng.
Com.	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	Eng.
Com. Cas.	Commercial Cases, 1895—(current)	Eng.
Com. Dig.	Comyns' Digest	Eng.
Comb.	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	Eng.
Con. & Law.	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	Ir.
Cong. Dig.	Congdon's Digest	Can.
Cooke & Al.	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	Ir.
Cooke, Pr. Cas.	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	Eng.
Cooke, Pr. Reg.	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	Eng.
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Coop. Pr. Cas.	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	Eng.
Coop. *temp.* Brough.	C. P. Cooper's Cases *temp.* Brougham, Chancery, 1 vol., 1833—1834	Eng.
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Couper	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885	Scot.
Cout.	Coutlees' Unreported Cases	Can.
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S. C. (H. L.) (preceded by date).	Court of Session Cases (Scotland) (House of Lords), since 1906 (*e.g.*, [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date).	Court of Justiciary Cases (Scotland), since 1906 (*e.g.*, [1906] S. C. (J.))	Scot.
S. C. R.	Canada, Supreme Court Reports	Can.
S. L. T.	Scots Law Times, 1893 (current)	Scot.
S. Q. R.	Queensland State Reports	Aus.
S. R.	Reports of the High Court of Southern Rhodesia	S. Af.
S. R. C.	Stuart's Lower Canada Reports	Can.
S. R. N. S. W.	New South Wales, State Reports	Aus.
S. R. Q.	Queensland Reports, Supreme Court	Aus.
S. V. A. R.	Stuart's Vice-Admiralty Reports	Can.
Saint	Saint's Digest of Registration Cases, 1843—1906, 1 vol.	Eng.
Salk.	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	Eng.
Sask. L. R.	Saskatchewan Law Reports	Can.

Sau. & Sc.	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840...	Ir.
Saund.	Saunders's Reports, King's Bench, 2 vols., 1666—1672... ...	Eng.
Saund. & A.	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	Saunders and Bidder's Locus Standi Reports, 1905—(current) ...	Eng.
Saund. & C.	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848 ...	Eng.
Saund. & M.	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858	Eng.
Sav.	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591 ...	Eng.
Say.	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756 ...	Eng.
Sc. Jur....	Scottish Jurist, 46 vols., 1829—1873	Scot.
Sc. L. R.	Scottish Law Reporter, 1865—(current)	Scot.
Sc. R. R.	Scots Revised Reports	Scot.
Sch. & Lef.	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806...	Ir.
Scott	Scott's Reports, Common Pleas, 8 vols., 1834—1840	Eng.
Scott, N. R.	Scott's New Reports, Common Pleas, 8 vols., 1840—1845 ...	Eng.
Sea. & Sm.	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860...	Eng.
Sel. Cas. Ch.	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	Eng.
Sess. Cas. K. B. ...	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sh. (Ct. of Sess.) ...	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838...	Scot.
Sh. & D.	Shaw & Dunlop, Court of Session Cases	Scot.
Sh. & Macl.	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838...	Scot.
Sh. Dig.	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1868	Scot.
Sh. Just.	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831 ...	Scot.
Sh. Sc. App.	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct.	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch.	Sheppard's Touchstone of Common Assurances	Eng.
Show.	Shower's Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas. ...	Shower's Cases in Parliament, fol., 1 vol., 1694—1699	Eng.
Sid.	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	Eng.
Sim.	Simons' Reports, Chancery, 17 vols., 1826—1852	Eng.
Sim. & St.	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826 ...	Eng.
Sim. N. S.	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852 ...	Eng.
Skin.	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697 ...	Eng.
Sm. & Bat.	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	Ir.
Sm. & G.	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857 ...	Eng.
Smith, K. B.	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806 ...	Eng.
Smith, L. C.	Smith's Leading Cases, 2 vols.	Eng.
Smith, Reg. Cas. ...	C. L. Smith's Registration Cases, 1895—(current)	Eng.
Smythe...	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1839—1840	Ir.
Sol. Jo....	Solicitors' Journal, 1856—(current)	Eng.
Spence	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks	Spinks' Prize Court Cases, 2 parts, 1854—1856	Eng.
Stair Rep.	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681...	Scot.
Stark.	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr.	State Trials, 34 vols., 1163—1820	Eng.
State Tr. N. S. ...	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stewart	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton	Stockton's Vice-Admiralty Report and Digest	Can.
Story	Story's Commentaries on Equity Jurisprudence	Eng.
Stra.	Strange's Reports, 2 vols., 1716—1747	Eng.
Stu. M. & P.	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853	Scot.
Stuart	Sessions Cases (Stuart)	Scot.
Stuart, Adm.	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S. ...	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874	Can.
Stuart, K. B.	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835...	Can.
Sty.	Style's Reports, King's Bench, fol., 1 vol., 1646—1655... ...	Eng.
Sw.	Swabey's Reports, Admiralty, 1 vol., 1855—1859	Eng.
Sw. & Tr.	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	Eng.
Swan.	Swanston's Reports, Chancery, 3 vols., 1818—1821	Eng.
Swin.	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M....	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851...	Eng.

T. H.	Reports of the Witwatersrand High Court (Transvaal Colony)...	S. Af.
T. Jo.	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685...	Eng.
T. L. R.	The Times Law Reports, 1884—(current)...	Eng.
T. P. D.	South African Law Reports, Transvaal Provincial Division ...	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683	Eng.
Taml.	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Tas. L. R.	Tasmanian Law Reports	Aus.
Taunt.	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas.	Tax Cases, 1875—(current)...	Eng.
Tay.	Taylor's King's Bench Reports	Can.
Temp. Wood	Manitoba Reports *temp.* Wood	Can.
Term Rep.	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R.	Territories Law Reports	Can.
Thom.	Nova Scotia Reports (Thomson)	Can.
Toth.	Tothill's Transactions in Chancery, 1 vol., 1559—1646	Eng.
Town. St. Tr.	Townsend, Modern State Trials	Eng.
Trist.	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
Tudor, L. C. Merc. Law.	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Tudor, L. C. Real Prop.	Tudor's Leading Cases on Real Property	Eng.
Turn. & R.	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr.	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
Tyr. & Gr.	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836	Eng.
U. C. Jur.	Upper Canada Jurist	Can.
U. C. L. J. N. S. ...	Upper Canada Law Journal, New Series—(current)	Can.
U. C. L. J. O. S. ...	Upper Canada Law Journal, Old Series, to 1865...	Can.
U. C. R.	Upper Canada Reports, Queen's Bench	Can.
Udal	Fiji Law Reports (Udal)	Fiji.
V. L. R.	Victorian Law Reports	Aus.
V. R.	Victorian Reports	Aus.
V. R. (Adm.)	Victorian Reports (Admiralty)	Aus.
Vaugh.	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673 ...	Eng
Vent.	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	Eng.
Vern.	Vernon's Reports, Chancery, 2 vols., 1680—1719	Eng.
Vern. & Scr.	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788...	Ir.
Ves.	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	Eng.
Ves. & B.	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814 ...	Eng.
Ves. Sen.	Vesey Sen.'s Reports, 2 vols., 1747—1756	Eng.
Vin. Abr.	Viner's Abridgment of Law and Equity, fol., 22 vols.	Eng.
Vin. Supp.	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	Eng.
W.	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857...	S. Af.
W. A. L. R.	West Australian Law Reports	Aus.
W. A'B. & W.	Webb, A'Beckett and Williams' Victorian Reports	Aus.
W. & W.	Wyatt and Webb	Aus.
W. C. C.	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	Eng.
W. H. C.	South African Law Reports, Witwatersrand High Court ...	S. Af.
W. Jo.	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640...	Eng.
W. L. D.	South African Law Reports, Witwatersrand Local Division ...	S. Af.
W. L. R.	Western Law Reporter	Can.
W. L. T.	Western Law Times	Can.
W. N. (preceded by date)	Law Reports, Weekly Notes, 1866—(current) (*e.g.*, [1866] W. N.)	Eng.
W. N.	Calcutta Weekly Notes	Ind.
W. R.	Weekly Reporter, 54 vols., 1852—1906	Eng.
W. R.	Sutherland's Weekly Reporter	Ind.
W. R.	Weekly Reporter, reporting cases in the Cape Provincial Division	S. Af.
W. W. & A'B.	Wyatt, Webb and A'Beckett	Aus.
W. W. R.	Western Weekly Reports	Can.
Wallis	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791 ...	Ir.
Web. Pat. Cas. ...	Webster's Patent Cases, 2 vols., 1602—1855	Eng.
Welsh, Reg. Cas. ...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	Ir.
Went. Off. Ex.... ...	Wentworth's Office and Duty of Executors	Eng.
West	West's Reports, House of Lords, 1 vol., 1839—1841	Eng.
West *temp.* Hard. ...	West's Reports *temp.* Hardwicke, Chancery, 1 vol., 1736—1740	Eng.
West. Tithe Cas. ...	Western's London Tithe Cases, 1 vol., 1592—1822	Eng.
White	White's Justiciary Reports (Scotland), 3 vols., 1886—1893 ...	Scot.
White & Tud. L. C. ...	White and Tudor's Leading Cases in Equity, 2 vols.	Eng.

Wight.	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	Eng.
Will. Woll. & Dav. ...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	Eng.
Will. Woll. & H. ...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	Eng.
Willes	Willes' Reports, Common Pleas, 1 vol., 1737—1758	Eng.
Wilm.	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	Eng.
Wils.	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1742—1774	Eng.
Wils. & S.	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	Scot.
Wils. Ch.	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	Eng.
Wils. Ex.	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817 ...	Eng.
Win.	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625 ...	Eng.
Wm. Bl.	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1746—1779	Eng.
Wm. Rob.	William Robinson's Reports, Admiralty, 3 vols., 1838—1850 ...	Eng.
Wms. Saund.	Williams' Notes to Saunders' Reports, 2 vols.	Eng.
Wolf. & B.	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864 ...	Eng.
Wolf. & D.	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858 ...	Eng.
Woll.	Wollaston's Reports, Bail Court and Practice, 1 vol., 1840—1841	Eng.
Wood	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	Eng.
Y. A. D.	Young's Vice-Admiralty Reports	Can.
Y. & C. Ch. Cas. ...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	Eng.
Y. & C. Ex.	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	Eng.
Y. & J.	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830 ...	Eng.
Y. B.	Year Books	Eng.
Yelv.	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613 ...	Eng.
You.	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832 ...	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xv—xxx, *ante.*)

A.-G.	for Attorney-General.
Act.	,, Actiengesellschaft.
Admlty.	,, Admiralty.
Affd.	,, Affirmed.
Affg.	,, Affirming.
Akt.	,, Aktiengesellschaft; Aktiebolaget; Aktieselskabet.
Anon.	,, Anonymous.
Apld.	,, Applied.
Appct.	,, Applicant.
Appln.	,, Application.
Appln.	,, Application to Register a Trade Mark.
Applt.	,, Appellant.
Apprvd.	,, Approved.
Arbn.	,, Arbitration.
Archbp.	,, Archbishop.
Art.	,, Article.
Assce.	,, Assurance.
Assocn.	,, Association.
B. C.	,, Borough Council.
Bkpcy.	,, Bankruptcy.
Bkpt.	,, Bankrupt.
Bldg. Soc.	,, Building Society.
Bp.	,, Bishop.
C. A.	,, Court of Appeal.
C. & S. L. Ry. Co.	,, City & South London Railway Co.
C. C. A.	,, Court of Criminal Appeal.
C. C. R.	,, County Court Rules.
C. C. R.	,, Court of Crown Cases Reserved.
C. L. P. Act	,, Common Law Procedure Act.
C. L. Ry. Co.	,, Central London Railway Co.
C. S. U. C.	,, Consolidated Statutes of Upper Canada.
Cale. Ry. Co.	,, Caledonian Railway Co.
Ct.	,, Court.
Ct. of Eq.	,, Court of Equity.
Ct. of R.	,, Court of Review.
Co.	,, Company.
Co-op. Assocn.	,, Co-operative Supply Association.
Comrs.	,, Commissioners.
Consd.	,, Considered.
Corpn.	,, Corporation.
D. C.	,, Divisional Court.
Dbtd.	,, Doubted.
Deft.	,, Defendant.
Distd.	,, Distinguished.
Eccl. Comrs.	,, Ecclesiastical Commissioners.
Eccl. Ct.	,, Ecclesiastical Court.
Ex. Ch.	,, Exchequer Chamber.
Ex p.	,, *Ex parte.*
Exch.	,, Exchequer.

Exor.	for Executor.
Exorship.	,, Executorship.
Expld.	,, Explained.
Extd.	,, Extended.
Extrix.	,, Executrix.
Folld.	,, Followed.
G. & S. W. Ry. Co.	,, Glasgow & South Western Railway Co.
G. C. Ry. Co.	,, Great Central Railway Co.
G. E. Ry. Co.	,, Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	,, Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	,, Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	,, Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland.	,, Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	,, Great Western Railway Co.
Govt.	,, Government.
Grdns.	,, Guardians or Guardians of the Poor.
H. C. of A.	,, High Court of Australia.
H. L.	,, House of Lords.
I. R. Comrs.	,, Inland Revenue Commissioners.
Insce.	,, Insurance.
JJ.	,, Justices.
Jud. Act	,, Judicature Act.
L. & B. Ry. Co.	,, London & Brighton Railway Co.
L. & N. W. Ry. Co.	,, London & North Western Railway Co.
L. & S. W. Ry. Co.	,, London & South Western Railway Co.
L. & Y. Ry. Co.	,, Lancashire & Yorkshire Railway Co.
L. B.	,, Local Board.
L. B. & S. C. Ry. Co.	,, London, Brighton & South Coast Railway Co
L.C.	,, Lord Chancellor.
L. C. & D. Ry. Co.	,, London, Chatham & Dover Railway Co.
L. C. C.	,, London County Council.
L. Elec. Ry. Co.	,, London Electric Railway Co.
L. G. Board	,, Local Government Board.
L.J.	,, Lord Justice.
L.JJ.	,, Lords Justices.
L. T. & S. Ry. Co.	,, London, Tilbury & Southend Railway Co.
M. S. Act	,, Merchant Shipping Act.
M. S. & L. Ry. Co.	,, Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	,, Magistrates.
Mentd.	,, Mentioned.
Met. Dist. Ry. Co.	,, Metropolitan District Railway Co.
Met. Ry. Co.	,, Metropolitan Railway Co.
Mid. G. W. Ry. Co.	,, Midland Great Western Railway Co.
Mid. Ry. Co.	,, Midland Railway Co.
Mtge.	,, Mortgage.
Mtgee.	,, Mortgagee.
Mtgor.	,, Mortgagor.
N. B. Ry. Co.	,, North British Railway Co.
N. E. Ry. Co.	,, North Eastern Railway Co.
N. F.	,, Not Followed.
N. P.	,, Nisi Prius.
O.	,, Order.
O. H.	,, Outer House.
Overd.	,, Overruled.
P. C.	,, Privy Council.
Petn.	,, Petition or Election Petition.
Pltf.	,, Plaintiff.
R. C.	,, Rural Council.
R. D. C.	,, Rural District Council.
R. S. A.	,, Rural Sanitary Authority.
R. S. C.	,, Revised Statutes of Canada.
R. S. C.	,, Rules of the Supreme Court, 1883,
Refd.	,, Referred.
Regn. of Trade Mk.	,, Registration of Trade Mark.
Regr. of Trade Mks.	,, Registrar of Trade Marks.
Resp.	,, Respondent.
Restg.	,, Restoring.
Revsd.	,, Reversed.

Revsg.	for Reversing.
Ry. Co.	,, Rail. Co. or Railway Co.
S. C.	,, Same Case.
S. C. (name of colony following)	,, Supreme Court of a Colony.
S. E.	,, Settled Estates.
S. E. & C. Ry. Co.	,, South Eastern & Chatham Railway Co.
S. E. Ry. Co.	,, South Eastern Railway Co.
S. P.	,, Same Point.
S.S. Co.	,, Steamship Co.
Sect.	,, Section.
Set. Land Act	,, Settled Land Act.
Settlmt.	,, Settlement.
Soc.	,, Society.
Soc. Anon.	,, Société Anonyme, etc.
Solr.	,, Solicitor.
Trade Mk.	,, Trade Mark.
Tram. Co.	,, Tramways Company.
U. C.	,, Urban Council.
U. D. C.	,, Urban District Council.
U. S. A.	,, United States of America.
Union Assmt. Com.	,, Union Assessment Committee.
Urban S. A.	,, Urban Sanitary Authority.
V. A. C.	,, Vice-Admiralty Court.
V.-C.	,, Vice-Chancellor.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases are listed chronologically except such as are classified as "Referred to" or "Mentioned." These come at the end and are arranged *inter se* in chronological order. The terms used in classifying the annotating cases are as follows :—

"APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.

"APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.

"CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.

"DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.

"DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case, without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.

"EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.

"EXTENDED" (Extd.).—Compare "APPLIED," *supra.*

"FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.

"NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.

"OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.

"REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.

"MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

TABLE OF CASES.

INCLUDING CASES FROM THE COURTS OF SCOTLAND, IRELAND, THE EMPIRE OF INDIA, AND THE DOMINIONS BEYOND THE SEAS.

A.

PAGE

——, *Ex p.* (1852) 333
——, *Ex p., Re* Hall (1856) 333
—— *v.* Scroggs (1678) 321, 322
A. B., *Re* (1841) 382
A. B. *v.* A.-G. (Ir.) 369
Abbott & Peake's Case (1796) 327
Abrahams *v.* Bullock (1902) 88
Achamparambath Cheria Kunhammu *v.* Gantz (Ind.) 331
Adam *v.* Bank of England (1908) 124
——— *v.* Henderson (Can.) 105
Adams *v.* Aston (1859) 247
——— *v.* Craig & Ontario Bank (Can.) ... 221
——— *v.* M'Keown (Ir.) 43
——— *v.* Mocke (S. Af.) 110
——— *v.* Peters (1849) 178
——— *v.* Rogers (Aus.) 404
Adamson *v.* Jarvis (1827) 36
Addis, *Re* (1822) 403
Adelphi Bank *v.* Edwards (1882) 236
Admission to the Bar, *Re* (Can.) 316
Advocate, An, *Re* (Ind.) ... 328, 329, 337
Agar *v.* Blethyn (1835) 176
Aghore Nath Chuckerbutty *v.* Ram Churn Chuckerbutty (Ind.) 334
Agnew *v.* Stewart (Can.) 319
Agra & Masterman's Bank, *Re, Ex p.* Asiatic Banking Corpn. (1867)... ... 254
——————, *Re, Ex p.* Waring (1866)... ... 169
——————— Ltd. *v.* Hoffmann (1864) 220, 221
—— Bank, *Ex p., Re* Barber & Co. (1870) ... 251, 252
————, *Re, Ex p.* Tondeur (1867) ... 251
———— Claim, *Re* European Bank (1872) 171, 292
Agricultural Savings & Loan Assocn. *v.* Federal Bank (Can.) 231
Ah Kee, *Re, Ex p.* Walker (Aus.) 382
Ahitbol *v.* Benedetto (1810) 338
Aiken, *Ex p., Re* Aspinall (1817) 298
Ainsworth *v.* Cusack (Nfld.) 154
Aitken *v.* Bachelor (1893) 339
——— *v.* Mitchell (Scot.) 364
Akrokerri (Atlantic) Mines, Ltd. *v.* Economic Bank (1904) 218, 240, 291
Alberta Ornamental Iron Co. & Imperial Bank, *Re* (Can.) 157
Aldridge *v.* Great Western Ry. Co. (1864) ...59, 60
Alexander *v.* Barker (1831) 263

PAGE

Alexander *v.* Burchfield (1842) 203
———— *v.* Mackenzie (1848) ... 159, 160
———— & Webster *v.* Mackay (or Wilson) (Scot.) 360
Allan *v.* Allan & Co. (Scot.) 257
Allan's Executor *v.* Union Bank of Scotland, Ltd. (Scot.) 177
Allard *v.* Demers (Can.) 191
Allen, *Re* (Can.) 321
——— *v.* Bank of New Brunswick (Can.) ... 290, 291
——— *v.* Dingley (1576) 349
——— *v.* Francis (1914) 329, 330
——— *v.* London County & Westminster Bank, Ltd. (1915) 264, 265
——— *v.* M'Kenna (Ir.) 178
Alley, *Re, Ex p.* Mills (Aus.) 3
Alliance Bank, Ltd. *v.* Broom (1864) ... 263
Allison, *Ex p., Re* Westmorland Bank (Can.) 154
——— *v.* Central Bank (Can.) 196
Almour *v.* Banque Jacques Cartier (Can.) ... 215
Alsager *v.* Currie (1844) 294
Alsop *v.* Bowtrell (1619) 360
Alvanley *v.* Lewis (1831) 24
Amir Ali *v.* Inderjit Koer (Ind.) 342
Amod Salie *v.* Ragoon (S. Af.) 59
Amoretty *v.* City of Melbourne Bank (Aus.)... 274
Ancher *v.* Bank of England (1781) 235
Anderson *v.* Collinson (1901) 403
———— *v.* Croall (John) & Sons, Ltd. (Scot.) 43
———— *v.* North Eastern Ry. Co. (1861)... 82
———— *v.* North of Scotland Bank (Scot.) 193
———— *v.* Reid (Nfld.) 81
Anderton *v.* Yates (1850) 349
Andrews *v.* Hawley (1857) 346
Andros, *Re*, Andros *v.* Andros (1883) ... 372, 373, 374, 375
Angell, *Re*, Angell *v.* Oodeen (1860) 333
Anglo-American Telegraph Co. *v.* Spurling (1879) 232
Anglo-Sardinian Antimony Co., *Re* (1894) ... 347
Annand *v.* Merchants Bank (Can.) 232
Annesley *v.* Muggridge (1816) ... 24, 25
Anon. (undated), cited in 3 Esp., p. 115 ... 100, 101
——— (undated), 2 Eq. Cas. Abr. 284 ... 117
——— (undated), Preston, Privy Council Appeals 170 320
——— (1510), Keil. 160 108
——— (1594), Poph. 38 71
——— (1609), Godb. 160 110
——— (1642), March, 202, pl. 242 60

PAGE
Anon. (1696), 2 Salk. 645 350
——— (1700), 12 Mod. Rep. 408 198
——— (1704), 6 Mod. Rep. 137 325
——— (1741), 2 Atk. 173 ... ... 316, 325
——— (1823), 1 L. J. O. S. K. B. 117 ... 348
——— (1839), 8 L. J. Ch. 319... 330
——— (1841), 5 Jur. 1198 382
——— (1843), 7 Jur. 725 327
——— (1850), 14 L. T. O. S. 496 319
——— (1852), 20 L. T. O. S. 55 319
——— (1859), 32 L. T. O. S. 262 341
——— (1875), 1 Char. Pr. Cas. 39 327
——— (1885), 78 L. T. Jo. 286 319
———, *Re* (1885), 78 L. T. Jo. 285 337
——— *v.* Anon. (1856), 23 Beav. 273 ... 358, 366
Anson *v.* Towgood (1820) 18
Antigua JJ., *Re* (1830) 316, 323
Arbon *v.* Fussell (1862) 91
Archer *v.* Hudson (1844) 296
——— *v.* ——— (1846) 296
Arden *v.* Tucker (1832) 349
Armfield *v.* London & Westminster Bank (1883)... 218
Armistead, *Ex p.*, *Re* Dilworth (1828) ... 212
Armitage *v.* Hamer (1832) 142
Armory *v.* Delamirie (1722) 64
Armour *v.* Kilmer (Can.) 333
Armstrong *v.* Allan Brothers (1892) 105
——— *v.* Buchanan (Can.) ... 279, 280
Arnold *v.* Cheque Bank (1876) ... 236, 237
——— *v.* City Bank (1876) 236, 237
——— *v.* Jefferson (1697) 112
Arnott *v.* Hayes (1887) 308, 309
——— *v.* Humphreys (Ir.) 353
Ashdown *v.* Defoe (Can.) 73
Ashwin, *Ex p.*, *Re* Newport Old Bank, *Re* Williams & Son (1853) 303
Ashworth *v.* Miller (1865) 209
Asiatic Banking Corpn., *Ex p.*, *Re* Agra & Masterman's Bank (1867) 254
———, *Re*, Royal Bank of India's Case (1869) 270, 271
Aspinall, *Re*, *Ex p.* Aiken (1817) 298
Associated Portland Cement Manufacturers (1910), Ltd. *v.* Ashton (1915) 55
Atchley *v.* Sprigg (1864) ... 360, 361, 363
Atkin *v.* Barwick (1719) 54
Atkins, *Ex p.*, *Re* Wise (1842) 211
Atkinson, *Ex p.* (Aus.) 391, 394
——— *v.* Atkinson (1825)... 367
——— *v.* Pacific Stevedoring, etc. Co. & U. S. Steel Products Co. (Can.) 328
A.-G. *v.* Australian Joint Stock Bank, Ltd. (Aus.) 195
——— *v.* Birkbeck (1884) 132
——— *v.* Brunsden, *Re* Stavely (Can.) ... 364
——— *v.* Capel (1494) 99, 100
——— *v.* Cathew (Ir.) 3
——— *v.* Coldnam (1905) 315
——— *v.* Lord Advocate (1834) ... 318, 327
——— *v.* Malone (Ir.) 4
——— *v.* Taylor (1824)... ... ... 2, 3, 4
——— *v.* West Riding of Yorkshire County Council (1906) 318
——— for Dominion of Canada *v.* A.-G. for Province of Ontario (Can.)... 327
Attwood *v.* Ernest (1853) 116
——— *v.* Hill (1852) 97
——— *v.* Kinnear & Sons (Scot.) 271
Atwood *v.* Crowdie (1816) 289
——— *v.* Ernest (1853) 116
Auchmuty, *Re* (1908) 126
Auld *v.* Traders Bank (Can.) 159
Auriol *v.* Smith (1811)... 133
Austen, *Ex p.* (Aus.) 394, 406
PAGE
Austin *v.* Bank of England (1803) 123
——— *v.* Mead, *Re* Mead (1880) 194
Australian Joint Stock Bank, Ltd., *Ex p.*, *Re* King (Aus.) 282
Australian Joint Stock Bank, *Re*, *Ex p.* Savings Bank of New South Wales (Aus.)... 158
Australian Joint Stock Bank *v.* Oriental Bank (Aus.) 196
Avery *v.* Lawlor (Can.) 107
Avul Khadar *v.* Andhu Set (Ind.) 341
Ayer *v.* South Australian Banking Co. (Aus.) 280
Aylesford Peerage, The (1885) 367
Ayotte *v.* Quebec Bank (Can.) ... 276, 277

B.

BACKHOUSE *v.* Charlton (1878) ... 187, 188
Baerlein & Co. *v.* Chartered Mercantile Bank of India, London & China (1896) 208
Baggott, *Ex p.* (1888) 393
Bailey *v.* Bodenham (1864) 203
——— *v.* Finch (1871)... 186
——— *v.* Jellett (Can.) 189
——— *v.* Porter (1845) 226
Baillie's Case (1788) 335
Bain *v.* A.-G. (1892) 370
——— *v.* Torrance (Can.) 173
Baine, Johnston & Co.'s Trustees *v.* Union Bank Receivers (Nfld.) 265
Baines' Case, *Re* Central Bank of Canada (Can.) 154
Baker *v.* Black (1847) 344
——— *v.* Brown (1836) 347
——— *v.* Faber (1908) 348
——— *v.* Liscoe (1797) 76, 77
——— *v.* Merchants Bank (Can.) 223
——— *v.* Nottingham & Nottinghamshire Banking Co., Ltd. (1891) ... 272
Baldwin *v.* Montgomery (Can.) 333
Bale *v.* Parr's Bank, Ltd. (1909) 216
Baleard *v.* White (1843) 330
Ball *v.* Royal Bank (Can.) 261
Ballard *v.* White (1843) 330
Bamford (Doe d.) *v.* Barton (1837) 368
Bampton *v.* Paulin (1827) 48
Banbury *v.* Bank of Montreal (1918) ... 164, 165, 172
——— Peerage Case (1811) ...358, 362, 364
Banco de Lima *v.* Anglo-Peruvian Bank (1878) 248, 269
Banes, *Ex p.*, *Re* Royal British Bank (1857) 294
Banister, *Re*, Broad *v.* Munton (1879) ... 355
Bank of Africa, Ltd. *v.* Colonial Government (S. Af.) 197
Bank of Australasia *v.* Breillat (1847) ... 145, 167
——— *v.* Cotchett (Aus.) ... 164
——— *v.* Harding (1850) ... 152
——— *v.* Nias (1851) 152
——— *v.* Palmer (1897) ... 219
——— *v.* Walters (Aus.) ... 291
Bank of Australia *v.* Pollard (Aus.) 308
Bank of Bombay *v.* Suleman Somji (1908) 307
Bank of British North America *v.* Bossuyt (Can.) 259, 266
Bank of British North America *v.* Browne (Can.) 138
Bank of British North America *v.* Clarkson (Can.) 279
Bank of British North America *v.* Elliott (Can.) 202
Bank of British North America *v.* Haslip (Can.) 202
Bank of British North America *v.* McComb (Can.) 269

PAGE
Bank of British North America *v.* McElroy (Can.) 336
Bank of British North America *v.* Rattenbury (Can.) 174
Bank of British North America *v.* Sherwood (Can.) 268
Bank of British North America *v.* Standard Bank (Can.) 219
Bank of British North America *v.* Warren (Can.) 203, 204
Bank of British North America *v.* Wood (Can.) 282, 283
Bank of China, Japan & the Straits, Ltd. *v.* American Trading Co. (1894) 168
Bank of Commerce *v.* Jenkins (Can.) ... 163, 164
Bank of England, *Ex p.*, *Re* Price (1867) ... 127
——— *v.* Anderson (1837) ... 123, 132
——— *v.* Cutler (1908) ... 125, 126
——— *v.* Davis (1826) ... 124, 128, 129
——— *v.* Johnson (1849) ... 149
——— *v.* Moffat (1791) 123
——— *v.* Newman (1699) ... 258
——— *v.* Parsons (1800) ... 124
——— *v.* Vagliano Brothers (1889) 244, 245
——— *v.* ——— (1891) 170, 228, 237, 244, 245
Bank of Hamilton *v.* Donaldson (Can.) ... 280
——— *v.* Halsted (Can.) ... 269
——— *v.* John T. Noye Manufacturing Co. (Can.) ... 278
——— *v.* Shepherd (Can.) ... 269
Bank of Hindostan, China & Japan *v.* Smith (1867) 146
Bank of Ireland *v.* Evans' Charities Trustees (Ir.) 231
Bank of Ireland (Governor & Co.) Petitioners, *Re* Shields' Estate (Ir.) 167
Bank of Liverpool, *Re*, Forsyth *v.* Bank of Nova Scotia (Can.) 157
——— *v.* Bigelow (Can.) ... 147
Bank of Montreal *v.* Bethune (Can.) ... 259
——— *v.* Hartman (Can.) ... 266
——— *v.* Henderson (Can.) ... 153
——— *v.* Little (Can.) 195
——— *v.* R. (Can.) 231
——— *v.* Rankin (Can.) 144
——— *v.* Reynolds (Can.) ... 206, 258
——— *v.* Sweeney (Can.) ... 274
——— *v.* Thomas (Can.) ... 257
Bank of Montreal's Claim, *Re* Chatham Banner Co. (Can.) 305
Bank of New South Wales *v.* Campbell (Aus.) 267
Bank of New South Wales *v.* Goulburn Valley Butter Co., Proprietary (1902) ... 189, 190
Bank of New South Wales *v.* Jones (Aus.) 159
Bank of New South Wales *v.* Milvain (Aus.) 220
Bank of New South Wales *v.* Owston (1879) 161
Bank of New Zealand *v.* Logan (N.Z.) ... 154
Bank of Nova Scotia *v.* Fish (Can.) 162
——— *v.* Hawkins (Can.) ... 268
——— *v.* Smith (Can.) ... 155, 156
Bank of Ottawa *v.* Harty (Can.) 204
Bank of Scotland *v.* Dominion Bank (Toronto) (1891) ... 207, 208
——— *v.* Hutchison, Main & Co., Ltd. (Scot.) ... 283
——— *v.* Robertson (Scot.) ... 177

PAGE
Bank of Scotland *v.* Watson (1813) 178
Bank of Toronto *v.* Ansell (Can.) 255
——— *v.* Hamilton (Can.) ... 180, 216
——— *v.* Perkins (Can.) 267
——— *v.* Wilmot (Can.) 174
Bank of Upper Canada *v.* Baldwin (Can.) ... 156, 307
——— *v.* Bradshaw (1867)... 162, 165
——— *v.* ——— (Can.)... 161
——— *v.* Covert (Can.) ... 174
——— *v.* Grand Trunk Ry. Co. (Can.) ... 93
——— *v.* Killaly (Can.) ... 283
——— *v.* Widmer (Can.) ... 144
Bank of Upper Canada Trustees *v.* Canadian Navigation Co. (Can.) 198
Bank of Van Diemen's Land *v.* Bank of Victoria (1871) 206, 207
Bank of Victoria *v.* Forbes (Aus.) 268
Bankers' Books Evidence Act, 1879, *Re*, R. *v.* Bono (1913) 309
Banner *v.* Johnston (1871) 253
Banque D'Epargne De Montreal *v.* Geddes (Can.) 147
Banque De St. Hyacinthe *v.* Philie (Can.) ... 276
——— *v.* Sarrazin (Can.) 259
Banque De St. Jean, *Re* (Can.) 139
——— *v.* Molleur (Can.) ... 258
Banque D'Hochelaga *v.* Merchants Bank (Can.) 280
Banque D'Hochelaga's Case, *Re* Commercial Bank of Manitoba (Can.) 234
Banque Du Peuple *v.* Pacaud (Can.) ... 259
Banque Franco-Egyptienne *v.* Bank of New Zealand (N.Z.) 206
Banque Jacques-Cartier *v.* Banque d'Epargne de Montreal (1887)... 162, 303
——— *v.* Limoilu Corpn. (Can.) 201
Banque Nationale *v.* Beckett (Can.) ... 168
——— *v.* Boyer (Can.) 280
——— *v.* City Bank & Bank of Montreal (Can.) ... 160, 225
——— *v.* Guay (Can.) 293
Banque Populaire de Bienne *v.* Cavé (1895) 297
Bar, *Re* Admission to the (Can.) 316
Barber & Co., *Re*, *Ex p.* Agra Bank (1870)... 251, 252
Barclee's Case (1658) 319
Bardell *v.* Spinks (1846) 16
Barfoot *v.* Goodall (1811) 138
Bargate *v.* Shortridge (1855) 153
Baring's Case, Devaynes *v.* Noble (1816) ... 304
Barker *v.* Buttress (1843) 139
——— *v.* Furlong (1891) 45
Barkworth, *Ex p.*, *Re* Harrison (1858) ... 211
——— *v.* Ellerman (1861) 303
Barlow *v.* Osborne (1858) 2, 3
Barnard *v.* Walkem (Can.) 322
Barnardo *v.* McHugh (1891) 382, 384
Barned's Banking Co., *Re*, Coupland's Claim (1869) 252
———, *Re*, Massey's Case (1870) 298
——— *v.* Johnston (1871) ... 253
Barnes *v.* Exchange Bank of Canada (Can.) 165
——— *v.* Nicholson (1843) 336
Barnett, *Re*, *Ex p.* Reynolds (1885) ... 319
——— *v.* Brandao (1843) 285, 290
——— *v.* Tugwell (1862) 377
Barnewall, *Ex p.*, *Re* Biddulph (1849) ... 185
——— *v.* Sutherland (1850) 142

PAGE
Barrett *v.* M'Carthy (Ir.) 177
Barrette *v.* Canadian Bank of Commerce & Syndicat Lyonnais Du Klondike (Can.) ... 284
Barristers & Vakils, *Re* (Ind.) 320
Barron *v.* National Bank of Scotland (Scot.) 272
Barry *v.* Bank of Ottawa (Can.) 281
——— *v.* Barry (Ir.) 383
——— *v.* Roberts (1835) 68
Barss *v.* Bank of Nova Scotia (Can.) ... 154
——— *v.* Strong (Can.) 266
Bartlett *v.* Purnell (1836) 8
——— *v.* Wood (1861) 345
Barton *v.* Bank of New South Wales (Aus.)... 267
Barwick *v.* English Joint Stock Bank (1867) 161
Barwick's Case, *Re* Ontario Bank (Can.) ... 156
Bass's Case, *Re* London & Manchester Direct Independent Ry. Co. (1849) 339
Basse & Selve *v.* Bank of Australasia (1904) 251
Bate *v.* Robins (1863) 266, 267
Bateman, *Re*, *Ex p.* Bateman (1845) ... 316
Bateman's Case, *Re* Devonport & South Devon Steam Flour Mill Co. (1873) ... 180
Bates, *Re* (Aus.) 383
——— *v.* Kirkpatrick (Can.) 281
Bates-Smith *v.* General Motor Cab Co., Ltd. (1911) 57, 86
Bathe *v.* Bank of England (1858) 127
Bathgate *v.* Merchants Bank (Can.) ... 280
Batistoni *v.* Dance (1908) 58
Batut *v.* Hartley (1872) 115
Bavins, Junr. & Sims *v.* London & South Western Bank (1900) 243
Baxter *v.* Baxter (Aus.) 386
——— *v.* Finlay (Can.) 15
Baxter & Galloway Co. *v.* Jones (Can.) ... 67
Bayard, *Re* (Can.) 333
Bayley *v.* Chadwick (1877) 34
——— *v.* ——— (1878) 34
Baylis *v.* Grout (1835) 329
Beak's Estate, *Re*, Beak *v.* Beak (1872) ... 246
Beal *v.* South Devon Ry. Co. (1860) ... 68
——— *v.* South Devon Ry. Co. (1864) ...61, 68
Beale *v.* Caddick (1857) 246, 262
——— *v.* Price (Aus.) 96
Beales, *Ex p.* (Can.) 399, 401
Bearblock *v.* Tyler (1820) 350
Bears *v.* Central Garage Co. (Can.) 77
Beauchamp (Earl) *v.* Madresfield (1872) ... 348
——— *v.* Powley (1831) 68
Beauclerk *v.* Greaves (1886) 178
Beaumont, *Re*, Beaumont *v.* Ewbank (1902) 214
Beavan, *Re* (1854) 334
———, *Re*, Davies, Banks & Co. *v.* Beavan (1912) 191, 265
Beavis *v.* Stewart (Can.) 11
Beck, *Re*, *Re* Cartington Estate (1883) ... 35
Beckett *v.* Tower Assets Co. (1891) 94
——— *v.* Urquhart (Can.) 76
——— *v.* Wilson (1841) 262
Beckford *v.* Beckford (1774) 380
Beckx *v.* Jones (Aus.) 104
Beeching *v.* ——— (1816) 202
——— *v.* Gower (1816) 197
Beer *v.* London and Paris Hotel Co. (1875)... 7, 8
Beers *v.* Sampson (1824) 55
Belcher, *Ex p.*, *Re* Maberly (1833) ... 298
Belfast Bank, *Ex p.*, *Re* J. R. M. (Ir.) ... 257
Bell *v.* Balls (1897) 7, 9
——— *v.* Capital & Counties Bank (1887) ... 222
——— *v.* Clubbs (1892) 389, 392
——— *v.* Fisk (1852) 143
——— Engine & Thresher Co., Ltd. *v.* Gagne (Can.) 336
Bellamy *v.* Marjoribanks (1852) ... 240, 241
Belsize Motor Supply Co. *v.* Cox (1914) ... 93, 94, 98
Beltz *v.* Molsons Bank (Can.) ... 215, 234
Belyea *v.* Diocesan Synod of Fredericton (Can.) 193
Benedict *v.* Boulton (Can.) 336
Benjamin *v.* Bank of England (1813) ... 131
——— *v.* Storr (1874) 48
Benner *v.* Edmonds (Can.) 342
Bennett *v.* Booty, *Re* Osmand (Aus.) ... 364
——— *v.* Field (Aus.) 160
——— *v.* Flood (Aus.) 112
——— *v.* Harthill (1847) 352
Benson, *Ex p.*, *Re* Dilworth (1832) 211
Benson's Case (1670) 325
Benthall *v.* Kilmorey (Earl) (1844) 319
Bentinck *v.* London Joint Stock Bank (1893) 271
Bentley, *Re*, *Ex p.* Vere (1835) ... 287, 288
Bepin Behary Das Bairagi *v.* Atul Krishna Das Bairagi (Ind.) 360
Bergheim *v.* Great Eastern Ry. Co. (1878) ... 82
Bergin *v.* Pepper (Ir.) 149
Berkeley Peerage Case (1811) 368
Berkley *v.* Thompson (1884) 393, 394
Berry *v.* Young (1788) 25
Berteau *v.* Jillard (Nfld.) 183
Berton *v.* Central Bank (Can.) 167
Bertrand *v.* Gaudreau (Can.)... 97
Bessette *v.* Brien (Can.) 153
Bestwick & Austin, *Re* (Can.) 382
Bethel, *Re* (1899) 138
Betteley *v.* Reed (1843) 101
Bevan *v.* Capital & Counties Bank, Ltd. (1906) 240, 247
——— *v.* National Bank, Ltd. (1906)... 240, 247
Bexwell *v.* Christie (1776) 12, 14
Bhagwan Das *v.* Creet (Ind.) 231
Bhut Nath Sircar *v.* Ram Lall Sircar (Ind.) 340
Biddle *v.* Bond (1865) ... 30, 101, 102
Biddulph, *Re*, *Ex p.* Barnewall (1849) ... 185
———, *Re*, *Ex p.* Burton (1843) 185
———, *Re*, *Ex p.* Eyre (1843) 256
Bigg, *Re* (1835) 128
Biggs *v.* Bree (1881) 6
——— *v.* ——— (1882) 6
Bignold, *Ex p.*, *Re* Brereton (1836) 213
Bilborough *v.* Holmes (1876) ... 191, 192
Billington *v.* Cyples (1885) 389
Billows, *Re* (Aus.) 381
Binstead *v.* Buck (1776) 66
Birch *v.* Corbin (1784)... 127
——— *v.* Hanson (1831) 13, 14
——— *v.* Walsh (Ir.) 323
———, Chambers & Co. *v.* Vale (1812) ... 165
Birchall, *Re*, Wilson *v.* Birchall (1880) ... 341
Bird, *Ex p.*, *Re* Bourne (1851) 235
——— *v.* Boulter (1833) 10
——— *v.* National Bank of New Zealand (N.Z.) 201
Birkbeck Permanent Benefit Building Society, *Re* (1912) 159
Birmingham & District Land Co., Ltd. *v.* London & North Western Ry. Co. (1886) 347
Birmingham Banking Co., *Re*, *Ex p.* Brinsley (1866) 306
Birtwhistle *v.* Vardill (1840) 374, 376
Bishop, *Ex p.*, *Re* Fox, Walker & Co. (1880) 260
———, *Re*, *Ex p.* Langley, *Ex p.* Smith (1879) 28
——— *v.* Chitty (1743) 227
——— *v.* Jersey (Countess) (1854) 172
Bissell & Co. *v.* Fox, Brothers & Co. (1885) 238, 241
Blackburn *v.* Macdonald (Can.) 35
Blackburn & District Benefit Building Society *v.* Cunliffe, Brooks & Co. (1885) ... 263, 264

PAGE
Blackburn Building Society *v.* Cunliffe, Brooks & Co. (1882) 243
Blackley *v.* McCabe (Can.) 300
Blackmore *v.* Bristol & Exeter Ry. Co. (1858)..69, 70
Blackrock *v.* Passage Ry. Co. (Ir.) 83
Blackwood *v.* Rourke (Aus.) 163
Bladwell *v.* Edwards (1596) 379
Blagden *v.* Bradbear (1806) 7
Blake, *Re*, *Ex p.* Steward (1843) 286
——— *v.* B. (Ir.) 378
——— *v.* Beaumont (1842) 226
Blakemore *v.* Bristol & Exeter Ry. Co. (1858) 69, 70
Blaksley's Trusts, *Re* (1883) 128
Blane, *Ex p.*, *Re* Hallett & Co. (1894) ... 185
Blodwell *v.* Edwards (1596) 379
Bobbett *v.* Pinkett (1876) 234, 235
Boddington *v.* Schlencker (1833) 203
Bodenham *v.* Hoskins (1852) ... 181, 188
——— *v.* Purchas (1818) ... 275, 276
Boldero, *Re*, *Ex p.* Leeds Bank (1812) ... 212
———, *Re*, *Ex p.* Pease (1812) ... 210, 306
———, *Re*, *Ex p.* Wakefield Bank (1812) ... 212, 305
——— *v.* Jackson (1809) 263
Bolland *v.* Bygrave (1825) 285
Bolognesi's Case, *Re* London & Mediterranean Bank (1870) 146
Bolton *v.* Puller (1796) 248
Bomanjee Cowasjee *v.* Lower Burma Chief Court Chief Judge & Judges (Ind.) ... 324
Bond, *Ex p.*, *Re* Forster (1840) 211
——— *v.* Warden (1845) 201
——— & Pateshall, *Re*, *Ex p.* Gribble (1833) 187
Bonschowsky *v.* Whitledge (Can.) 399
Booker, *Ex p.*, *Re* West of England Bank (1880) 147
Booreman's Case (1641) 315, 316
Booth *v.* Bank of England (1840) ... 132, 133
Borghild, S.S. *v.* D'Eutremont (Can.) ... 320
Borthwick *v.* Bank of New Zealand (1900) ... 253
——— *v.* Bremner (Scot.) 285
Bosanquet *v.* Corser (1841) 270
——— *v.* Forster (1841) 270
——— *v.* Shortridge (1850) 153
——— *v.* Woodford (1843) 150
——— *v.* Wray (1815) 139
Bosley *v.* Bank of Australasia (Aus.) ... 218
Bosvile *v.* A.-G. (1887) ... 358, 361, 362
Bottomgate Industrial Co-operative Society, *Re* (1891) 159
Bouchette *v.* Anderson (Can.) ... 99, 100
Boulton, *Re* (Can.) 327
Bourne, *Re*, *Ex p.* Bird (1851) 235
Bousfield *v.* Hodges (1863) 6
Bouverie's Petition, *Re*, Bouverie *v.* A.-G. (1862) 370
Bowden *v.* Bowden (1917) 362, 363
Bower *v.* Foreign & Colonial Gas Co., Ltd., Metropolitan Bank Garnishees (1874) 285
——— *v.* Turner (1863) 265, 267
Bowes, *Re*, Strathmore (Earl) *v.* Vane (1886) 289
——— *v.* Howe (1813) 199, 200
——— *v.* Sutherland (Can.) 349
Bowie *v.* Buffalo, Brantford & Goderich Ry. Co. (Can.) 80
Bowles *v.* Orr (1835) 170
——— *v.* Round (1800) 13
Bowyer *v.* Robinson (1843) 107
Boyd *v.* Emmerson (1834) 204, 205
——— *v.* Nasmith (Can.) 225
——— *v.* Petrie (1870) 345
Boyes *v.* Bedale (1863) 374
Boyker *v.* Surgey (1854) 352
Boynton, *Ex p.* (1850) 402
Brabant *v.* King (1895) 73, 74

PAGE
Bracken & Co., *Re*, *Ex p.* Waring, *Ex p.* Inglis, *Re* Brickwood & Co. (1815)... ... 302
Bradfield *v.* Bank of Ottawa (Can.) 186
Bradford Old Bank, Ltd. *v.* Sutcliffe (1918)... 264
Bradshaw *v.* Bennett (1831) 17, 25
——— *v.* Bradshaw (1820) 375
——— *v.* Irish North Western Ry. Co. (Ir.) 81
Bramhall *v.* Hall (1764) 379, 380
Bramley *v.* Alt (1798) 14
Brandao *v.* Barnett (1840) 285, 290
——— *v.* ——— (1846) 285, 290
Brandon, *Re* (Can.) 382
——— *v.* Scott (1857) 117
Bransby *v.* East London Bank (1866) 218, 247
Bratt *v.* Ellis (1805) 43
Bray *v.* Hadwen (1816) 208
——— *v.* Mayne (1818) 89
Brazilian & Portuguese Bank, Ltd. *v.* British & American Exchange Banking Corpn., Ltd. (1868) 252
Breame *v.* Breame (1571) 336
Bremmilow *v.* Arden (1854) 351
Brennan, *Ex p.*, R. *v.* McCormick (Aus.) ... 398
Brentwell *v.* Western Elevator Co. (Can.) ... 77
Brereton, *Re*, *Ex p.* Bignold (1836) 213
Breton *v.* Cope (1791) 133
Brett *v.* Clowser (1880) 16, 17, 18
Brickwood & Co., *Re*, *Re* Bracken & Co., *Ex p.* Waring, *Ex p.* Inglis (1815) 302
Bridges *v.* Hawkesworth (1851) 64
Bridgewater Cheese Factory Co. *v.* Murphy (Can.) 258
Bridgman *v.* Gill (1857) 184
Brierley *v.* Brierley & Williams (1918) ... 362
Brill *v.* Grand Trunk Ry. Co. (Can.)... ... 101
Brimson *v.* Suttor (Aus.) 137, 138
Bringloe *v.* Morrice (1676) 70
Brinkley *v.* A.-G. (1889) 370
Brinsley, *Ex p.*, *Re* Birmingham Banking Co. (1866)... 306
Bristol & West of England Bank *v.* Midland Ry. Co. (1891) 78, 109
British American Elevator Co. *v.* Bank of British North America (Can.) 188
British & American Telegraph Co. *v.* Albion Bank (1872) 171, 172
British Berna Motor Lorries, Ltd. *v.* Inter-Transport Co., Ltd. (1915) 95
British Columbia Land & Investment Agency, Ltd. *v.* Wilson (Can.) 333
British Guarantee Assocn. *v.* Western Bank of Scotland (Scot.) 166
British Guiana Bank *v.* Official Receiver (British Guiana) 295
British Linen Co. *v.* Caledonian Insurance Co. (1861) 231, 254
British Linen Co. Bank *v.* Carruthers & Fergusson (Scot.) ... 221
——— *v.* Thomson (Scot.)... 306
British Waggon Co. *v.* Lea (1880) 107
Brittain *v.* Lloyd (1845) 37
Broad, *Re*, *Ex p.* Neck (1884) 299
——— *v.* Munton, *Re* Banister (1879) ... 355
——— *v.* Selfe (1863) 32
Broadbent *v.* Ledward (1839) 117
Broderick *v.* McKay (Can.) 389
Brodie *v.* Dowell (Scot.) 12
——— *v.* Dyce (Scot.)... 363
Brook *v.* City Bank (Can.) 305, 306
Brooke *v.* Bank of Upper Canada (Can.) 139, 157
Brooks *v.* Beirnstein (1909) 96
——— *v.* Cox (1857) 340
——— *v.* Richardson (Aus.) 22
——— & Co. *v.* Blackburn Benefit Society (1884)... 243

PAGE
Broome v Speak (1903) 347
Brosnan v Stewart & McCulloch (N.Z.) ... 399
Brossard v. Sterling Bank (Can.) 215
Broughton v. Manchester & Salford Waterworks Co. (1819) 132
Broun v. Kennedy (1864) 334
Brown, *Re*, *Ex p.* Plitt (1889) 299
——— v. Blackwell (Can.) 343
——— v. Borlace (1697) 315
——— v. Defoe (Can.)... 73
——— v. Farebrother (1888) 6
——— v. Fisher (Can.) 21
——— v. Foster (1857) 335, 336
——— v. Hickinbotham (1881) 46
——— v. Livingstone (Can.) 204
——— v. Norton (Aus.) 144
——— v. Quebec Bank (Can.) 214
——— v. Saul (1803) 130
——— v. Staton (1816) 28
———, Brough & Co. v. National Bank of India, Ltd. (1902) 239
———, Janson & Co. v. Cama & Co. & Salberg (1890) 209
Browne, *Re* (1894) 126
——— v. Bank of Australasia (Aus.) ... 220
——— v. Bank of New South Wales (Aus.)... 292
——— v. Commercial Bank (Can.) 205
——— v. Fenton (1807) 24
Brownrigg, Miller & Brown v. Rae (1850) ... 283
Bruce v. Good (N.Z.) 287
——— v. Hurly (1815) 269, 270
Brunelle v. Ostigny (Can.) 225
Brunet v. Painchaud (Can.) 74
Bryant, *Ex p.* (Aus.) 399, 406
——— v. Knyvett, *Re* Plaskett (1861) ... 386
——— v. Wardell (1848) 106
Buchanan, *Ex p.*, *Re* Kensington (1812) ... 211
——— v. Finlayson (Scot.) 396
Buckingham & Co. v. London & Midland Bank, Ltd. (1895) 218
Buckley, *Ex p.*, *Re* Clarke (1845) 139
——— v. Gross (1863) 64, 65, 71
Buckman v. Levi (1813) 75
Buckmaster v. Harrop (1807) 8
Buddhu v. Diwan (Ind.) 337
Budge v. Bank of New South Wales (Aus.)... 292
Buldeo Narain v. Scrymgeour (Ind.) ... 55
Bull v. O'Sullivan (1871) 214
——— v. Wright (1850) 352
Bullen v. Swan Electric Engraving Co. (1907) 63
Bullock, *Ex p.*, *Re* Mercantile Bank of Australia, Ltd. (Aus.) 166
Bulstrode v. Lechmore (1676) 335
Bunbury v. Hibernian Bank (Ir.) 275
Bunnett v. Brees (1844) 353
Burbury v. Jackson (1917) 397
Burk, *Ex p.*, *Re* Central Bank (Can.) ... 156
Burke v. Colonial Bank (N.Z.) 229
———, Ltd. v. Standard Bank of South Africa, Ltd. (S. Af.) 244
Burmester, *Re* (Ir.) 144
Burnaby v. Baillie (1889) 366, 367
Burnand v. Seaton (1900) 353
Burnard v. Haggis (1863) 56
Burne v. Burne (Ir.) 355
Burns v. Hart (Can.) 41
——— v. Langford (Ir.) 34
——— v. Lawrie's Trustees (Scot.) 292
Burrough, *Re*, *Ex p.* Sargeant (1810) ... 211
———, *Re*, *Ex p.* Sollers (1811) ... 211, 212
——— v. Skinner (1770) 23
Burton, *Ex p.*, *Re* Biddulph (1843) 185
———, *Ex p.*, *Re* Kensington (1812) ... 260
———, *Re*, Danby v. Burton (1901) 330
——— v. Gray (1873)... 290
——— v. Hughes (1824) 113

PAGE
Burton v. Levey (1891) 56
——— v. Payne (1827) 306
——— v. Tuckey (Aus.) 398
Burton Bank, *Ex p.*, *Re* Whitehead (1814)... 212
Bury v. Halifax Commercial Banking Co., Ltd. (1901) 276
——— v. Phillpot (1834) 360
Bury's Case (1598) 360
Bush v. Bush (N.Z.) 365
Busk's Case, *Re* St. Marylebone Joint Stock Banking Co. (1850) ... 148
———, *Re* St. Marylebone Joint Stock Banking Co. (1852) 148
Buswell v. White (Aus.) 398
Bute's (Marquis) Case, *Re* Cardiff Savings Bank (1892) 136
Butler v. Bridge (Ir.) 112
Butt v. Jackson (Ir.) 352
Butter v. M'Laren (Scot.) 397
Butterworth v. Clapham (1820) 339
——— v. Commonwealth Bank of Australia (Aus.) 138
Buxton v. Baughan (1834) 75
——— v. Bellin (Aus.) 10

C.

C., *Re* (Can.) 381, 382
C.M.G., *Re* (1898) 127
Cailiff v. Danvers (1792) 76
Caine v. Coulton (1863) 200
Cairncross, *Re* (Ir.) 381, 382
Cairns v. Robins (1841) 59, 80, 81
Caisse d'Economie v. Quebec (Can.)... ... 189
Caldwell v. Davys (Can.) 353
——— v. Merchants Bank of Canada (Can.) 221
Calisher v. Forbes (1871) 168
Calland v. Loyd (1840) 190
Calley v. Short (1815) 302
——— v. ——— (1821) 302
Callwell v. Callwell & Kennedy (1860) ... 341
Calvin Austin, S. S. v. Lovitt (Can.) ... 320
Cambrian Steam Packet Co., *Ex p.*, *Re* Trent & Humber Co. (1868) 99
Cameron v. Baker (1824) 385
——— v. Forsyth (Can.) 336
——— v. Royal Bank of Canada (Can.) ... 206
Camidge v. Allenby (1827) 198, 199
Camoys v. Scurr (1840) 70
Campbell v. Buckman's Official Assignee (N.Z.) 95, 96
——— v. Corley (1857) 334
——— v. Hackney Furnishing Co., Ltd. (1906) 354
——— v. Loader (1865) 353
——— v. Smith (Aus.) 38, 39
Canada Shipping Co.'s Case, *Re* Central Bank (Can.)... ... ... 277, 288
Canadian Bank of Commerce v. Davidson (Can.) ... 257
——— v. Green (Can.) 258
——— v. McDonald (Can.) ... 266
——— v. Stevenson (Can.) ... 278
——— v. Wilson (Can.) 268
Canadian Express Co. v. Home Bank (Can.) 237
——— v. O'Neil (Can.) ... 237
Canadian Gas Power Launches, *Re*, *Re* Ridge's Claim (Can.) 268
——— v. Crosby (Can.)... 73
Canadian Pacific Ry. v. Bank d'Hochelaga (Can.)... 215

PAGE
Canadian Pacific Ry. *v.* Canadian Bank of Commerce (Can.) 278
Canter *v.* Shepheard (1698) 214
Canterbury Frozen Meat & Dairy Export Co., Ltd. *v.* Shaw, Savill & Albion Co., Ltd. (N.Z.) 81
Cape of Good Hope Building Society Liquidators *v.* Bank of Africa (S. Af.) 204
Cape of Good Hope Permanent Land, etc., Society (in Liquidation) *v.* Standard Bank (S. Af.) 275
Capital & Counties Bank *v.* Bank of England (1889)... 132
Capital & Counties Bank, Ltd. *v.* Gordon (1903)... ... ... 200, 201, 239, 240, 243
Capp *v.* Topham (1805) 37
Cardiff Savings Bank, *Re*, Bute's (Marquis) Case (1892) ... 136
———, *Re*, Davies' Case (1890) 136
Cardiff Savings Bank & Aberdare District of Oddfellows, *Ex p.* Friendly Societies Registrar (1887) 135
Cardinal *v.* Fiset (Can.) 109
Carew *v.* Cooper (1864) 344, 345
——— *v.* Duckworth (1869) 223
Carew's Estate, *Re* (1858) 21
Carew's Estate Act, *Re* (1862) ... 259, 260
Carey, *Re*, R. *v.* Nash (1883) 381
Cargo *v.* Joyner (Can.) 55
Carlisle *v.* Grand Trunk Ry. Co. (Can.) ... 80
Carnegie *v.* Federal Bank of Canada (Can.)... 274
Carrick, *Ex p.*, *Re* Harrison (1858) 248
——— *v.* Johnston (Can.) 352
Carrison *v.* Rodrigues (Ind.) 342
Carroll *v.* Kennedy (Ir.) 148, 149
Carrow *v.* Ferrior (1868) 346
Carruthers *v.* Hamilton Provident & Loan Society (Can.) 27
Carson *v.* Pickersgill (1885) 332, 333
Carstairs *v.* Bates (1812) 257
Carter, *Ex p.*, R. *v.* Hastings Corpn. (1855) 405
——— *v.* Palmer (1841) 334, 335
——— *v.* Shephard (1698) 214
Carter & Hastings Corpn., *Re* (1855) ... 405
Carthy *v.* Cock (Aus.) 361, 395
Cartington Estate, *Re*, *Re* Beck (1883) ... 35
Cartwright *v.* Green (1803) 65
Casey *v.* Wentworth (Aus.) 195
Cassidy *v.* Belfast Banking Co. (Ir.)... ... 194
Cassin, *Ex p.*, R. *v.* Bailey (N.Z.) 382
Caswell *v.* Western Elevator Co. (Can.) ... 78
Cattell *v.* Corrall (1839) 349
——— *v.* Ireson (1858) 398
Catton *v.* Bennett (1884) 44
——— *v.* Gleason (Can.) 22
Cavenagh *v.* Such (1815) 57
Cavendish *v.* Geaves (1857) 246, 301
Cayley's Case, *Re* Central Bank of Canada (Can.)... ... ... 225, 294
Central Bank, *Re*, *Ex p.* Burk (Can.) ... 156
———, *Re*, *Ex p.* Harrison & Standing (Can.) 157
———, *Re*, *Ex p.* Reid (Can.) ... 293
———, *Re*, Canada Shipping Co.'s Case (Can.) ... 277, 288
———, *Re*, Henderson's Case (Can.) ... 154, 156
———, *Re*, Morton & Block's Claims (Can.) 195
———, *Re*, North America Life Insurance Co.'s Case (Can.) 154
Central Bank of Canada, *Re*, Baines' Case (Can.) ... 154
———, *Re*, Cayley's Case (Can.) 225, 294
Central Bank of Canada, *Re*, Home Savings & Loan Company's Case (Can.) ... 157
———, *Re*, Wells & MacMurchy's Case (Can.)... 300
———, *Re*, Yorke's Case (Can.) 301
Chamberlain *v.* English, Scottish & Australian Chartered Bank (Aus.) 166
Chamberlen *v.* Trenouth (Can.) 91
Chambers *v.* Mason (1858) 342
——— *v.* Miller (1862) 214
Chaplin *v.* Clarke (1849) 178
Chaplin's Petition, *Re* (1867), L. R. 1 P. & D. 328 369
———, *Re* (1867), 36 L. J. P. & M. 90 369
Chapman *v.* Great Western Ry. Co. (1880)... 80
——— *v.* Milvain (1850) 141
Charles, *Ex p.* (1828) 355
——— *v.* Blackwell (1877) 237, 238
Charlesworth *v.* Mills (1892) 20
Charlick *v.* Foley Brothers, Ltd. (Aus.) ... 337
Chartered Bank of India, Australia, & China *v.* Macfayden (P.) & Co. (1895) 253
Chatham Banner Co., *Re*, Bank of Montreal's Claim (Can.) 305
Chatteris *v.* Young (1819) 383
Chatterton *v.* London County Bank (1891)... 244
Chattock & Co. *v.* Bellamy & Co. (1895) 78, 79
Cheque Bank, Ltd., *Re* (1901), 18 T. L. R. 8 158
———, *Re* (1901), 18 T. L. R. 22 158
Cherry *v.* Anderson (Ir.) 38
Cheshire *v.* Bailey (1905) 88
Chesley Furniture Co. *v.* Krug (Can.) ... 281
Chew *v.* Jones (1847) 86, 87
Child & Co. *v.* Thorley (1880) 262
Childe, *Ex p.*, *Re* Walker (1909) 349
Chin Hong & Co. *v.* Seng Moh & Co. (Ind.)... 80
Chinery *v.* Viall (1860) 113
Chinic, *Re* (Can.) 293
Chinnock *v.* Sainsbury (1860) 7
Cholmondeley (Earl) *v.* Clinton (Lord) (1815) 330
Chowne *v.* Baylis (1862) 67
Christie *v.* A.-G. (1796) 13
——— *v.* Peart (1841) 141
——— *v.* Quaife (N.Z.) 12, 27
Christy *v.* Pidgeon (1847) 155
Churchill *v.* Bank of England (1843) ... 129
Citizens' Bank of Louisiana *v.* First National Bank of New Orleans (1873) ... 300, 301
City & District Savings Bank *v.* Jacques Cartier Bank (Can.)... ... ... 159, 165
City Bank *v.* Macdonald (Can.) 259
——— *v.* Montreal Harbor Comrs. (Can.) 216
——— *v.* Smith (Can.) 300
——— *v.* White (Can.) 147
City Bank Case, *Re* Laurence, *Ex p.* M'Kenna (1861)... 288
City Bank of Sydney *v.* Barden (Aus.) ... 277
——— *v.* Moloney (Aus.) ... 277
——— *v.* Penfold (Aus.) ... 277
City of Melbourne Bank, Ltd., *Re*, *Ex p.* Melbourne & Metropolitan Board of Works (Aus.)... 299
City of Melbourne Bank, Ltd., *Re*, Ferguson's Case (Aus.) 298
City of Prahran, The, *Ex p.* (Aus.) 299
City Sawmilling Co., Ltd., *Re* (N.Z.) ... 206
Claims for Interest on Debts Proved, *Re*, *Re* Commercial Bank of Manitoba (Can.) ... 195, 225
Clancarty (Lord) *v.* La Touche (Ir.) ... 172, 265
Clare & Co. *v.* Dresdner Bank (1915) ... 173
Clare's Claim, *Re* Victor Varnish Co. (Can.)... 281

PAGE
Claridge *v.* South Staffordshire Tramway Co. (1892)... 114
Clark *v.* Bank of Montreal (Can.) 250
——— *v.* Exchange Bank (Can.) 221
——— *v.* McClellan (Can.) 54
——— *v.* Randall (1903) 19
——— *v.* Smythies (1860) 34, 37
——— *v.* Ware (1867) 31, 32
Clark's Case, *Re* Sovereign Bank (Can.) ... 157
Clarke, *Re*, *Ex p.* Buckley (1845) 139
———, *Re*, *Ex p.* Haynes (1844) 134
——— *v.* Carfin Coal Co. (Scot.) 376
——— *v.* Chaplin (1847) 178
——— *v.* ——— (1848) 178
——— *v.* Earnshaw (1818) 99
——— *v.* Laurie (1857) 212, 213
——— *v.* London & County Banking Co. (1897) 240
——— *v.* McLean (Aus.) 223
——— *v.* Wright (1861) 380
Clarkson *v.* Dominion Bank (Can.) ...268, 280, 281
——— *v.* Noble (Can.) 9, 38
Clayton's Case, Devaynes *v.* Noble (1816) ... 179, 180, 303
Cleave *v.* Moore (1857) 38
Cleaver *v.* Cleaver (1884) 318, 320
Cleeve *v.* Harwar (1857) 151
Clement *v.* Bell & Sons, Ltd. (Scot.) ... 376
Clement's Inn Case (1661) 318
Clench *v.* Consolidated Bank of Canada (Can.) 183
Clennell, *Ex p.*, *Re* Davies & Troughton (1861) 301
Clerk *v.* Laurie (1857) 212, 213
Clift, *Re*, *Ex p.* Colquhoun (1890) 333
Clifton, The (1835) 339
Cligart *v.* Mayer (1854) 352
Clode *v.* Bayley (1843) 173, 208
Close, *Ex p.*, *Re* Hall (1884) 280, 281, 282
Cloyes *v.* Darling (Can.) 157
Clutton, *Ex p.*, *Re* Nash (1850) 304
——— *v.* Attenborough & Son (1897) ... 238
Cluxton *v.* Dickson (Can.) 80
Clydesdale Bank, Ltd. *v.* Paton (1896) ... 164
Clydesdale Banking Co. *v.* Lord Advocate (Scot.)... ... 197
——— *v.* Royal Bank of Scotland (Scot.) 231, 232
Coate *v.* Terry (Can.) 38
Coates *v.* Sovereign Bank (Can.) 163
Coats (J. & P.), Ltd. *v.* Direction der Disconto Gesellschaft (1916) 196
Cobb *v.* Snowdon (1849) 264
Cobban *v.* Downe (1803) 76
Cobbett *v.* Hudson (1850) 319
Cochran & Son *v.* Leckie's Trustee (Scot.) ... 105, 106
Cochrane *v.* O'Brien (Ir.) 178, 193
——— *v.* Rymill (1879) 45, 46
Cockayne, *Re* (1884) 332
Cockburn's Case, *Re* Royal Bank of Australia (1850)... 148
Cockle *v.* Joyce (1877)... 351
Cocks *v.* Masterman (1829) 235
Codling *v.* Mowlem (John) & Co., Ltd. (1913) 348
Coe, *Ex p.*, *Re* District Savings Bank, Ltd. (1861)... ... ... 134, 135, 156, 157
Coffey *v.* Quebec Bank (Can.) 111
Coggs *v.* Bernard (1703) ... 53, 60, 64, 67, 69, 72, 73, 85, 86, 89, 90
Cohen *v.* Bank of New Zealand (N.Z.) ... 230
——— *v.* Foster (1892) 42
——— *v.* Hale (1878) 224
Cole, *Ex p.*, *Re* Wise (1843) 300
———, *Ex p.*, R. *v.* Pratt (1870) 406
——— *v.* Christie, Manson & Woods (1910) ... 27
——— *v.* Manning (1877) 396, 397
Coleman *v.* Bucks & Oxon Union Bank (1897) 182
——— *v.* Coleman (Ir.) 307
Coleman *v.* Riches (1855) 79
Coles *v.* Bank of England (1839) 126
——— *v.* Trecothick (1804) 10
——— & Ravenshear, *Re* (1907) 347
Coley, *Ex p.* (1851) 401
Colledge *v.* Horn (1825) 345
Colless, *Ex p.*, Matthews *v.* Colless (Aus.) ... 395
Collie, *Re*, *Ex p.* Manchester & County Bank (1876)... 293
Collier *v.* Hicks (1831)... 319
——— *v.* Nokes (1849) 11
Collingwood *v.* Russell (1864) 323
Collins *v.* Dominion Bank (Can.) 244
——— *v.* Martin (1797) 210
Collinson *v.* Lister (1855) 162
Collis, *Ex p.*, R. *v.* Bank of England (1906) 133
——— *v.* Hibernian Bank (Ir.) 272
Colonial Bank, *Re*, Hay *v.* Paterson (Aus.)... 308
——— *v.* Exchange Bank of Yarmouth, Nova Scotia (1885) 179
——— *v.* Hepworth (1887) 273
Colonial Bank of Australasia *v.* Ettershank (Aus.) ... 164
——— *v.* Hunter (Aus.) 224
Colonial Bank of Australasia, Ltd. *v.* Marshall (1906)... 233
Colonial Bank of New Zealand *v.* Bank of New Zealand (N.Z.)... 138
Colquhoun, *Ex p.*, *Re* Clift (1890) 333
——— *v.* Colquhoun (Scot.) 363
Coltart *v.* Winnipeg Industrial Exhibition Assocn. (Can.) 61
Colville *v.* Bowman (Ir.) 354
Colwill *v.* Reeves (1811) 71
Comité Des Assureurs Maritimes *v.* Standard Bank of South Africa (1883) 181
Commercial Bank *v.* Bank of Upper Canada (Can.) 267
——— *v.* Cameron (Can.) ... 296
——— *v.* Dyer (N.Z.) 206
——— *v.* Gibbons (Aus.)... ... 258
——— *v.* Page (Can.) 269
——— *v.* Stevenson (Can.) ... 165
Commercial Bank of Australia, *Re* (Aus.) ... 157, 158, 196
Commercial Bank of Australia, Ltd. *v.* Hulls (Aus.) 223
Commercial Bank of Canada *v.* Cotton (Can.) 268
——— *v.* Harris (Can.) 266
Commercial Bank of Manitoba, *Re*, *Re* Claims for Interest on Debts Proved (Can.) ... 195, 225
Commercial Bank of Manitoba, *Re*, Banque D'Hochelaga's Case (Can.) 234
Commercial Bank of Manitoba, *Re*, Robertson's Claim (Can.) 300
Commercial Bank of Scotland *v.* Rhind (1860) 247
Commercial Bank of South Australia, *Re*, *Ex p.* Young (Aus.)... 157
Commercial Bank of Windsor *v.* Smith (Can.) 175
Commercial Bank Trustees *v.* Pitts (Nfld.)... 157
Commercial National Bank of Chicago *v.* Corcoram (Can.) 278
Commonwealth Furniture Supply Co. *v.* Waterman (Aus.) 92
Compagnie De L'Union Des Abattoirs de Montreal *v.* Leduc (Can.) 63
Compton *v.* Allward (Can.) 111, 112
——— *v.* Compton (Ir.) 359
Condon *v.* Bank of British North America (Can.) 193
——— *v.* Kingston (Ir.) 328
Conflans Quarry Co., Ltd. *v.* Parker (1867)... 255
Conn *v.* Merchants Bank of Canada (Can.) ... 198
——— *v.* Smith (Can.) 281
Connolly *v.* Connolly (Ir.) 320

PAGE
Connolly *v.* Nugent (Ir.) 384
Connor, *Re* (Ir.) 377
Conolly *v.* Parsons (1797) 14
Consolidated Co. *v.* Curtis & Son (1892) ... 47
Consolidated Tea & Lands Co. *v.* Oliver's Wharf (1910) 79
Constable *v.* Martin (1846) 9
——— *v.* ——— (1847) 24
Continental Caoutchouc & Gutta Percha Co. *v.* Kleinwort, Sons & Co. (1904) 179
Contract Corpn., *Re* (1872) 159, 305
Cook, *Ex p.* (Can.) 398
——— *v.* Rattray (Scot.) 398
——— *v.* Royal Canadian Bank (Can.) ... 174
Cooke, *Ex p.*, *Re* Cotton (1913) 28
———, *Re* (1889) 348
——— *v.* Cooke (1865)... 371
——— *v.* Courtown (Lord) (Ir.) 135
——— *v.* Elmsall (1865) 371
——— *v.* Seeley (1848) 187, 244
Cookson *v.* Driscoll (Can.) 333
Coonan *v.* O'Connor (Ir.) 46
Cooper *v.* Barton (1810) 89
——— *v.* Commercial Banking Co. of Sydney (Aus.) 183
——— *v.* Jagger (1819) 347
——— *v.* Marsden (1793) 305, 306
——— *v.* Willomatt (1845) 106, 110
Cope *v.* Cope (1833) 363, 365
Copland *v.* Brogan (Scot.) 68
Coppin *v.* Craig (1816)... 40
——— *v.* Walker (1816) 39
Corbin *v.* Stephen (Can.) 70
Corcoran *v.* Duggan (Ir.) 361
Cordey *v.* Cardiff Pure Ice Co. (1903) ... 74
Corea (C. E. Victor S.) *v.* Peiri (Henry Joseph) (Ind.) 336
Cork (Eastern Division) Case (1911)... ... 335
——————— (Ir.) 307
Corley *v.* Stafford (Lord) (1857) 334
Corse *v.* R. (Can.) 57
Cosentino *v.* Dominion Express Co. (Can.) ... 58
Costello *v.* Martin (Ir.)... ... ... 193, 194
Costigan *v.* Johnson (Can.) 86, 87
Costley *v.* Little (Scot.) 396
Cotè *v.* Watson (Can.)... ... ... 3, 4
Cottam *v.* Banks (1847) 350
Cotter *v.* Bank of England (1833) 291
Cotton, *Ex p.* (1846) 322
———, *Re*, *Ex p.* Cooke (1913) 28
Cotton Co., Ltd. *v.* Coast Quarries, Ltd. & Patterson (Can.) 113
Coughlin *v.* Gillison (1899) 70
Coulston *v.* Taylor (N.Z.) 395
Counter, *Ex p.*, Harper *v.* Counter (Aus.) ... 395
County of Gloucester Bank, *Ex p.*, *Re* Dobbs (1866)... 143
Coupé Co. *v.* Maddick (1891)... ... 91, 117
Couper *v.* National Bank (Scot.) ... 243, 244
Coupland's Claim, *Re* Barned's Banking Co. (1869)... 252
Courtauld, *Ex p.*, Else *v.* Barnard (1860) ... 15
Courtois *v.* Vincent (1820) 383
Courtown *v.* Goff (Ir.)... 135
Cousins *v.* Thompson (1795) 130
Couston *v.* Chapman (Scot.) 16
Coutts & Co. *v.* Irish Exhibition in London (1891)... 263
Coverley *v.* Burrell (1821) 15
Cowie's Petition, *Re* (Ind.) 178
Cox *v.* Canadian Bank of Commerce (Can.)... 269
——— *v.* Short, *Ex p.* Short (Aus.) 385, 386, 394
Craig, *Ex p.* (1851) 330
——— *v.* Miller (Can.) 17
Craig's Trustee *v.* Macdonald, Fraser & Co. (Scot.) 35

PAGE
Craik *v.* Macfarlane & Co. (Can.) 229
Crake (Doe d.) *v.* Brown (1832) 338
Cramer *v.* Giles (1883)... ... ... 95, 96
Crammond *v.* Crouch (1828) 355
Cranch *v.* White (1835) 111
Crane *v.* Galway (Ir.) 98
Craufurd *v.* Cocks (1851) 171
Craven *v.* Sanderson (1838) 349
Craw *v.* Commercial Bank (Scot.) 175
Crawford, *Re*, *Ex p.* Official Assignee (N.Z.)... 92
Crawfurd *v.* Cocks (1851) 171
Creaser *v.* Hurley (1915) 4
Cree *v.* Durie (Scot.) 12
Creed *v.* Trap (1578) 335
Creighton *v.* Halifax Banking Co. (Can.) ... 258
Crellin *v.* Brook (1845) 152
——— *v.* Calvert (1845) 152
Crickett, *Ex p.*, *Re* Seal (1893) 332
Crisp *v.* Bunbury (1832) 135
Crispin *v.* Doglioni (1863) 368
Critten *v.* Chemical Bank of New York (N.Y.) 244
Crockett *v.* Green (1865) 340
Croft *v.* Alison (1821) 113
Crofts *v.* Marshall (1836) 352
Crook *v.* Hill (1876) 378
Crooks *v.* Davies (Can.), 5 O. S. 141... ... 320
——— *v.* Davis (Can.), 6 Gr. 317 ... 10, 14
Cross *v.* Law (1840) 148, 149
Crosse *v.* Smith (1806)... 57
——— *v.* ——— (1813)... ... 208, 294, 304
Crosskey *v.* Mills (1834) 30
Crosskill *v.* Bower (1863) 265, 267
Crossman *v.* Mosely (Can.) 16
Croudace, *Re* (1866) 270
Crowder *v.* Austin (1826) 12
Crowe, *Re* (Ir.) 383
Crowhurst *v.* Laverack (1852) 386
Crowther *v.* Elgood (1887) 28
Crumplin *v.* London Joint Stock Bank, Ltd. (1913)... 242
Cull *v.* Wakefield (Can.) 28
Cullen *v.* Barclay (Ir.)... 109
——— *v.* Thomson's Trustees (1862)... ... 165
Cumming *v.* Bell (Ir.) 30
——————— *v.* Ince (1847) 343, 344
——————— *v.* Shand (1860) 264
Cunningham, *Ex p.*, *Re* Maberley (1833) ... 298
——————— *v.* Wegg (1787) 318
Curling *v.* Shuttleworth (1829) 25
Currie, *Ex p.* (Can.) 394
Curry *v.* Walter (1796) 335
Curtice *v.* London City & Midland Bank, Ltd. (1908)... 224
Curtis *v.* Bottomley (1911) 351
——— *v.* Greated (1834) 26, 27
——— *v.* Livesey (1790) 297
——— *v.* Perth & Fremantle Bottle Exchange Co., Ltd. (Aus.) 111
Cuthbert *v.* Robarts, Lubbock & Co. (1909)... 261, 286
Cuthill *v.* Strachan (Scot.) 179
Cutler *v.* North London Ry. Co. (1887) ... 82
Cutts *v.* Salmon (1852) 22

D.

DAKINS *v.* Scrogs (1678) 321, 322
Dale *v.* Bank of New South Wales (Aus.) ... 291
Dale & Co., *Ex p.*, *Re* West of England & South Wales District Bank (1879) ... 299
Dalgleish *v.* Buchanan (Scot.) ... 105, 106
Dalhousie (Countess) *v.* M'Douall (1840) ... 373
Dalton *v.* McNider (Can.) 198
Daly *v.* Slatter (1830) 174
Danby *v.* Burton, *Re* Burton (1901) ... 330
——— *v.* Coutts & Co. (1885) ... 282, 283

PAGE
Daniell *v.* Royal British Bank (1857) ... 151
Daniels *v.* Imperial Bank (Can.) ... 171, 183
Danks *v.* Farley (1853) 91, 92
Dansey *v.* Richardson (1854) 82
Darby *v.* Ouseley (1856) 351, 352
Darcys, *Re* (Ir.) 368, 383
Dare *v.* Bognor Urban District Council (1912) 87
Darling *v.* Carter & Co. (Aus.) 308
Darlington District Joint Stock Banking Co., *Ex p.*, *Re* Riches (1865) 260
Darnel's (Sir Thomas) Case (1627) 325
Da Silva *v.* Fuller (1776) 215
Davey *v.* Chamberlain (1803) 117
Davidson *v.* Bower (1842) 141
——— *v.* Canada Shipping Co. (Can.) ... 81
——— *v.* Cooper (1843) 140, 141
——— *v.* ——— (1844) 140, 141
——— *v.* Laurier (Can.) 337
Davies, *Ex p.*, *Re* Sadler (1881) ... 30, 101
——— *v.* D'Ennett, *Ex p.* D'Ennett (Aus.) 394, 395
——— *v.* Evans (1882) 404
——— *v.* Kennedy (Ir.) 134, 196
——— *v.* Sibly (1825) 355
——— *v.* White (1884) 308
Davies & Troughton, *Re*, *Ex p.* Clennell (1861) 301
Davies, Banks & Co. *v.* Beavan, *Re* Beavan (1912) 191, 265
Davies' Case, *Re* Cardiff Savings Bank (1890) 136
Davis, *Ex p.* (1853) 392
——— *v.* Artingstall (1880) 45
——— *v.* Bank of England (1824) 124
——— *v.* Bowsher (1794) 289, 290
——— *v.* Brown (Can.) 104
——— *v.* Canada Farmers' Mutual Insurance Co. (Can.) 336
——— *v.* Danks (1849) 45
——— *v.* Davis (1880) 343
——— *v.* Feinstein (Can.) 399
Davis & Co., *Re*, *Ex p.* Rawlings (1888) ...94, 96
Davison *v.* Farmer & Grace (1851) 152
Dawes *v.* Pinner (1801) 265
Dawson, *Ex p.* (Aus.) 70
——— *v.* Bank of New Zealand (Aus.) ... 219
——— *v.* Isle (1906) 258
——— *v.* M'Kenzie (Scot.) 396, 397
Day *v.* Ponsonby (Ir.) 330
—— *v.* Spread (Ir.) 359
—— *v.* Wells (1861) 7, 15
Deakins *v.* Scroggs (1678) 321, 322
Dean *v.* Hogg (1834) 114
Deane *v.* Packwood (1847) 336
Death, *Ex p.* (1852) 320
Debaum, *Ex p.* (Can.) 178
De Bergareche *v.* Pillin (1826) 226
De Bernales *v.* Fuller (1810) 248
De Kock *v.* Van de Wall's Executors (S. Af.) 191
De La Chaumette *v.* Bank of England (1829) 131
——— *v.* ——— (1831) 131
De Lacy *v.* Lizardi (1912) 178
De La Warr (Earl) *v.* Miles (1881) 349
Dellar, *Re* (1884) 382, 383
Deller *v.* Prickett (1850) 26, 37
De Medewe, *Re* (1859) 282
De Mestre *v.* West (1891) 380
Denault *v.* Banville (Can.) 395
Denew *v.* Daverell (1813) 33, 37
D'Ennett, *Ex p.*, Davies *v.* D'Ennett (Aus.)..394, 395
Dennis *v.* Codrington (1579) 335
Dennison *v.* Gavaza (Can.) 109
Derby *v.* Ouseley (1856) 351, 352
De Souza's Petition (1885) 320
Desparois *v.* Frothingham & Workman, Ltd. (Can.) 114
Deutsche Bank (London Agency) *v.* Beriro & Co. (1895) 207

PAGE
Devaynes *v.* Noble, Baring's Case (1816) ... 304
——— *v.* Noble, Clayton's Case (1816) ... 179, 180, 303
——— *v.* Noble, Houlton's Case (1818) ... 304
——— *v.* Noble, Sleech's Case (1816) ... 304
Dever, *Ex p.*, *Re* Suse (1884) ... 250, 251
Devereux *v.* Barclay (1819) 78
Devonport & South Devon Steam Flour Mill Co., *Re*, Bateman's Case (1873) 180
Dickenson *v.* Naul (1833) 39
Dickie *v.* White (Ir.) 23
Dickinson *v.* Bowes (1812) 197
——— *v.* Commercial Bank Directors (Nfld.) 153
——— *v.* North Eastern Ry. Co. (1863)... 376
Dickson *v.* Harrison (1878) 319
——— *v.* National Bank of Scotland (Scot.) 192
Didisheim *v.* London & Westminster Bank (1900) 190, 191
Dill *v.* Dominion Bank (Can.) 164
Dillon, *Re*, Duffin *v.* Duffin (1890) 195
Dilworth, *Re*, *Ex p.* Armistead (1828) ... 212
———, *Re*, *Ex p.* Benson (1832) 211
———, *Re*, *Ex p.* Thompson (1828) ... 211
Dimmock *v.* Hallett (1866) 13
Dinning & Samson, *Re* (Can.) ... 160, 165
Dinwoodie's Executors *v.* Carruther's Executor (Scot.) 194
Dipple *v.* Corles (1852) 319
Dirks *v.* Richards (1842) 36
Disputed Adjudication, A, *Re* (1860) ... 346
District Savings Bank, Ltd., *Re*, *Ex p.* Coe (1861) 134, 135, 156, 157
Dixon *v.* Bank of New South Wales (Aus.) 183
Dobbs, *Re*, *Ex p.* County of Gloucester Bank (1866) 143
Dobell *v.* Ontario Bank (Can.) 174
Dodds *v.* A.-G. (1880) 369
Dodgson *v.* Bell (1850) 151
——— *v.* Scott (1848) 149, 150
Doe d. Bamford *v.* Barton (1837) 368
——— Crake *v.* Brown (1832) 338
——— Wood *v.* Elias (1846) 331
—— *v.* Hale (1850) 329, 331
—— d. Dunlop *v.* McNab (Can.) 351
——— Marr *v.* Marr (Can.) 359, 365
——— Warry *v.* Miller (1876) 318
—— *v.* Roe (1809) 349
—— d. Swinton *v.* Sinclair (1836) 338
——— Strickland *v.* Strickland (1849) ... 353
——— Birtwhistle *v.* Vardill (1840)... 374, 376
Doglioni *v.* Crispin (1866) 376
Doherty *v.* Desbrisay (Can.) 338
——— *v.* Hogan (Can.) 351
Dollar *v.* Greenfield (1905) 89
——— *v.* National Bank (Scot.) ... 243, 244
Dominion Bank *v.* Davidson (Can.) 278
——— *v.* Knowlton (Can.) 163
——— *v.* Markham (C. C.) Co., Ltd. (Can.) 287
——— *v.* Oliver (Can.) 280
——— *v.* Union Bank of Canada (Can.) 232
Don's Estate, *Re* (1857) 374
Done & Egerton *v.* Hinton & Starky (1617) 360, 361
Donogh *v.* Gillespie (Can.) 206
Doolubdass Pettamberdass *v.* Ramloll Thackoorseydass (1850) 21
Doorman *v.* Jenkins (1834) 63
Doria *v.* Bank of Victoria (Aus.) 261
Dormer *v.* Taylor (N.Z.) 394, 407
Dossett *v.* Harding (1857) 151, 155
Douglas, *Ex p.*, *Re* Noble (1833) 287
——— *v.* Archbutt (1858) 32

PAGE
Douglas *v.* Douglas & Trevor (1897) ... 372
Dover *v.* Alexander (1843) 379
Dovey *v.* Cory (1901) 145, 147
Dow *v.* Parsons (Can.) 404
Dowell *v.* Allan (Scot.) 41
Downes *v.* Bank of New Zealand (N.Z.) ... 193
——— *v.* Grazebrook (1817) 22
Downie & Arrindell, *Re* (British Guiana) ... 324
Downing *v.* Cage (1699) 342
Doyle *v.* Dumaine (Can.) 73
Drake *v.* Bank of Toronto (Can.) ... 144, 259
Driscoll *v.* Hart (Can.) 351
Driver *v.* Cholmondeley (1835) 33
Druitt's Case (1872) 159, 305
Drummond *v.* Thomson's Trustees (Scot.) ... 159
Dubost, *Ex p.*, *Ex p.* Pye (1811) 380
Duckitt *v.* Jones (1876) 320
Dudgeon *v.* O'Connell (Ir.) 141
Dudley *v.* Darling (Can.) 180
——— & West Bromwich Banking Co. *v.* Spittle (1860) 230, 231
Duffin *v.* Duffin, *Re* Dillon (1890) 195
Duhamel *v.* O'Sullivan (Can.) 21
Duke *v.* Ventris (1656) 337
Duncan *v.* Cafe (1837)... 25
Duncombe *v.* Daniell (1837) 345
Dunlop, *Re*, Dunlop *v.* Dunlop (1882) ... 293
——— (Doe d.) *v.* McNab (Can.) 351
Dunn *v.* Beau (Can.) 73
——— *v.* Chalmers (Scot.) 395
——— *v.* Ferrior (1868) 346
——— *v.* Packwood (1847) 336
——— *v.* Prescott Elevator Co. (Can.) ... 75, 77
Dunne's Assignees *v.* Hibernian Joint Stock Co. (Ir.) 292
Duquet *v.* Banque Nationale (Can.) ... 225
Durand *v.* Potter (Ir.) 143
Durocher *v.* Bradford (Can.) 346
——— *v.* Meunier (Can.) 74
Durr *v.* Bam (S. Af.) 17
Dutton, *Re* (1892) 322
Dyke *v.* Walford (1848) 376
——— (H.M. Procurator-General) *v.* Williams, *In the Goods of* Emsley (1862) 368
Dyson *v.* Union Bank of Australia, Ltd. (Aus.) 220

E.

EADON *v.* Blake (1845) 17, 18
Eagleton *v.* East India Co. (1802) 19
Eardley *v.* Law (1840)... 149
Earl *v.* Dowling (1852) 350
Earle *v.* Wilson (1811)... ... ... 377, 378
Early *v.* Smith (Ir.) 23, 24
Easley *v.* Crockford (1833) 131
East & West India Dock Co., *Re* (1891) ... 284
East India Co. *v.* Tritton (1824) 207
East Indian Ry. Co. *v.* Sispal Lal (Ind.) ... 109
East of England Banking Co., *Re* (1868) ... 195, 196, 197
Eastern Construction Co., Ltd. *v.* National Trust Co., Ltd. & Schmidt (1914)... 105, 114
Eastern Townships Bank *v.* Picard (Can.) ... 259
Eastwood *v.* Eastwood (Ir.) 368
Eaton *v.* Bell (1821) 245, 261
Ebbern *v.* Fowler (1909) 379
Eby *v.* McTavish (Can.) 97
Ecroyd *v.* Davis (Aus.) 8
Edborg *v.* Imperial Timber & Trading Co. & Royal Bank of Canada (Can.) 282
Eddy *v.* Bank of New South Wales (Aus.) ... 218
Eden *v.* Blake (1845) 17, 18
Edgell *v.* Day (1865) 24
Edinburgh Albert Building Co., Ltd. *v.* General Guarantee Corpn., Ltd. (Scot.) ... 96
PAGE
Edmeads *v.* Newman (1823) 302
Edwards, *Ex p.*, *Re* Wise (1842) ... 211, 269
———, *Re*, Fieldings, Ltd. *v.* Franklin (1900) 182
——— to Sykes (Daniel) & Co., Ltd., *Re* (1890) 18
——— *v.* Buchanan (1832)... 142
——— *v.* Edmonton (Can.) 55
——— *v.* Hodding (1814) 24
——— *v.* Vere (1833) 195
Egan *v.* Kensington Union Guardians (1841) 332
Egmont (Earl) *v.* Smith (1877) 26
Elderton, *Re*, *Ex p.* Russell (1887) 319
Elford *v.* Teed (1813) 226
Elgin Loan & Savings Co. *v.* National Trust Co. (Can.) 55, 100
Ellender *v.* Wood (1888) 342
Ellerton, *Re* (1887) 319
Elliot's Case (1629) 326
Elliott *v.* McKillop (S. Af.) 17
Ellis *v.* Bank of Australasia (Aus.) 255
——— *v.* O'Neill (Ir.) 328
Elsas *v.* Williams (1884) 344
Else *v.* Barnard, *Ex p.* Courtauld (1860) ... 15
Elwes *v.* Brigg Gas Co. (1886) 65
Elworthy *v.* Bird (1824) 340
Emanuel *v.* Robarts (1868) 213, 214
Embiricos *v.* Anglo-Austrian Bank (1905) ... 234
Emerson *v.* Dallison (1660) 324, 325
Emly *v.* Lye (1812) 260
Emmerson *v.* Dallison (1660) 324, 325
——— *v.* Heelis (1809) 8
Emmott *v.* Star Newspaper Co. (1892) ... 308
Emsley, *In the Goods of*, Dyke (H.M. Procurator-General) *v.* Williams (1862) ... 368
English, Scottish & Australian Chartered Bank *v.* Levinger (Aus.) 203
Errington, *Re*, *Ex p.* Fermor... 322
Escallier *v.* Escallier (Trinidad) 376
Esdaile *v.* Lund (1844) 149
——— *v.* Maclean (1846) 141, 142
Eshenchunder Singh *v.* Shamachurn Bhutto (Ind.) 22
Esmail Ebrahim *v.* Haji Jan Mahomed (Ind.) 337
Essaji Adamji *v.* Bhimji Purshotam (Ind.) ... 23
Essex Land & Timber Co., *Re*, Trout's Case (Can.) 267, 268
Estabrooks, *Ex p.* (Can.) 399
——— *v.* Tapley (Can.) 350
Etty *v.* Jackson (1837) 16
European & Australian Royal Mail Co., Ltd. *v.* Royal Mail Steam Packet Co. (1861) ... 100, 102
European Bank, *Re*, *Ex p.* Oriental Commercial Bank (1870) ... 161
———, *Re*, Agra Bank Claim (1872) 171, 292
Evans, *Ex p.* (1846) 319
———, *Ex p.* (1872) 407
——— *v.* Evans (1835) 40
——— *v.* Evans & Blyth (1904), P. 274 ... 372
——— *v.* ——— (1904), P. 378 ... 360, 367
——— *v.* National Provincial Bank of England (1897) 193
——— *v.* Nichol (1841) 103
——— *v.* Pickett, *Re* Pickett (1896) ... 19, 20
——— *v.* Roberts, *Re* Roberts (1887) ... 20
——— & Finch's Case (1637) 318
Everet *v.* Williams (1725) 325
Everley *v.* Dunkley (Can.) 193
Ewing (William) & Co. *v.* Dominion Bank (1904)... 236
Exchange Bank *v.* Burland (Can.) 156
——— *v.* Fletcher (Can.) 274
——— *v.* Montreal Coffee House Assocn. (Can.) 300

PAGE
Exchange Bank v. Newell (Can.) 268
——— v. St. Amour (Can.) ... 301
Exchange Bank of Canada v. Canadian Bank of Commerce (Can.) ... 206, 293, 294
——— v. Counsell (Can.) 216
——— v. Hall (Can.) ... 300
——— v. Montreal City & District Savings Bank (Can.) ... 157
——— v. People's Bank (Can.) ... 159, 160, 225
——— v. R. (Can.) ... 156
——— v. Stinson (Can.) 300
Eyles v. Ellis (1827) 303
Eyre, *Ex p.*, *Re* Biddulph (1843) 256
——, *Ex p.*, *Re* Wright (1843) 256
——— v. M'Dowell (Ir.) 143, 144
Eyton v. Knight (1838) 171

F.

FAIRBROTHER v. Nerot & Harris (1818) ... 27
——— v. Prattent (1818) 27
Fairburn v. Rothwell (1843) 350
Fairlie v. Denton (1828) 349
——— v. Fenton (1870) 3, 38
Farebrother v. Ansley (1808)... 37
——— v. Simmons (1822) 39
——— v. Welchman (1855) 30
Farina v. Home (1846) 76, 104, 105
Farley v. Turner (1857) 298
Farmer v. Casey (Ir.) 27
Farmers Bank, *Re* (Can.) 157
———, *Re*, Lindsay's Case (Can.) ... 157
——— v. Blow (Can.) 155
Farmers' & Settlers' Co-operative Society, Ltd., *Re* (Aus.) 277
Farquhar, *Ex p.*, *Re* Land Securities Co. (1896) 257
——— v. Billman (Can.) 6, 10
——— v. Farley (1817) 25
Farrer v. Kirkby (1888) 41
——— v. Lacy, Hartland & Co. (1885) ... 5
Farrer & Rooth v. North British Bank (Scot.) 285, 286
Faulds v. Corbett & Miller (Scot.) 12
Fawcett v. Garford (1789) 321
——— v. Hodges (Ir.) 140
——— v. Smelthurst (1914)... 56
Federal Bank of Australia, Ltd., *Re* (Aus.)... 138
Felettie v. Goldie (Aus.) 398, 399
Fell v. Brown (1791) 338
——— v. Burchett (1857) 148
Fellows v. Mitchell & Owen (1705) 70
Fenn v. Bittleston (1851) 106, 110
Fenton v. Browne (1807) 24
——— v. Livingstone (1859)... 374
Fenwick v. MacDonald, Fraser & Co. (Scot.) 19, 42
Ferguson v. Cristall (1829) 111
——— v. Roblin (Can.) 96
Ferguson's Case, *Re* City of Melbourne Bank, Ltd. (Aus.) 298
Fergusson v. Fyffe (1841) 195
Fermor, *Ex p.*, *Re* Errington (1821)... ... 322
Fernandey v. Glynn (1808) 223
Ferrers (Earl) v. Robins (1835) 5
Ferrier v. Dods & Gray (Scot.) ... 41, 42
Ferris v. Mullins (1854) 289
Fick v. De Klerk (S. Af.) 89
Field v. Bennett (Aus.) 160
PAGE
Field v. Carr (1828) 209
——— v. Lonsdale (1850) 137
——— v. Mackenzie (1847) 149
Fielding, *Ex p.* (1861)... 391
Fielding & Co. v. Corry (1898) ... 208, 209
Fieldings, Ltd. v. Franklin, *Re* Edwards (1900)... 182
Filmer v. Delber (1811) 340
Financial Insurance Co., Ltd., *Re* (1867) ... 305
Finch v. Finch (1876) 267
Fine Art Society, Ltd. v. Union Bank of London, Ltd. (1886) 213
Finucane v. Small (1795) 73
Firth v. Brooks (1861)... 201
Fisher v. Marsh (1865)... 40
Fitzgerald v. Green (S. Af.) ... 361, 364, 365
——— v. Luck (Aus.) 3
——— v. Portarlington (Ir.) 407
——— v. Rowan (Ir.) 135, 136
Fitzpatrick, *Ex p.* (Can.) 4
———, *Ex p.*, R. v. Bindon (Aus.) ... 401
——— v. M'Donald (Ir.)... 308
Flach v. London & South-Western Bank, Ltd. (1915)... 220
Fleetwood v. Fleetwood (Ir.) 134
Fleming v. Bank of New Zealand (1900) ... 219, 220, 261
Fletcher v. Crosbie (1842) 327
——— v. Sandys (1746) 198
Flewellin v. Rave (1610) 116
Flint v. Woodin (1852) 5, 14
Flintoft v. Elmore (Can.) 9
Florence v. Smith (Scot.) 396
Flower v. Evans (1840) 345
Fly & Young v. Percy Brothers (N.Z.) ... 108
Foisy v. Wurtlle (Can.) 338
Foley v. Hill (1848) 168
Follit v. Koetzow (1860) 385, 400
Fontaine-Besson v. Parr's Banking Co. & Alliance Bank, Ltd. (1895)... ... 222, 223
Foote v. Hayne (1824) 336
Forbes v. Marshall (1855) 145, 146
Forbes' Case, *Re* Contract Corpn. (1872) ... 305
Forde v. Head (Ir.) 347
Forman v. Bank of England (1902) 219
Forrest v. McRea (Can.) 384
Forshaw v. Lewis (1855) 329
Forster, *Re*, *Ex p.* Bond (1840) 211
——— v. Clements (1809) 227
——— v. Wilson (1843) 198
Forsyth v. Bank of Nova Scotia, *Re* Bank of Liverpool (Can.) 157
——— v. Laurence (Can.) 206
Fortescue v. Clayton (1860) 353
Foster v. Bank of England (1846) 129
——— v. Bank of London (1862) 305
——— v. Crabb (1852) 116
——— v. Green (1862) 163
Fottrill v. Willans (Ir.) 138
Fournier v. Union Bank (Can.) 244
Fowler v. Churchill (1843) 129
——— v. Lock (1872)... ... ... 57, 87
——— v. ——— (1874) 57, 87
Fox v. F. (Ir.) 194
Fox, Walker & Co., *Re*, *Ex p.* Bishop (1880)... 260
Foxton v. Manchester & Liverpool District Banking Co. (1881) 183, 184
Francome v. Francome (1865) 321
Franklin v. Bank of England (1826)... ... 123
——— v. ——— (1829)... ... 123
Franklyn v. Lamond (1847) 42
Franks v. Townsend (1904) 98
Fraser v. Bruce (S. Af.) 244
——— v. Fraser (1845) 337
——— v. Imperial Bank of Canada (Can.) ... 283
——— v. Roche (Can.) 74
Frederick v. A.-G. (1874) 369

PAGE
Freedman *v.* Dominion Bank (Can.)... ... 291
Freehold Permanent Building Society *v.* Choate (Can.) 28
Freeman *v.* Birch (1833) 113
——— *v.* Farrow (1886) 38
——— *v.* Standard Bank of South Africa, Ltd. (S. Af.) 218, 223
Freer *v.* Rimner (1844) 19
French, *Re* (Can.) 316
Frere, *Ex p.*, *Re* Sikes & Co. (1829) 212
Friedlander *v.* Bank of Australasia (Aus.) ... 252
Friendly Societies Registrar, *Ex p.*, Cardiff Savings Bank & Aberdare District of Oddfellows (1887) 135
Froggatt, *Ex p.*, *Re* Parker (1843) ... 210, 291
Frost *v.* London Joint Stock Bank, Ltd. (1906)... 220
Fry *v.* Quebec Harbour Comrs. (Can.) ... 61, 76
Fuller *v.* Abrahams (1821) 22
——— *v.* Glyn, Mills, Currie & Co. (1914) ... 271
——— *v.* Smith (1824)... 235
Fuller's Case (1607) 324
Furillio *v.* Crowther (1826) 385
Furness *v.* Cope (1828) 306
Furnival *v.* Bogle (1827) 344
Fursaker *v.* Robinson (1717) 379
Furtado *v.* Lumley (1890) 23
Fydell *v.* Clark (1796) 260

G.

GABB *v.* Prendergast (1855) 378
Gabell *v.* South Eastern Ry. Co. (1877) ... 85
Gaby *v.* Driver (1828) 25
Gadbois *v.* Lauzon (Can.) 98
Gaden *v.* Newfoundland Savings Bank (1899) 225, 247
Gage *v.* Johnson (1622) 332
Gagnon *v.* Viau (Can.)... 87
Galbally *v.* Watkins (Aus.) 394
Galletly *v.* Child (Scot.) 15
Galliard *v.* Laxton (1862) 403
Galloway *v.* Galloway (N.Z.)... 376
Galton *v.* Emuss (1844) 20, 21
Galyer *v.* Massey-Harris Co., Ltd. (N.Z.) ... 97
Game *v.* Harvie (1603) 70
Gannon *v.* S. (N.Z.) 394
Garand *v.* West (Can.)... 204
Garbutt *v.* Simpson (1863) 398
Gardner *v.* Gardner (1877) 358, 359
——— Peerage Claim (1826) 371
Garland *v.* Garland (1793) 322
Garner, *Re*, *Ex p.* Holmes (1839) ... 268, 269
Garnett *v.* McKewan (1872) 222
——— *v.* Woodcock (1817) 226
Garrold, *Ex p.*, *Re* Hereford Municipal Election Petition (1889) 320
Garside *v.* Trent & Mersey Navigation Proprietors (1792) 79, 80
Gaskell *v.* Gaskell (1828) 184
Gatty *v.* Fry (1877) 214
Gaunt *v.* Taylor (1843) 176
Gaura *v.* Gayadin (Ind.) 378
Gauthier *v.* Reinhardt (Can.) 204
Geddes *v.* Banque Jacques Cartier (Can.) ... 274
Gendreau *v.* Widder (Can.) 258
General Council of the Bar (England) *v.* Inland Revenue Comrs. (1907) ... 333, 334
General Exchange Bank, *Re*, *Re* Lewis (1871) 156
General Provident Assurance Co., *Re*, *Ex p.* National Bank (1872) 290
General South American Co., *Re* (1877) ... 297
Genn *v.* Winkel (1912)... 100
Gera *v.* Ciantar (Malta) 371
Gerrarde *v.* Worseley (1579) 379
Gethings *v.* Cloney (Ir.) 343
Gibbons *v.* Standon (1867) 87
Gibbs *v.* Dominion Bank (Can.) 278
——— *v.* Pike & Wells (1842) 353
Giblin *v.* McMullen(1868) 61, 256
Gibson *v.* Hutchison (Scot.) 194
——— *v.* Inglis (1814) 67
——— *v.* M'Fagan (Scot.) 398
——— *v.* Midland Ry. Co. (Can.) 376
——— *v.* Minet (1824) 230
Gibson & Sturt, *Re*, *Re* St. Alban's Bank (1850)... 169
Gignac *v.* Woodburn (Can.) 100
Gilbart *v.* Dale (1836) 84
Gilbert *v.* Campbell (Can.) ... 336, 351, 353
——— *v.* Raymond (Can.) 331
Gilchrist *v.* Macadams (Scot.) 324
——— *v.* Wyer (Can.) 135
Giles *v.* Perkins (1807) 210
Gillard *v.* Wise (1826) 199
Gillen *v.* Gibson (Ir.) 38
Gillespie *v.* International Bank of London, Ltd. (1888) 241, 242
Gillett *v.* Bank of England (1889) 130
——— *v.* Hill (1834) 103
Gilliat *v.* Gilliat (1869) 11
Gillies *v.* Commercial Bank of Manitoba (Can.)... 281
Gilman *v.* Court (Can.) 156
——— *v.* Gilbert (Can.) 300
Ginger, *Re* (Ir.)... 144
Giraldi *v.* Banque Jacques-Cartier (Can.) ... 186
Girdler *v.* Watthews (1738) 322
Gissing *v.* Hopper (Can.) 237, 253
Gladstone *v.* Musurus Bey (1862) 170
Glamorganshire Banking Co., *Re.*, Morgan's Case (1884) 306
Glasgow & Ship Bank & Forbes & Co. *v.* Struthers & Commercial Bank (Scot.) 254, 255
Glass, *Ex p.* (Can.) 337
——— *v.* Whitney (Can.) 78
Glenister *v.* Harding, *Re* Turner (1885) ... 367
Glover, *Ex p.* (1835) 383
Glyn *v.* Hood (1860) 283
Glynn *v.* Bank of England (1750) 130
Goddard, *Re* (1843) 295
Gonchar, The, & The Izgar (1896) 216
Good *v.* Bruce (N.Z.) 287
——— *v.* Joynt (Ir.) 370
Goodall *v.* Exchange Bank of Canada (Can.) 257
Goodbody *v.* Foster (1831) 267
Goodenough *v.* City Bank (Can.) 206
Goodfallow, *Re*, Traders' Bank *v.* Goodfallow (Can.)... 279
Goodman *v.* Boycott (1862) 108
——— *v.* Goodman (1862)... 373
Goodman's Trusts, *Re* (1881)... ...372, 373, 374
Goodright d. Stevens *v.* Moss (1777)... 365, 367
——— Tompson *v.* Saul (1791) ... 364
Goodwin *v.* Robarts (1876) 272, 273
Gopaul Chunder Lahari *v.* Solomon (Ind.)... 347
Gordon *v.* Capital & Counties Bank (1902)...239, 240, 243
——— *v.* Ellis (1846) 31
——— *v.* Gordon (1816) 378
——— *v.* ——— (1903) 360
——— *v.* ——— (1904) 360
——— *v.* London City & Midland Bank (1902) 239, 240, 243
——— *v.* Pym (1843)... ... ... 174, 175
——— *v.* Rae (1858) 296
Gore *v.* Hawsey (1862) 385
——— *v.* Stacpoole (1812) 318
Gore Bank *v.* County of Middlesex (Can.) ... 174
——— *v.* Royal Canadian Bank (Can.)... 217
Gosbell *v.* Archer (1835) 5, 10, 25
Gosling *v.* Birnie (1831) 102

PAGE
Gough *v.* Davies & Gibbons (1817) 191
Goughlin *v.* Gillison (1899) 70
Gour Pershad Doss *v.* Sookdeb Ram Deb (Ind.) 338
Gouthwaite, *Ex p.*, *Re* North of England Joint Stock Banking Co. (1851) 158
Graham *v.* Connell (1850) 151
——— *v.* Mahony (Ir.) 255
——— *v.* North British Bank (Scot.) ... 168
Grand Trunk Ry. Co. *v.* Frankel (Can.) ... 58
——— *v.* Gutman (Can.) ... 81
——— *v.* McMillan (Can.) ... 81
Grande Maison d'Automobiles, Ltd. *v.* Beresford (1909) 93
Grant *v.* Armour (Can.) 91
——— *v.* Austen (1816) 249
Grant's Farming Co., Ltd. *v.* Attwell (S. Af.) 106
Grassie *v.* Cauper (Scot.) 361
Gratton *v.* Banque d'Hochelaga (Can.) 186, 258
Graves *v.* Davies (Ir.) 169
——— *v.* Home Bank (Can.)... 277
Gray *v.* Gutteridge (1828) 23
——— *v.* Johnston (1868) 186, 187, 222
——— *v.* Lewis (1873) 146, 260, 261
——— *v.* Marshall (Scot.) 396
Great Australian Gold Mining Co. *v.* Martin (1877)... 321
Great West Supply Co. *v.* Grand Trunk Pacific Ry. Co. (Can.) 77
Great Western Ry. Co. *v.* Hodgson (Can.) ... 71
——— *v.* London & County Banking Co., Ltd. (1901) 172, 239
——— *v.* Waterford & Limerick Ry. Co. (1881) 348
Greatorex *v.* Shackle (1895) 32
Greaves *v.* Ashlin (1813) 75
——— *v.* Sutherland (N.Z.) 401
Green *v.* All Motors, Ltd. (1917) 95
——— *v.* Bank of England (1839) 127
——— *v.* Bartlett (1863) 33, 34
——— *v.* Baverstock (1863) 13
——— *v.* Crockett (1865) 340
——— *v.* Hall (1848) 33
——— *v.* Rose (Aus.) 19
Green Fuel Economiser Co. *v.* Toronto (Can.) 100
Greenwell *v.* National Provincial Bank (1883) 189
Greenwood Teale *v.* Williams (William), Brown & Co. (1894)... ... ... 189, 295
Greesh Chunder Bannerjee *v.* Collins (Ind.)... 91
Grehan, *Re* (Ir.) 35
Gremley *v.* Stubbs (Can.) 89
Grey's Trusts, *Re*, Grey *v.* Stamford (1892)... 374
Gribble, *Ex p.*, *Re* Bond & Pateshall (1833) 187
Grice *v.* Kenrick (1870) 39, 40
Griesbach *v.* Hogan (Can.) 12
Grieve *v.* Molsons Bank (Can.) 160
Griffin, *Re*, Griffin *v.* Griffin (1899) ... 194, 195
Griffith *v.* Evans (1882) 404
Griffiths, *Re* (1884) 377
——— *v.* Jay (1835) 167
Grigby *v.* Oakes (1801) 130
Grigg *v.* Cocks (1831) 189
Grimes, *Ex p.* (1853) 388, 404
Grimshaw *v.* Atterwell (1837) 47
——— *v.* Bowden (Ir.) 141
Gristing *v.* Hore (1579) 321
Grocock *v.* Stevenson (Aus.) 394
Grocott & Sherry *v.* African Banking Corpn. (S. Af.) 224
Gross, *Re*, *Ex p.* Kingston (1871) 182
Grove, *Re*, Vaucher *v.* Treasury Solicitor (1888)... 373
Groves & Sons *v.* Webb & Kenward (1916)... 79
Grylls *v.* Grylls (1869)... 139
Guinea's Case (Ir.) 336
Gunga Pershad *v.* Inderjit Singh (Ind.) ... 306

PAGE
Gunn *v.* Gillespie (Can.) 6
——— *v.* Van Allen (Can.) 350
Gunnis *v.* Erhart (1789) 17
Gunnison *v.* Thomas (Can.) 78
Gur Prasad *v.* Gorakhpur Bank, Ltd. (Ind.)... 175
Gurney *v.* Gurney (1863) 371
——— *v.* Womersley (1854) 235
Gutsole *v.* Mathers (1836) 22
Guy *v.* Booth (Can.) 3
——— *v.* Brady (Can.) 345
Gwatkin *v.* Campbell (1854) 160
Gwyn *v.* Godby (1812) 265
Gwynne, *Ex p.*, Smith *v.* Gwynne (Aus.) 385, 401

H.

HAGUE *v.* Dandeson (1848) 155, 156
Halbronn *v.* International Horse Agency & Exchange, Ltd. (1903) 36
Haldane *v.* Spiers (Scot.) 215
Halford *v.* Hardy (1899) 345
Halifax City Ry. Co. *v.* M. (Can.) 320
Halifax Union *v.* Wheelwright (1875) 172, 233
Hall, *Ex p.*, *Re* Hall (1838) 143
———, *Ex p.*, *Re* ——— (1839) 143
———, *Ex p.*, R. *v.* Seddon (1916) 390
———, *Re*, *Ex p.* ——— (1856) 333
———, *Re*, *Ex p.* Close (1884) ... 280, 281, 282
———, *Re*, *Ex p.* Hall (1838) 143
———, *Re*, *Ex p.* ——— (1839) 143
——— *v.* Bank of New South Wales (Aus.) ... 220
——— *v.* Buck (Can.) 196
——— *v.* Connell (1840) 307
——— *v.* Franklin (1838) 139
——— *v.* Fuller (1826) 233
——— *v.* McNulty (Aus.) 382
——— *v.* Pickard (1812) 111
——— *v.* Smith (1823) 138, 139
——— *v.* Stothard (1816) 339
Haller *v.* Worman (1861) 346
Hallett & Co., *Re*, *Ex p.* Blane (1894) ... 185
Hallett's Estate, *Re*, Knatchbull *v.* Hallett (1880)... 185
Halse *v.* Rumford (1878) 286
Halstead *v.* Skelton (1843) 226
Halwell *v.* Wilmot Township (Can.) 175
Ham *v.* McPherson (Can.) 80
Hambleton *v.* Scroggs (1678) 321, 322
Hamel *v.* Grand Trunk Ry. Co. (Can.) ... 79
Hamilton, *Ex p.* (Aus.) 11
——— *v.* Bank of New South Wales (Aus.) 291
——— *v.* Watson (1845) 305
——— *v.* Western Bank of Scotland (Scot.) 277
Hammet *v.* Yea (1797) 259
Hammond, S. S. *v.* Coolin (Can.) 320
Hamp *v.* Robinson (1867) 365, 367
Hampton *v.* Rickard (1874) 387
Hancock *v.* Smith (1889) 185, 186
Handford *v.* Palmer (1820) 69
Handon *v.* Caledonian Ry. Co. (Scot.) 83, 84
Hands *v.* Law Society of Upper Canada (Can.) 317
Hankey *v.* Trotman (1746) 167
Hanley *v.* McMasters (Aus.) 394, 398
Hannaford *v.* Syms (1898) 32
Hannan's Lake View Central, Ltd. *v.* Armstrong & Co. (1900)... 242
Hannum *v.* McRae (Can.) 305, 307
Hanson *v.* Roberdeau (1792) 41
Harber *v.* Rand (1821) 350
Hardacre *v.* Stewart (1804) 47
Hardcastle, *Ex p.*, *Re* Mawson (1881) ... 189
Hardie *v.* Brown (Aus.) 34
Harding *v.* Williams (1880) 307

PAGE
Hardman *v.* Booth (1862) 47
——— *v.* Willcock (1831) 29, 30
Hardy *v.* Atherton (1881) 384, 404
——— *v.* Veasey (1868) 304
——— *v.* Woodroofe (1818) 229
Hare *v.* Copland (Ir.) 238
——— *v.* Hare (1876) 320
——— *v.* Henty (1861) 202
Hare & O'More's Contract, *Re* (1901) ... 16
Hargrave *v.* Hargrave (1846)... 361
——— *v.* ——— (1850)... ... 340, 341
Hari Balkrishna *v.* Naro Moreshvar (Ind.) ... 21
Harington *v.* Hoggart (1830) 25
Harper *v.* Counter, *Ex p.* Counter (Aus.) ... 395
——— *v.* Godsell (1870) 116
——— *v.* Jones (Aus.) 73
——— *v.* Paterson (Scot.) 396
Harrington, *Re*, Wilder *v.* Turner (1908) ... 404
Harris *v.* De Bervoir (1624) 116
——— *v.* Great Western Ry. Co. (1876) ... 84
——— *v.* Nickerson (1873) 47, 48
——— *v.* Packer (1833) 226
——— *v.* Richards (1847) 29
——— *v.* Royal British Bank (1857) ... 152
——— *v.* Sheffield (Can.) 68
Harris, Scarfe & Co., Ltd. *v.* Brownlie Brothers (Aus.) 98
Harrison, *Ex p.* (1852) ... 391, 392, 401
———, *Re*, *Ex p.* Barkworth (1858) ... 211
———, *Re*, *Ex p.* Carrick (1858) 248
——— *v.* Brown (1852) 142
——— *v.* Rumsey (1752) 338
——— *v.* Smith (Aus.) 163, 168
Harrison & Standing, *Ex p.*, *Re* Central Bank (Can.)... 157
Harrisson, *Re* (1908) 330
Hart *v.* Bank of British North America (Can.) 258
——— *v.* Frontino & Bolivia South American Gold Mining Co., Ltd. (1870) ... 232
——— *v.* Pryor (Can.) 9
——— *v.* Wright (1885) 95
Harte *v.* Graham (Ir.)... 29
Hartga *v.* Bank of England (1796) 123
Hartley, *Re* (1899) 377
Hartop *v.* Hoare (1743) 59, 108, 110
Harvey *v.* Anning (1902) 397
——— *v.* Church (N.Z.) 397
——— *v.* Croydon Union Rural Sanitary Authority (1884) 344
——— *v.* Scott (1847) 150
Harvey's Case (1821) 316
Harwood *v* Law (1840) 142
——— *v.* Underhill (1820) 265
Hastie's Trusts, *Re* (1887) 378
Hatch *v.* Lee (1841) 136
——— *v.* Lewis (1861) 339
——— *v.* Searles (1854) 350
Hatfield *v.* Imperial Bank (Can.) 282
Havery *v.* Brownlee (Scot.) 396
Haward *v.* Bank of England (1723) 197
Hawes *v.* Draeger (1883) 364
——— *v.* Watson (1824) 104
Hawke's Bay Farmers' Co-operative Assocn., Ltd. *v.* Farquharson (N.Z.) ... 27, 28
Hawkins *v.* Harwood (1849) 329
——— *v.* Smith (1896) 114
Hawks *v.* Howard (1847) 181, 182
Hay *v.* Paterson, *Re* Colonial Bank (Aus.) ... 308
Haycock, *Ex p.*, *Re* Jones (1828) 375
Haynes, *Ex p.*, *Re* Clarke (1844) 134
Hays *v.* Bryant (1789) 384
Hayward *v.* Hayward (1859) 341
Head, *Re*, Head *v.* Head (1893) 192
———, *Re*, ——— *v.* ——— (1894) 192
——— *v.* Head (1823) 359
Heald *v.* Carey (1852) 108
Healey *v.* Bank of New South Wales (1900)... 181
Healey *v.* Home Bank (Can.)... 274
——— *v.* Wright (1912) 388, 392
Hearn *v.* McNeil (Can.) 329
Heathcote's Divorce Bill (1851) 362
Heatley *v.* Newton (1880) 42, 43
Heaton *v.* Richards (Aus.) 68
Hebert *v.* Montreal Harbour Comrs. (Can.)... 59
Heden *v.* Atlantic Royal Mail Steam Navigation Co. (1860) 354
Heffer *v.* Martyn (1867) 21
Heighington *v.* Grant (1840) 297
——— *v.* ——— (1842) 297
Heinrich *v.* Sutton (1871) 140
Helby *v.* Matthews (1894) 93
——— *v.* ——— (1895) 93
Helby's Case (1866) 155
Hemming *v.* Hale (1859) 350
Henderson *v.* Bank of Australasia (1888) ... 140
——— *v.* Bank of Hamilton (Can.) 137, 193
——— *v.* North Eastern Ry. Co. (1861) 82
——— *v.* Philipson (1853) 322
——— *v.* Royal British Bank (1857) ... 151
——— *v.* Somers (Scot.) 398
Henderson & Co. *v.* Williams (1895)... 76, 104
Henderson's (J. D.) Case, *Re* Central Bank (Can.)... ... ... 154, 156
Hendrie *v.* Thompson (Ir.) 147
Hendry *v.* Hendry (Scot.) 342
Hennell *v.* Strong (1856) 153
Hennessy, *Re* (Ir.) 277
Henniker *v.* Wigg (1843) 180
Henry *v.* Burness (Can.) 21
——— *v.* Harper (Aus.) 404
——— *v.* Simard (Can.) 144
Henty *v.* Holt (N.Z.) 163
Hereford Municipal Election Petition, *Re*, *Ex p.* Garrold (1889) 320
Herefordshire Banking Co., *Re* (1867) ... 197
Herr Piano Co., *Re* (Can.) 286
Herrick *v.* Tanner (N.Z.) 395
Hertford (Marquis), *Re* (1842) 128
Hertslet *v.* Oatway, *Re* Oatway (1903) ... 71
Hesketh *v.* Gowing (1804) 385
Heslop *v.* Bank of England (1833) 133
Hetherington *v.* Hetherington (1887) 360, 366
Heugh *v.* London & North Western Ry. Co. (1870)... 58
Heward *v.* Wheatley, *Ex p.* Wilson (1852) ... 150
——— *v.* ———, *Ex p.* ——— (1853) ... 150
Hewat's Divorce Bill (1887) 369
Hewison *v.* Ricketts (1894) 96
Hewlett *v.* Cruchley (1813) 346
Heywood *v.* Mallalieu (1883) 18
——— *v.* Pickering (1874) 202
——— *v.* Watson (1828) 261, 262
Hibbert *v.* Bayley (1860) 29
Hibernian Banking Co. *v.* Maguire (Ir.) ... 286
Hickey *v.* Bedard (Can.) 361, 363, 364, 365
Hickie, *Re* (Ir.)... 332
Hickman *v.* Berens (1895) 339, 344
——— *v.* Clarke (1615) 324
Hicks *v.* Gregory (1849) 386
Higginson *v.* Clowes (1808) 18
Higgons *v.* Burton (1857) 47
Hill *v.* Denmark (1895) 397
——— *v.* Royds (1869) 248
——— *v.* Smith (1844) 249
——— *v.* Willis (Aus.) 10
Hill's Case (1603) 324
Hilton *v.* Fowler (1836) 347
Hinchcliffe *v.* Ballarat Banking Co. (Aus.) ... 213
Hinde *v.* Whitehouse (1806) 7
Hindle *v.* Brown (1908) 39
Hindley & Co. *v.* Tothill, Watson & Co. (N.Z.) 252
Hinton Electric Co. *v.* Bank of Montreal (Can.) 215, 237, 238

PAGE
Hiort v. Bott (1874) 59
——— v. London & North Western Ry. Co. (1879)... 78
Hippisley v. Knee Brothers (1905) 31
Hirst v. West Riding Union Banking Co., Ltd. (1901)... 164
Hitcham & Naunton's Case (1622) 330
Hoare v. Great Western Ry. Co. (1877) ... 58
Hobart v. Butler (Ir.) 331
Hobbs v. Cathie (1890) 214
Hobler, Re (1844) 339
Hobson, Re, Ex p. Randleson (1828) 131, 132
———, Re, Ex p. ——— (1833)... 131, 132, 181, 244
Hochelaga Bank v. Larue (Can.) 268
Hodgens, Ex p. (Ir.) 134
——— v. Keon (Ir.)... 38
Hodges v. Bennett (1860) 397
Hoffnung v. Simpson & Pinkstone (Aus.) ... 3
Hoggart v. Cutts (1841) 27
Hoke, Ex p. (Can.) 166
Holder v. Jackson (Can.) 19
——— v. Soulby (1860) 82, 83
Hole v. Kinnish (I. of M.) 8
Holeshed, Re (Can.) 382
Holl v. Griffin (1833) 102, 103
——— v. Mercantile & Exchange Bank, Ltd. (1865)... 297
Holland v. Hardy (Aus.) 43
——— v. Manchester & Liverpool District Banking Co., Ltd. (1909) ... 222, 244, 247
Holland's (Earl) Case (1649) 326
Hollins v. Fowler (1875) 66
Holmes, Ex p., Re Garner (1839) ... 268, 269
———, Re (Can.) 401, 402
——— v. Henty (1836) 136
——— v. Moore (Can.) 63
——— v. Tutton (1855) 41
Holroyd v. Whitehead (1814)... ... 227, 228
Holt v. Harberton (Lord) (Ir.) 320
——— v. Jesse (1876) 343
Holton v. Sanson (Can.) 103
Home v. Douglas (1912) 328
Home Savings & Loan Company's Case, Re Central Bank of Canada (Can.) 157
Honan v. Bar of Montreal (Can.) 317
Hone v. Boyle, Low, Murray & Co. (Ir.) ... 272
——— v. O'Flahertie (Ir.) 151, 152
Hong Kong & Shanghai Banking Corpn. v. Baker (Ind.) 81
Hood v. Pimm (1830) 347
Hooper v. Eastern Townships Bank (Can.)... 167
——— v. Hooper (1860) 341
Hopkins v. Abbott (1875) 194
——— v. Great Eastern Ry. Co. (1895) ... 114
Hopkinson v. Forster (1874) ... 175, 221, 222
Horlor v. Carpenter (1857) 354
Horne's Case (1779) 316
Horner v. Horner (1799) 383
Horsey's Case (1866) 155
Horsfall v. Halifax & Huddersfield Union Banking Co. (1883) 293
Horton v. Bank of New Zealand (N.Z.) ... 179, 180, 282
——— v. McMurtry (1860) 353
Hosegood v. Bull (1876) 164
Hotchkis v. Royal Bank of Scotland (1797)... 133, 134
——— v. ——— (Scot.) 155
Houlton's Case, Devaynes v. Noble (1818) ... 304
House Property Co. of London v. London County & Westminster Bank (1915) ... 241
Hovell v. Law Society (Can.)... 316
Howard v. Bank of England (1875) 127
——— v. Beall (1889) 308
——— v. Braithwaite (1812) 17
——— v. Castle (1796) 12
Howard v. Doig (N.Z.) 386
——— v. Godard (Can.) 209
——— v. Gossett (1842) 352
——— v. Harris (1884) 58
——— v. Love (Ir.) 141
Howe v. Bowes (1812)... ... ... 199, 200
——— v. Howe (Ind.) 364, 365
Howland v. Brown (Can.) 105
Hoxman v. Barnden (N.Z.) 397
Huard v. Feiczewicz (Can.) 90
Hudson v. Slade (1862) 317
Hue, Ex p., Re Royal British Bank, Ex p. Walton (1857) 153
Huenerbein v. Federal Bank of Australia (Aus.) 219
Hughes v. Lipscombe (1846) 19
——— v. Thorpe (1839) 134
Hull & County Bank, Re, Trotter's Claim (1879)... 345
Hull Ropes Co., Ltd. v. Adams (1895) ... 92
Hulton, Re, Ex p. Manchester & County Bank, Ltd. (1891) 165
Humberstone v. Chase (1836) ... 123, 124
Hume v. Bolland (1832) 212
Hume-Dick v. Herries, Farquhar & Co. (1888) 255
Humphrys v. Polak (1901) 382
Hunt, Ex p., Re Mackenna (1854) 35
——— v. Chapman (1852) 228
——— v. Malley (Ir.) 350
——— v. Maniere (1864) 102, 222
——— v. Maniere (1865) 222
Hunter, Re (Can.) 338
——— v. Borst (Can.) 77
——— v. Coles (Scot.) 363
——— v. Martin (Ir.)... 34
——— v. Seton (1802) 6
——— v. Stewart (1861) 292
——— v. Wallace (Can.) 137
Husband v. Davis (1851) 187
Hussey v. Bank of Australasia (Aus.) ... 229, 230
Hutton v. Brown (1881) 92
——— v. Glass (Aus.) 223
Hyman v. Nye (1881) 87, 88
Hyndman, Re (Ir.) 382, 383
Hyndmarsh v. Everard (1702) 325

I.

ICELY v. Grew (1834) 14
Idiots' Asylum v. Handysides (1906) ... 308
Idle v. Cook (1705) 378
Iggulden v. Terson (1834) 336
Ikin v. Bradley (1818)... 195
Illegitimate Child, An, Re (1887) 383
Imperial Bank v. Ross (Can.) 261
Imperial Bank of Canada v. Bank of Hamilton (1903)... 234
Imperial Land Co. of Marseilles, Re, Re National Bank (1870) 297
Imperial Paper Mills of Canada v. Quebec Bank (Can.) 281
Indian & General Investment Trusts, Ltd. v. Union Bank (Can.) 280, 281
Indian Companies Act, Re (Ind.) 156
Ingersoll Town v. Chadwick (Can.) 174
Inglis, Ex p., Re Brickwood & Co, Re Bracken & Co., Ex p. Waring (1815) 302
——— v. Douglas (Scot.) 144
——— v. National Bank of Scotland, Ltd. (Scot.) 175
——— v. Richardson & Sons, Ltd. (Can.) ... 110
Ingram v. Gillen (Ir.) 42, 43
Ings v. Bank of Prince Edward Island (Can.) 157
Inland Revenue v. Seigenberg (1910) ... 11
Inman v. Clare (1858)... 250

PAGE
Inner Temple *v.* Ince (1677) 315
Innes *v.* Innes (Scot.) 359
——— *v.* Stephenson (1831) 187
International Bridge Co. *v.* Canada Southern Ry. Co. (Can.) 328
Iredale *v.* Kendall (1878) 47
Ireland *v.* North of Scotland Banking Co. (Scot.) 219
Irving *v.* McWilliams (Can.) 20, 21
——— *v.* Pritchard (1825) 344
Irwin *v.* Sholl (Aus.) 384
Isaack *v.* Clark (1615)... ... 66, 108, 109,110
Isaacson, *Re, Ex p.* Mason (1895) 97
Izgar, The, & The Gonchar (1896) 216

J.

J. R. M., *Re, Ex p.* Belfast Bank (Ir.) ... 257
Jackson, *Re, Re* Walker (1885) 366
——— *v.* Bristol & West of England Bank, Ltd., *Re* Wall (1885) 184
——— *v.* Kassel (Can.) 385, 389
——— *v.* McLellan (Can.) 351
Jacobson, *Ex p., Re* Pincoffs (1882)... ... 349
Jacomb *v.* Harwood (1751) 196
Jame *v.* Owen (N.Z.) 94
James *v.* Harris (1835) 328
——— *v.* Holditch (1826) 198
——— *v.* Morgan (1909) 386
——— *v.* Shore (1816)... 16
Jameson *v.* Union Bank of Scotland (1913) 274, 275
Jane, *Re, Ex p.* The Trustee (1914) ... 294, 295
Jang Bahadur Singh *v.* Shankar Rai (Ind.)... 340
Jannette *v.* Great Western Ry. Co. (Can.) ... 345
Jarvis *v.* Chapple (1815) 40
Jefferson *v.* Ulster Bank (Ir.) 196
Jeffries *v.* Great Western Ry. Co. (1856) 64, 112
Jeffryes *v.* Agra & Masterman's Bank (1866) 294
Jelks *v.* Hayward (1905) 96
Jenkins *v.* Slade (1824) 355
Jennings *v.* Brown (1842) 386
——— *v.* Hart (Can.) 12
——— *v.* London General Omnibus Co. (1874) 354
——— *v.* Rundall (1799) 55, 56
Jerningham *v.* M'Dowell (Ir.) 183
Jessop *v.* Brierley (1872) 388, 394
Jewell *v.* Connolly (Can.) 70
Job *v.* Job (1877) 57
Jobson *v.* Reid (Scot.)... 385
Johns *v.* Standard Bank (Can.) 225
Johnson, *Ex p.* (1863)... ... ... 401, 405
———, *Re* (1848) 167
———, *Re*, Roberts *v.* A.-G. (1903) ... 376
——— *v.* Jones (1626) 65
——— *v.* Robarts (1875) 248
——— *v.* Roberts (1855) 23
Johnson & Co., Ltd., *Re* (Ir.)... 295
Johnston *v.* Boyes (1899) 20, 25
——— *v.* Henderson (Can.) 46
Johnston's Claim, *Re* United Service Co. (1870)... ... ... 256, 291
Johnstone *v.* A.-G. & Hawkins (1873) ... 369
Joint Stock Companies Winding-up Acts, 1848 & 1849, & Royal Bank of Australia, *Re, Ex p.* Walker (1854) 145
Jones, *Ex p.* (1810) 259, 297
———, *Re, Ex p.* Haycock (1828) 375
——— *v.* Bank of Montreal (Can.) 223
——— *v.* Chew (1847) 87, 88
——— *v.* Davies (1901) 388
——— *v.* Dowle (1841) 42
——— *v.* Dyke (undated) 43
——— *v.* Edney (1812) 26
——— *v.* Goodchild (1729) 376
——— *v.* Hibbert (1817) 268
Jones *v.* Huntingdon (Can.) 12
——— *v.* Imperial Bank of Canada (Can.) 138, 155
——— *v.* Lewis (1751)... 64
——— *v.* Littledale (1837) 41
——— *v.* Machen (1849) ... 390, 398, 399, 402
——— *v.* Merthyr Tydfil Union (1911) ... 404
——— *v.* Moore (1841) 71
——— *v.* Nanney (1824) 37
——— *v.* Page (1867) 87, 88
——— *v.* Quinn (Ir.) 11
——— *v.* Ryde (1814) 201, 235, 236
——— *v.* Somervell's Trustee (Scot.) ... 383
——— *v.* Starkey (1852) 284
Jones & Co. *v.* Coventry (1909) 177
Jones' Case, R. *v.* Barnardo (1891) ... 382, 384
Jourdaine *v.* Lefevre (1793) 212, 292
Juggernath Sahoo *v.* Mahomed Hossein (Ind.) 351
Jyoti Prokash Nandi *v.* Jhowmull Johurry (Ind.)... 21

K.

KAISERHOF Hotel Co. *v.* Zuber (Can.) ... 19
Kaitling *v.* Parkin (Can.) 10
Kavanagh *v.* Cuthbert (Ir.) 27, 29
Kaye & Son *v.* Glassey (Aus.) 93
Keane *v.* Robarts (1819) 186
Kearsley *v.* Cole (1846) 296
Kebbell *v.* Ollivier (N.Z.) 154
Keene *v.* Graham (Ir.)... 347
——— *v.* Thomas (1905) 95
Kelly *v.* Harbour Grace Savings Bank (Nfld.) 306
——— *v.* Munster & Leinster Bank (Ir.) ... 272
Kelly & Co., *Ex p., Re* Smith, Fleming & Co. (1879)... 179
Kelsall *v.* Marshall (1856) 152
Kemeys *v.* Proctor (1820) 11
Kempshall *v.* Holland (1895)... ... 336, 342
Kendall *v.* Wilkinson (1855) 403, 404
Kennedy, *Ex p.* (Ir.) 148, 155
——— *v.* Broun (1862) 354
——— *v.* ——— (1863) 331
——— *v.* M'Evoy (Ir.) 48
Kensington, *Re, Ex p.* Buchanan (1812) ... 211
———, *Re, Ex p.* Burton (1812) ... 260
Kenworthy *v.* Schofield (1824) 7
Kepitigalla Rubber Estates, Ltd. *v.* National Bank of India, Ltd. (1909)... ...230, 232, 245
Kerr (otherwise M'Ilwrath), *Re* (Ir.)... ... 383
——— *v.* Burns (Can.) 333
——— *v.* James (1835) 197
——— *v.* Martin (Scot.)... 372
Kerridge *v.* Simpson (1846) 25, 26
Kerrison *v.* Glyn, Mills, Currie & Co. (1911) 170, 249
Kerrs *v.* Lindsay (Scot.) 359
Kettle *v.* Bromsall (1738) 61
Keymer *v.* Laurie (1849) 222, 227
Kidson *v.* Dilworth & Welch (1818)... ... 209
Kilsby *v.* Williams (1822) 204
King, *Re, Ex p.* Australian Joint Stock Bank, Ltd. (Aus.) 282
——— *v.* British Linen Co. (Scot.) 220
——— *v.* Milson (1809)... 130
Kingsmill *v.* Bank of Upper Canada (Can.) ... 167
Kingston, *Ex p., Re* Gross (1871) 182
Kingston-upon-Hull Dock Co. *v.* La Marche (1828)... 75
Kinning *v.* Buchanan (1850) 335, 336
Kinross (Lord), *Re* (1905) 318
Kirk, Claimant, Wylie *v.* Nisbet (Aus.) ... 94
——— *v.* Bell (1851) 144
Kirkman *v.* Booth (1848) 32
Kirkwood & Sons *v.* Clydesdale Bank (Scot.) 218
Kishtna Row *v.* Muttukistna (Ind.) ... 331, 332
Kissam *v.* Link (1896)... 309
Kitson *v.* Short (Can.)... 114

PAGE
Klein *v.* Tutty (N.Z.) 399
Kleinwort, Sons & Co. *v.* Comptoir National D'Escompte de Paris (1894) ... 242
——— *v.* Dunlop Rubber Co. (1907)... 179
Klock *v.* Molsons Bank (Can.) 281
Knatchbull *v.* Bradshaw (1835) 306
——— *v.* Hallett, *Re* Hallett's Estate (1880)... 185
Knee, *Ex p.* (1804) 381
Knights *v.* Wiffen (1870) 103
Knock *v.* Owen (Can.)... 333
Knowlman *v.* Bluett (1873) 386, 387
——— *v.* ——— (1874) 386, 387
Knox *v.* Cockburn (Aus.) 30
——— *v.* Loyd (Ir.) 347
Koch *v.* Mineral Ore Syndicate (London & South Western Bank, Ltd., Garnishees) (1910)... 177
Krause, *Ex p.* (S. Af.)... 316
Kunhan Mayan *v.* Bank of Madras (Ind.) ... 287
Kura Mal *v.* Ram Nath (Ind.) 347
Kymer *v.* Laurie (1849) 222, 227

L.

LABBÉ *v.* Murphy (Can.) 89
Lacave & Co. *v.* Crédit Lyonnais (1897) ... 239
Lacey, *Ex p.* (1802) 22
La Cloche *v.* La Cloche (1872) 374
Ladbroke & Co. *v.* Todd (1914) ... 239, 240
Laing & Sons *v.* Hain (Scot.) 15
Laing's Claim, *Re* (N.Z.) 3
Laird *v.* Securities Insurance Co., Ltd. (Scot.) 191
Lake Erie & Detroit River Ry. Co. *v.* Sales (Can.) 79, 81
Lall Chand *v.* Agra Bank (Ind.) 214
Lamare *v.* London & St. Katherine Docks Co. (1878)... 74
L'Amie *v.* Wilson (Ir.)... 307
Lamond *v.* Davall (1847) 39
Lamoureux *v.* Molleur (Can.)... 292
Lamprell *v.* Markham (1844)... 108
Lampson & Co. *v.* London & India Dock Joint Co. (1901) 76
Lancashire Waggon Co., Ltd. *v.* Nuttall (1879) 95
Lancaster, *Ex p.*, *Re* O'Shea (1911) 263
Land Securities Co., *Re*, *Ex p.* Farquhar (1896)... 257
Lane *v.* Tewson (1841) 36
Lang *v.* Bruce (Scot.) 17
Lange *v.* Grice (Aus.) 104
Langley, *Ex p.*, *Ex p.* Smith, *Re* Bishop (1879)... 28
Langlois & La Caisse d'Economie N.-D. de Quebec *v.* Arcand (Can.) 134
Langsdon *v.* ——— (1850) 376
Langstaff *v.* Bar of Quebec (Can.) 316
Lapierre *v.* Banque St. Jean (Can.) 139
Lariviére *v.* Morgan (1872) 185
Larkin *v.* Inglis (Can.)... 336
Larned *v.* McRae (Can.) 99
Larue *v.* Fraser (Can.)... 42
Latham *v.* Chartered Bank of India (1874)... 251
Lau Kan Shi *v.* Bank of Canton, Ltd. (Hong Kong) 176
Lauderdale Peerage (Scot.) 374
Laurence, *Re*, *Ex p.* M'Kenna, City Bank Case (1861) 288
Laurie *v.* Black (Scot.) 105
——— *v.* Davis (1846)... 203
Law *v.* Parnell (1859) 161
Law Guarantee & Trust Society, Ltd. & Hunter *v.* Bank of England (Governor & Co.) (1890) 124
PAGE
Lawlor *v.* Nicol (Can.)... 54
Lawrence *v.* Ingmire (1869) 390
——— *v.* Tyrwhitt (1851) 397
Lawson *v.* Bank of London (1856) ... 167, 168
——— *v.* Commercial Bank of South Australia, Ltd. (Aus.) 183
——— *v.* Quare (1887) 341
Layton *v.* Mortimore (1860) 326
Leach *v.* Mullet (Ir.) 23
Leadbitter *v.* Farrow (1816) 174
Leader *v.* Rhys (1861)... 92
Leblanc *v.* Beauparlant (Can.) 334
Le Brasseur & Oakley, *Re* (1896) ... 332, 333
Lechmere Charlton's Case (1837) 323
Leck *v.* Maestaer (1807) 98
Lee *v.* Atkinson & Brooks (1609) ... 86, 108
—— *v.* Bank of British North America (Can.) 192
—— *v.* Bayes & Robinson (1856) ... 3, 115, 116
—— *v.* Butler (1893) 92
—— *v.* Markham (1568) 335
—— *v.* Munn (1817) 25
—— *v.* Robinson & Bayes (1856) ... 3, 115, 116
Leeds & County Bank, Ltd. *v.* Walker (1883) 130
Leeds Bank, *Ex p.*, *Re* Boldero (1812) ... 212
Lees, *Ex p.* (Can.) 324
Leese *v.* Martin (1873)... ... 256, 257, 291
Leete (Joseph) & Sons *v.* Direction der Disconto Gesellschaft (1915) 172, 173
Legal Profession Act & Hall, *Re* (Can.) ... 317
Legge *v.* Edmonds (1855) ... 361, 366, 367
Leggo *v.* Welland Vale Manufacturing Co. (Can.) 59, 85, 90, 91
Leigh *v.* Smith (1825) 76
Le Leung Shi *v.* Lo Lim Yeuk (Hong Kong)... 307
Lenane *v.* Bank of New South Wales (Aus.)... 266
Lenoir *v.* Ritchie (Can.) 327
Leopard *v.* Litoun (1897) 21
Leslie, *Re*, Leslie *v.* French (1883) ... 70, 71
——— *v.* Ball (Can.) 337
——— *v.* French, *Re* Leslie (1883) ... 70, 71
——— *v.* Verschoyle (Ir.) 334
Lethbridge *v.* Phillips (1819) 58
Lett *v.* Lye (Can.) 336
Levene *v.* Maton (1907) 177
Levi *v.* Levi (1833) 21
Levien & Rollet *v.* Fabian (N.Z.) 4
Levine *v.* Sebastian (Can.) 55
Levinz *v.* Randolph (1700) 317, 318
Levy *v.* Solomon (1877) 375
Lewes Sanitary Steam Laundry Co., Ltd. *v.* Barclay & Co., Ltd. (1906)... 231
Lewis, *Re*, *Re* General Exchange Bank (1871) 156
——— *v.* Branthwaite (1831) 331
——— *v.* White (1863)... 47
Lewis's *v.* Lewis (1890) 344
Lichfield Union Guardians *v.* Greene (1857) ... 199
Lilburn & Wharton's Case (1637) 326
Lilburne's Case (1649)... 326
Lilley *v.* Barnsley (1844) 99
——— *v.* Doubleday (1881) 77
Lind, *Ex p.*, Wendt *v.* Lind (Aus.) 396
Lindsay *v.* Zwicker (Can.) 23
Lindsay, Gracie & Co. *v.* Russian Bank for Foreign Trade (1918) 193
Lindsay's Case, *Re* Farmers Bank (Can.) ... 157
Linnegar *v.* Hodd (1848) 386
Linwood *v.* Andrews & Moore (1888) ... 324
Lister *v.* Cowdery (Aus.) 39
Litman *v.* Montreal City & District Savings Bank (Can.) 206
Little *v.* London Joint Stock Bank (1891) ... 271
Liverpool Borough Bank *v.* Mellor (1858) ... 139, 140
Llewellyn Brothers, Third Parties, Williams *v.* Lister & Co. (1913) 36, 37
Lloyd, *Ex p.* (1822) 329
———, *Ex p.*, *Re* Watson & Co. (1904) ... 299

PAGE
Lloyd, *Re* (1841) 382
——— *v.* Collett (1793) 26
——— *v.* Grace, Smith & Co. (1911) 256
——— *v.* ——————— (1912) 256
——— *v.* Heathcote (1833) 275
——— *v.* Powell Duffryn Steam Coal Co., Ltd. (1914) 359
——— *v.* Pughe (1872)... 187
——— *v.* Sadlier (Ir.) 57
——— *v.* Sigourney (1829) 260
Lloyd's *v.* Harper (1880) 295, 296
Lloyds Bank, Ltd. *v.* Luck (1901) ... 306, 307
——————— *v.* Swiss Bankverein (1913) 276
Locke *v.* Prescott (1863) 274
Lockyer *v.* Jones (1796) 198
Loe's Case (1623) 68
Loeschman *v.* Machin (1818) 45, 106
Loft, *Re* (1844)... 6
Logan *v.* Cobourg Harbour Co. (Can.) ... 75
Logie *v.* Gillies & Hislop (N.Z.) 27
——— *v.* Young (Can.)... 21
Lomas *v.* Wright (1833) 379
London & Canadian Loan & Agency Co., Ltd. *v.* Duggan (1893) 163
London & County Banking Co. *v.* Groome (1881)... 203
London & County Banking Co. *v.* London & River Plate Bank (1888) 162, 163
London & Eastern Banking Corpn., *Re, Ex p.* Longworth's Executors (1859) 158
London & General Bank, *Re* (1895) 166
London & Manchester Direct Independent Ry. Co., *Re*, Bass's Case (1849) 339
London & Mediterranean Bank, *Re*, Bolognesi's Case (1870) 146
London & North Western Ry. Co. *v.* Glyn (1859)... 106
London & Westminster Bank *v.* Button (1907)... ... ... 267, 307
London & Westminster Bank *v.* Commercial Bank Trustees (Nfld.) 275
London Banking Corpn., Ltd. *v.* Horsnail, Hayward & Cooper (1898) 215
London, Birmingham & South Staffordshire Banking Co., Ltd., *Re* (1865) 154
London Chartered Bank of Australia *v.* Lemprière (1873) 283, 284
London Chartered Bank of Australia *v.* Lempriere (Aus.) 261
London Chartered Bank of Australia *v.* McMillan (1892) 262
London Chartered Bank of Australia *v.* White (1879)... 265
London City & Midland Bank, Ltd. *v.* Gordon (1903)... ... ... 200, 201, 239, 240, 243
London Financial Assocn. *v.* Kelk (1884) ... 257, 258
London General Omnibus Co., Ltd. *v.* Holloway (1912) 295
London, Hamburg & Continental Exchange Bank, *Re*, Zulueta's Claim (1870) 140
London Joint Stock Bank *v.* Macmillan & Arthur (1918) 76, 172, 230, 233
——————— *v.* Simmons (1892) 271
London Life Insurance Co. *v.* Molsons Bank (Can.) 238
London, Provincial & South-Western Bank, Ltd. *v.* Buszard (1918) 173, 174
Longman *v.* Gallini (1790) 90, 91
Longworth *v.* Yelverton (1867) 331
Longworth's Executors, *Ex p.*, *Re* London & Eastern Banking Corpn. (1859) 158
Lord *v.* O'Leary (Ir.) 365
Lorden *v.* Babington (Ir.) 266
Lordly *v.* Kiely (Can.)... 327
Lotan *v.* Cross (1810) 111

PAGE
Love's Case (1651) 326, 327
Lovekin *v.* Podger (Can.) 108, 109
Lovell *v.* Martin (1813) 259
Low *v.* Holmes (Ir.) 352
Lowe *v.* Gallimore (1852) 29
Lowndes *v.* Anderson (1810) 131
Lowry *v.* Kilmainham District Council (Ir.) 333
Lows *v.* Guthrie (Scot.) 175
Lowther *v.* Vance (1876) 234
Loyd *v.* Freshfield & Kaye (1826) 305
Lubbock *v.* Tribe (1838) 205
Lubeck, *Re* (Ind.) 323
Lucas *v.* Bernard (Can.) 95
——— *v.* Dorrien (1817) 285
——— *v.* Peacock (1844) 329
Ludlow, *In the Goods of* (1858) 319
Lupton *v.* White (1808) 71
Lyman *v.* Bank of Upper Canada (Can.) ... 267
Lynch *v.* Cowell (1865) 343
——— *v.* Fitzgerald (Ir.) 135
——— *v.* McLennan & Bank of Upper Canada (Can.) 165, 176
Lyon *v.* Norwich Savings Bank (Trustees & Managers) (1839) 137
Lyons & Co. *v.* Caledonian Ry. Co. (Scot.) ... 84
Lyster *v.* Spearman (1882) 322
Lyte *v.* Peny (1541) 69

M.

M. *v.* R. (N.Z.) 389
Maberley, *Re, Ex p.* Cunningham (1833) ... 298
——————— *v.* Bank of Scotland (Scot.) 196, 197
Maberly, *Re, Ex p.* Belcher (1833) 298
———, *Re, Ex p.* National Bank of Scotland (1834) 302
———, *Re, Ex p.* Solomons (1833)... ... 298
———, *Re, Ex p.* Wylie (1833) 298
Macalister *v.* Murray (Ir.) 177
McAlpine *v.* Young (Can.) 19
M'Askie *v.* M'Cay (Ir.) 328
Macauley *v.* Bank of New South Wales (Aus.) 160
M'Bayne *v.* Davidson (Scot.) 395
McCaffrey & Banque Du Peuple *v.* Letourneux (Can.) 284
M'Callan *v.* Mortimer (1842) 133
M'Carthy *v.* Roche (Ir.) 265
MacCarthy *v.* Young (1861) 70
McCrae *v.* Molsons Bank (Can.) 280
McCready Co. *v.* Alberta Clothing Co. (Can.) 285
McCrosson *v.* Grand Trunk Ry. Co. (Can.) ... 78
McDaniel's Case (1755) 326
M'Donagh *v.* National Bank (Ir.) 285
Macdonald *v.* Galivan (Can.) 406
M'Donald *v.* Gilruth (Scot.) 398
——————— *v.* Glass (Scot.) 396
——————— *v.* Main (Scot.) 396
McDonald *v.* Stirskey (Can.) 69
McDonell *v.* Bank of Upper Canada (Can.) 267
Macdonell *v.* Blake (Can.) 315
McDonell *v.* McKay (Can.) 307
Macdonell *v.* Woods (Can.) 82, 83
M'Donnell *v.* Murray (Ir.) 196
M'Doualls *v.* M'Douall (Scot.) 372
McDougall, *Re* (Can.) 209
——————— *v.* Campbell (Can.) 333
Macdowall *v.* M'Lurg (Scot.) 385
M'Dowell *v.* Bergin (Ir.) 141
——————— *v.* Davys (Ir.) 141
——————— *v.* O'Connell (Ir.) 140, 141
McEneaney *v.* Shevlin (Ir.) 194
McEntire *v.* Crossley Brothers, Ltd. (1895)... 94
McEvoy, *Ex p.* (Aus.) 330

PAGE
McFadden & Co. *v.* Blue Star Line (1905) ... 352
McFarland *v.* Bank of Montreal (Can.) ... 138
McGae, *Ex p.*, *Re* Wood (1816) 302
McGale *v.* Security Storage Co. (Can.) ... 105
M'Gonnell *v.* Murray (Ir.) 246
M'Gorman *v.* Kierans (Ir.) 308
McGreal, *Ex p.* (Aus.) 394
M'Greavy *v.* Conolly (Ir.) 385
McGregor *v.* Telford (1915) 390
McGuiness *v.* Bank of New South Wales & Cherry (Aus.) 192, 193
McHugh *v.* Union Bank of Canada (Can.)... 266
M'Ilroy *v.* Quigley (Ir.) 38
McInally *v.* Blackledge (1911) 322
McIntosh *v.* Bank of New Brunswick (Can.)... 159, 168
——— *v.* Hastings (Can.) 57
Macintosh *v.* Haydon (1826) 237
Macintyre *v.* Connell (1851) 151
McIntyre *v.* Robinson South African Banking Co. (S. Af.) 221, 261
Mackay, *Re* (N.Z.) 163
McKay *v.* Commercial Bank (Can.) 165
Mackay *v.* Commercial Bank of New Brunswick (1874) 162
——— *v.* Mackay (Scot.) 360
M'Kean, *Re* (Ir.) 285
M'Kenna, *Ex p.*, *Re* Laurence, City Bank Case (1861) 288
———, *Ex p.*, *Re* Mortimore (1861) ... 288
Mackenna, *Ex p.*, *Re* Streatfield, Lawrence & Co., City Bank Case (1861) ... 288
———, *Re*, *Ex p.* Hunt (1854) 35
McKenna *v.* Cummisky (Can.) 353
M'Kenzie *v.* British Linen Co. (1881) ... 236
Mackenzie *v.* Cox (1840) 74
McKenzie *v.* King (Can.) 157
——— *v.* McKenzie & McKenzie (Can.) ... 335
M'Kenzie *v.* M'Leod (S. Af.) 180
McKenzie *v.* Taylor (Can.) 304
——— *v.* Wiswell (Can.) 155
Mackenzie Lyall & Co. *v.* Chamroo Singh & Co. (Ind.) 19
Mackersy *v.* Ramsays, Bonars & Co. (1843)... 174, 207
M'Kewan *v.* Rolt (1859) 142
M'Kiernan *v.* Kernan (Ir.) 376
McKinley *v.* Delaney (Aus.) 398
Mackintosh *v.* Bank of New Brunswick (Can.) 159, 168
M'Kinven *v.* M'Millan (Scot.) ... 395, 396
McL., *Re* (Aus.) 338
Maclae *v.* Sutherland (1854) 145
M'Laren's Trustee *v.* Argylls, Ltd. (Scot.) ... 94
McLaughlin *v.* Bank of Victoria, Ltd. (Aus.) 153, 154
McLea *v.* Des Barres (Nfld.) 8, 9
M'Lean *v.* Clydesdale Banking Co. (1883) ... 224
McLean *v.* McDonald (Can.) 351
McLeish *v.* Howard (Can.) 299
McLeod *v.* National Bank of New Zealand (N.Z.) 266
——— *v.* Vaughan (Can.) 333
McMahon *v.* Brewer (Aus.) 181, 182
M'Mahon *v.* Fetherstonhaugh, *Re* Reynolds (Ir.) 188
McMahon *v.* Railways Comr. (Aus.) ... 111
McManus *v.* Fortescue (1907) ... 5, 20, 44
McMeckan *v.* Aitken (Aus.) 156
M'Meekin *v.* Stevenson (Ir.) 8
McMennamin *v.* Evans (Can.) 209
McMillan *v.* Bank of New Zealand (N.Z.) ... 183
——— *v.* Read (Aus.) 23, 36
——— *v.* Stavert (Can.) 138, 139
McMorrin *v.* Canadian Pacific Ry. Co. (Can.) 80
M'Neill *v.* Millin & Co., Ltd. (Ir.) ... 98, 99
Macpherson *v.* Largue (Scot.) 396

PAGE
McPherson *v.* Temiskaming Lumber Co. (Can.) 281, 282
Macqueen, *Re* (1861) 320
MacTague *v.* Inland Lines (Can.) 70
M'Whirter *v.* Lynch (Scot.) 396
McWilliam & Everist *v.* Sovereign Bank (Can.) 223
Maddison, *Ex p.* (1796) 210
Maddocks *v.* Robinson (Aus.) ... 384, 404
Madras Official Assignee *v.* Krishna Bhatta (Ind.) 169
——— *v.* Lupprian (Ind.)... 169, 298
——— *v.* Milapparangavur Sarvajana Sahaya Nidhi (Ind.) 169
——— *v.* Rajam Ayyar (Ind.) 169
——— *v.* Smith (Ind.) ... 169
Magann *v.* Grand Trunk Ry. Co. (Can.) ... 288
Magee *v.* Farrell (Ir.) 384
Magill *v.* Bank of North Queensland (Aus.) 213
Magnus *v.* Queensland National Bank (1888) 273
Maher, *Re* (Can.) 381, 384
Mahomed Gour Ali Khan *v.* Ashruffoonissa (Ind.) 361
Mahony *v.* East Holyford Mining Co., Ltd. (1875) 216
Mainprice *v.* Westley (1865) 44
Maitland, *Re*, Pickthall *v.* Dawes (1903) ... 34
——— *v.* Backhouse (1848) 261
——— *v.* Chartered Mercantile Bank of India, London & China (1869) 254
Makin *v.* Clydesdale Banking Co. (Scot.) ... 235
Makin & Sons *v.* Union Bank (Scot.) ... 235
Makundi Kuar *v.* Balkishen Das (Ind.) ... 195
Malins *v.* Price (1845) 349
Malone *v.* Belfast Banking Co., Ltd. (Ir.) ... 160
——— *v.* Geraghty (Ir.) 354
Maltby *v.* Christie (1795) 28, 32
Man *v.* Carey (1697) 133
Manchester & County Bank, *Ex p.*, *Re* Collie (1876) 293
Manchester & County Bank, Ltd., *Ex p.*, *Re* Hulton (1891) 165
Mander *v.* Royal Canadian Bank (Can.) ... 195
Manders *v.* Williams (1849) 111
Mangan *v.* Cox (N.Z.) 113
Manisty *v.* Kenealy (1876) ... 315, 317, 318
Manitoba Mortgage Co. *v.* Bank of Montreal (Can.) 215
Manley & Sons, Ltd. *v.* Berkett (1912) ...40, 41
Mann *v.* Kendall (1869) 139
Manningford *v.* Toleman (1845) 290
Mansel *v.* A.-G. (1879) 369, 370
Mansell *v.* R. (1857) 326
Manser *v.* Back (1848) 7, 15, 16
Manson *v.* Maffra (Aus.) 340, 343
Marais *v.* Anderson (S. Af.) 61, 101
Marais' Trustee *v.* Queenstown Bank (S. Af.) 183
Marcus *v.* Stamper & Zontendyk (S. Af.) ... 45
Marcussen *v.* Birkbeck Bank (1889) ... 233
Mare *v.* Winter (Nfld.) 306
Marie Joseph, The (1866) ... 278, 279, 280
Maritime Bank *v.* R. (Can.) 156, 157
——— *v.* Robinson (Can.) 157
——— *v.* Troop (Can.) 157
——— *v.* Union Bank of Canada (Can.) 174
Marks *v.* Benjamin (1839) 331
Marler *v.* Molsons Bank (Can.) 223
Marner *v.* Banks (1867) 110
Marr (Doe d.) *v.* Marr (Can.) 359, 365
Married Woman, A, *Re* (1867) 349

PAGE
Marsh *v.* Collnett (1798) 133
——— *v.* Jelf (1862) 6, 33
——— *v.* Keating (1834) 124
Marshal *v.* Crutwell (1875) 190
Marshall *v.* Malcolm (1917) 388
——— *v.* Murgatroyd (1870) 387
——— *v.* National Provincial Bank of England (1892) 273
Marshfield, *Re*, Marshfield *v.* Hutchings (1886) 308
Marten *v.* Rocke, Eyton & Co. (1885) 28, 186
Martin *v.* Corbett (Can.) 351
——— *v.* Morgan (1819) 216, 217
Martineau *v.* Marleau (Can.) 47, 48
Marylebone Joint Stock Bank, *Re* (1856) ... 158
Marzetti *v.* Williams (1830) 217
Mash *v.* Darley (1914) 397
Mason, *Ex p.*, *Re* Isaacson (1895) 97
——— *v.* Armitage (1806) 21
——— *v.* Chamberlain (Can.) 5, 28
——— *v.* Great Western Ry. Co. (Can.) ... 101
——— *v.* Morgan (Can.) 112
Massey *v.* Banner (1820) 71
Massey's Case, *Re* Barned's Banking Co., Ltd. (1870) 298
Masson *v.* Merchants Bank of Canada (Can.) 172
Master in Equity *v.* Pearson (Aus.) ... 155, 195
Mathews *v.* Brown & Co. (1894) 239
Mathison *v.* Clark (1854) 32
——— *v.* ——— (1855) 32
Matthews *v.* Baxter (1873) 8, 9
——— *v.* Brown & Co. (1894) 239
——— *v.* Colless, *Ex p.* Colless (Aus.) ... 395
——— *v.* Matthews (1912) 403
——— *v.* Munster (1887) 340
Matthiessen *v.* London & County Bank (1879) 240
Matthison *v.* Clarke (1854) 32
Maude *v.* Pigott (1838) 139
Maving *v.* Todd (1815) 79
Mawson, *Re*, *Ex p.* Hardcastle (1881) ... 189
Max *v.* Buckley (Ir.) 46
Maxted *v.* Gray (Aus.)... 395
Maxwell *v.* Coyle & Wadsworth (Ir.) ... 40
May, *Re* (1858) 333
——— *v.* Harvey (1811)... 116
——— *v.* Hodges (Ir.) 140, 148
Mayer *v.* Grand Trunk Ry. Co. (Can.) ... 81
——— *v.* Hamilton (Scot.) 205
Mayo's (Lady) Case (1772) 127
Mayor *v.* Johnson & Eaton (1813) ... 196, 197
Mazullah Khan *v.* McNamara (Aus.) ... 57
Mead, *Re*, Austin *v.* Mead (1880) 194
——— *v.* Hendry (Can.) 15
Meadows, *Re* (1859) 282
——— *v.* Tanner (1820) 12
Meads *v.* Pollock (N.Z.) 395
Mears *v.* London & South Western Ry. Co. (1862)... ... ... 111, 112
Medallie & Sheiff *v.* Roux (S. Af.) 99
Medewe's Trust, *Re* (1859) 282
Megaw *v.* Molloy (Ir.) 9, 15, 16
Meiselback Petition, *Re* (Ind.) 399
Melbourne & Metropolitan Board of Works, *Ex p.*, *Re* City of Melbourne Bank, Ltd. (Aus.)... 299
Melrose *v.* Edinburgh Savings Bank (Scot.) 135
Melville *v.* Doidge (1848) 166
Mendes *v.* Guedalla (1862) 256
Mennie *v.* Blake (1856) 112
Mercantile Bank of Australia, Ltd., *Re*, *Ex p.* Bullock (Aus.) 166
Merchant Banking Co. of London *v.* Spotten (Ir.) 288
Merchants Bank *v.* McGrail (Can.) 250
——— *v.* McShane (Can.) 277

PAGE
Merchants Bank *v.* Monteith, *Re* Monteith (Can.) 280
——— *v.* Stirling (Can.) 268
Merchants Bank of Canada *v.* Darveau es-qualité (Can.) 282
——— *v.* Lucas (Can.)... 236
——— *v.* Smith (Can.)... 279
Merchants Bank of Halifax *v.* Houston (Can.) 281
——— *v.* Whidden (Can.) 174
Merchants Bank of London *v.* Maud (1871)... 284
Merritt *v.* City of Toronto (Can.) 4
Merry *v.* Green (1841)... 65
Mesnard *v.* Aldridge (1801) 15
Metcalfe *v.* London, Brighton & South Coast Ry. Co. (1858) 116
Metropolitan Bank, Garnishees, Bower *v.* Foreign & Colonial Gas Co., Ltd. (1874) ... 285
Metropolitan Bank *v.* Symes et vir (Can.) ... 188
Metropolitan Life Insurance Co. *v.* Quebec Bank (Can.) 234
Mews *v.* Carr (1856) 9
Meyer & Co., Ltd. *v.* Sze Hai Tong Banking & Insurance Co., Ltd. (1913) 215
Meyer, Morris & Co. *v.* London & Westminster Banking Co., Ltd. (1885) 217
Meyers *v.* Crown Bank of Canada (Can.) ... 234
Miall *v.* Olver (Can.) 77
Michelson *v.* Butler (1837) 353
Middleham *v.* Bellerby (1813) ... 384, 385
Middleton *v.* Barned (1849) 258
Miles *v.* Cattle (1830) 113
——— *v.* Commercial Banking Co. of Sydney (Aus.) 220
——— *v.* Henderson (Aus.) 163
Millar *v.* National Bank of Scotland, Ltd. (Scot.) 287
Millen *v.* Whittenbury (1808)... 386
Miller *v.* Beal (1879) 32
——— *v.* Hutcheson & Dixon (Scot.) ... 35
——— *v.* Race (1758) 130
——— *v.* Strohmenger (1887) 98
Milloy *v.* Grand Trunk Ry. Co. (Can.) ... 80
——— *v.* Kerr (Can.) 279
Mills, *Ex p.*, *Re* Alley (Aus.) 3
——— *v.* Charlesworth (1890) 20
——— *v.* Graham (1804) 56, 99
——— *v.* Oddy (1835) 24
Mills, Bawtree & Co., *Re*, *Ex p.* Stannard (1893)... ... ... 218, 298
Mingay *v.* Hammond (1618) 329
Mingaye *v.* Burton (Can.) 155
Misa *v.* Currie (1876) 224, 291
Mitchell *v.* Hayne (1824) 27
——— *v.* Lancashire & Yorkshire Ry. Co. (1875) 81, 82
Mixer's Case, *Re* Royal British Bank (1859) 158
Moffatt *v.* Merchants Bank of Canada (Can.)... 275
Mogamat Jassiem *v.* The Master (S. Af.) ... 376
Mohaheo Prosad Sahu *v.* Gajadhar Prosad Sahu (Ind.) 156
Mole *v.* Smith (1820) 338
Molsons Bank *v.* Beaudry (Can.) 288
——— *v.* Carscaden (Can.) 283
——— *v.* Cooper (Can.) 268
——— *v.* Girdlestone (Can.) 278
——— *v.* Lanaud (Can.) 279
Molyneux, *Ex p.*, *Re* Royal Bank of Liverpool (1868) 301
Monarch Bank, *Re* (Can.) 147
Monarch Manufacturing Co. *v.* Blouin (Can.) 109
Monohan *v.* Oke (Can.) 384
Montague, *Re*, *Ex p.* Ward *v.* London & South Western Bank (1897) 190
Monteith, *Re*, Merchants Bank *v.* Monteith (Can.) 280
Montgomery *v.* Fleming (Ir.)... ... 38, 39

PAGE
Montgomery v. Montgomery (Scot.) 360, 361
——— v. Ryan (Can.) 305
Montreal Bank v. McWhirter (Can.)... ... 278
Moolchand v. Robinson (Ind.) ... 59, 63
Moor v. Row (1629) 333
Moore, Ex p. (Aus.) 396
——— v. Allen (Can.)... 98
——— v. Bushell (1857) 249
——— v. Ulster Banking Co. (Ir.) ... 194, 195
——— v. Voughton (1816) 265
Moran, Ex p. (Aus.) 396
Mordaunt's (Lord) Case (1666) 326
Morgan v. Larivière (1875) 185, 255
Morgan's Case, Re Glamorganshire Banking Co. (1884) 306
Moriarty v. Brooks (1834) 351, 352
Morier, Ex p., Re Willis, Percival & Co. (1879)... ... ... 301, 302
Morison v. London County & Westminster Bank, Ltd. (1914) 230, 242
Morison, Pollexfen & Blair v. Walton (1909) 74, 75
Morisse v. Royal British Bank (1856) ... 151
Morley v. Culverwell (1840) 215
Morrell v. Wootten (1852) 175, 176
Morris v. Armit (Can.)... 117
——— v. Bank of Prince Edward Island (Liquidators) (Can.) 157
——— v. Davies (1837) 359, 363
——— v. Hunt (1819)... 332
——— v. London & Westminster Bank (1885) 217
——— v. McGinn (Can.) 301
——— v. Royal British Bank (1856) ... 151
——— v. Unwin (Can.) 306
Mortimer v. Bell (1865) 13
——— v. M'Callan (1840) 133
Mortimore, Re, Ex p. M'Kenna (1861) ... 288
Morton & Block's Claims, Re, Central Bank (Can.) 195
Moscati v. Lawson (1835) 331
Mosgrave v. Agden (1591) 65
Moss v. Cohen (Aus.) 10
Mosse v. Salt (1863) 170, 171, 266
Mostyn v. Burdekin (1839) 270
——— v. Mostyn (1870) 332
Mott v. Bank of Nova Scotia (Can.)... ... 156
Moule v. Brown (1838) 203
Mouncey v. Robinson (1867) 320
Mowbray v. Merryweather (1895) 88
Mowji Shamji v. National Bank of India (Ind.) 244
Moye v. Sparrow (1870) 243, 345
Moyse v. Dingle (1854) 350
Muir v. Royal Bank of Scotland (Scot.) ... 287
——— v. Tweedie (Scot.) 396
Muirhead & Turnbull v. Dickson (Scot.) ... 92
Mulgrave v. Ogden (1591) 65
Mullican v. M'Donagh (Ir.) 337
Mulville v. Munster & Leinster Bank (Ir.) ... 271
Muni Reddi v. Venkata Row (Ind.) ...323, 334, 337
Munro v. Munro (1840) 373
——— v. Saunders (1832) 373
Murdoch & Co., Ltd. v. Greig (Scot.) 92, 97
Murdock v. Bank of British North America (Nfld.) 291
Murphy v. Boese (1875) 8, 10
——— v. Harte (Ir.) 43
——— v. Kelly (Ir.) 38
——— v. Richardson (Ir.) 338
——— v. Yeomans (Can.) 104
Murray v. Comyn (Ir.) 141
——— v. Milner (1879) 367, 368
——— v. Pinkett (1846) 292
Murton v. City Bank, Ltd. (1891) 275
Mutchenbacker v. Dominion Bank (Can.) ... 281
Mutton v. Peat (1900)... 272
Myers v. Marsh (1883)... 47
Myott v. Barber (1863) 390
Mytton v. Cock (1738) 62

N.

PAGE
NABIN CHANDRA DAS GUPTA, Re (Ind.) ... 329
Nadeau v. Bank of Toronto (Can.) 204
Nancarrow, Re (Aus.) 395
Narenda Nath Pahari v. Kam Gobind Pahari (Ind.)... 362
Nash, Re, Ex p. Clutton (1850) 304
Nasir Bin Abdul Habib Fazal v. Dayabhai Itchachand (Ind.) 169
Nathan v. Ogdens, Ltd. (1905) 243
National Bank, Ex p., Re General Provident Assurance Co. (1872) 290
———, Re, Re Imperial Land Co. of Marseilles (1870) ... 297
——— v. Broderick (Ir.) 285
——— v. Dickie's Trustee (Scot.) 271, 287
——— v. Silke (1891) 205
National Bank of Australasia v. Falkingham & Sons (1902) ... 284
——— v. United Hand in Hand Band of Hope Co. (1879) ... 266
National Bank of China, Ltd. v. Lemaire & Co. (Hong Kong) 205
National Bank of New Zealand v. Grace (N.Z.) 265
——— v. Heslop (N.Z.) ... 295
——— v. Macintosh (N.Z.) ... 163
National Bank of Scotland, Ex p., Re Maberly (1834)... 302
——— v. Lord Advocate (Scot.) 197
National Bank of Wales, Ltd., Re (1899) ... 145
National Mercantile Bank v. Rymill (1881)... 46
Nawab Nazim of Bengal's Infants, Re Ullee (1885)... ... ... 381, 383
Neale v. Gordon Lennox (1902) ... 339, 343
——— v. M'Donald (Ir.) 149
Neate v. Denman (1874) 318, 355
Neck, Ex p., Re Broad (1884) 299
Nelson v. Aldridge (1818) 6
——— v. Hicks (Can.)... ... ... 4, 19
——— v. Scott (Scot.) 47
Nelson, Son & Hastings, Re (1885) 332
Ness v. Angas (1849) 150
——— v. Armstrong (1849) 150
Neuwith v. Over Darwen Industrial Co-operative Society (1894) 55
Nevill, Re, Ex p. White (1871) 184
Neville, Re, Ex p. Pike (Aus.) 333
New Brunswick & Canada Ry. Co. v. Conybeare (1862) 354
New Druce-Portland Co., Ltd. v. Blakiston (1908)... ... ... 190, 287
New Inn, Re (1905) 315
Newborn v. Just (1825) 84, 85
Newcombe v. Anderson (Can.) 82
Newell v. National Provincial Bank of England (1876) 295
Newland v. Osomond (1753) 384
Newman v. Bank of New South Wales (Aus.) 221
——— v. Bourne & Hollingsworth (1915) 65, 66
——— v. Richardson (1885) 32, 33
Newport Old Bank, Re, Re Williams & Son, Ex p. Ashwin (1853) 303
Newton v. Chaplin (1850) 354, 355
——— v. Harland (1838) 322
——— v. London, Brighton & South Coast Ry. Co. & Woodcock (1849) ... 321
——— v. North Western Provinces High Court Judge (Ind.) 323
——— v. Ricketts (1848) 354
Ngangelizwe Kama v. Kama's Exors. (S. Af.) 359
——— v. Yates & Murray (S. Af.) 59

PAGE
Nichol *v.* London Chartered Bank of Australia (Aus.) ... 160
Nichole *v.* Allen (1827) ... 385
Nicholls, *Ex p.* (Aus.) ... 396
——— *v.* Bastard (1835) ... 111, 113
Nichols *v.* Murray (Ir.) ... 196
——— *v.* Ryan (Can.) ... 261
Nicholson *v.* Chapman (1793) ... 66
Nickson *v.* Brohan (1712) ... 200
Nicolls *v.* Bastard (1835) ... 111, 113
Nightingale *v.* City Bank of Montreal (Can.) 229
Nikunja Behari Sen *v.* Havendra Chandra Sinha (Ind.) ... 348
Noble, *Re*, *Ex p.* Douglas (1833) ... 287
Nokes *v.* Kent Co. (Can.) ... 114
Nolan, *Re* (Ir.) ... 346
Norris *v.* Gilchrist (Scot.) ... 371
North America Life Insurance Co.'s Case, *Re* Central Bank (Can.) ... 154
North & South Wales Bank, Ltd. *v.* Irvine (1908) ... 238, 239
North & South Wales Bank, Ltd. *v.* Macbeth (1908) ... 238, 239
North British & Mercantile Insurance Co. *v.* London, Liverpool & Globe Insurance Co. (1876) ... 79
North British & Mercantile Insurance Co. *v.* London, Liverpool & Globe Insurance Co. (1877) ... 79
North British Bank *v.* Ayrshire Iron Co. (Scot.) ... 257, 258
North Eastern Ry. Co. *v.* Richardson (1872) 82
North of England Joint Stock Banking Co., *Re*, *Ex p.* Gouthwaite (1851) ... 158
North of Scotland Banking Co. *v.* Fleming (Scot.) ... 175
North Western Bank Ltd. *v.* Poynter, Son & Macdonalds (1895) ... 277, 278
Northern *v.* Yuen (Can.) ... 225
Northern Banking Co. *v.* Agricultural Bank (Ir.) ... 151
Northern Crown Bank *v.* Great West Lumber Co. (Can.) ... 168
Northern Elevator Co. *v.* Western Jobbers' Clearing House (Can.) ... 68, 72, 73
Northumberland & Durham District Banking Co., *Re* (1858) ... 157
Norton *v.* Canadian Bank of Commerce (Can.) 282
——— *v.* Sweeney (1844) ... 353
Notley *v.* Salmon (1853) ... 5
Nottingham Guardians *v.* Tomkinson (1879) 366
Nova Scotia Central Ry. Co. *v.* Halifax Banking Co. (Can.) ... 275
Novelli *v.* Rossi (1831) ... 227
Nugent *v.* Smith (1875) ... 53
——— *v.* ——— (1876) ... 53
Nulty *v.* Fagan (Ir.) ... 48
Nundo Lal Bose *v.* Nistarini Dassi (Ind.) 340, 342, 344
Nunn *v.* Lomer (1849) ... 149
Nyberg *v.* Handelaar (1892) ... 111

O.

OATWAY, *Re*, Hertslet *v.* Oatway (1903) ... 71
O'Brien *v.* Barker (N.Z.) ... 38
Occleston *v.* Fullalove (1874) ... 378
Ocean Accident & Guarantee Co. *v.* Larose (Can.) ... 336
O'Connell, *Re* (Ir.) ... 323
O'Connor *v.* Bradshaw (1850) ... 140
——— *v.* Government Savings Bank Comrs. (Aus.) ... 138
——— *v.* Majoribanks (1843) ... 277
——— *v.* Woodward (Can.) ... 19
Oehlrich, *Re* (Aus.) ... 137
Official Assignee, *Ex p.*, *Re* Crawford (N.Z.) ... 92
O'Flaherty *v.* Browne (Ir.) ... 191
——— *v.* M'Dowell (1857) ... 134
——— *v.* ——— (Ir.) ... 140
O'Flynn *v.* Carson (Can.) ... 54
Ogden *v.* Benas (1874) ... 242
Ogilvie *v.* Foljambe (1817) ... 17
——— *v.* West Australian Mortgage & Agency Corpn., Ltd. (1896) ... 231
Ogle *v.* Atkinson (1814) ... 102
O'Grady *v.* Brady (Ir.) ... 19
Okehampton, The (1913) ... 114
Oldham *v.* Lyons, Ltd. (N.Z.) ... 89, 91
Oliver *v.* Court (1820) ... 29
O'Neill *v.* Great Western Ry. Co. (Can.) ... 58
Ontario Bank (Pension Fund), *Re* (Can.) ... 157
Ontario Bank, *Re*, Barwick's Case (Can.) ... 156
——— *v.* Chaplin (Can.) ... 300
——— *v.* McAllister (Can.) ... 168
——— *v.* Miner (Can.) ... 161
——— *v.* O'Reilly (Can.) ... 278
——— *v.* Routhier (Can.) ... 193
——— *v.* Stewart (Can.) ... 180
——— *v.* Wilcox (Can.) ... 268
Ord *v.* Blackett (1724) ... 383
Oriental Bank Corpn. *v.* Wright (S. Af.) ... 197
Oriental Banking Corpn. *v.* Lippert & Co. (S. Af.) ... 254
Oriental Commercial Bank, *Ex p.*, *Re* European Bank (1870) ... 161
O'Rourke *v.* Campbell (Can.) ... 381, 385
Orr & Barber *v.* Union Bank of Scotland (1854) ... 253
——— *v.* Union Bank of Scotland (Scot.) ... 231
O'Shea, *Re*, *Ex p.* Lancaster (1911) ... 263
Osmand, *Re*, Bennett *v.* Booty (Aus.) ... 364
Otago Harbour Board *v.* Lysaght (John), Ltd. (N.Z.) ... 76
Ottley *v.* Browne (Ir.) ... 168
Overseers of Poor *v.* Burbine (Can.) ... 406, 407
——— *v.* Chase (Can.) ... 404
——— *v.* McGillivray (Can.) ... 395
——— *v.* McLellan (Can.) ... 395
Owens *v.* Quebec Bank (Can.) ... 201
Owenson *v.* Morse (1796) ... 198

P.

PAGE *v.* Cowasjee Eduljee (Ind.) ... 15
——— *v.* Defoe (Can.) ... 73
Palin *v.* Reid (Can.) ... 63
Pall Sigurdson, *Re* (Can.) ... 406, 407
Palmer, *Re*, *Ex p.* Richdale (1882) ... 203, 204, 224
——— *v.* Sutherland (Aus.) ... 179
Panjab National Bank, Ltd. *v.* Mercantile Bank of India (Ind.) ... 237
Pannell *v.* Hurley (1845) ... 183
Panton *v.* Panton (undated) ... 71
Parent *v.* Plante (Can.) ... 64
Parfitt *v.* Jepson (1877) ... 11
Paris *v.* Paris (1804) ... 129
Parker, *Re*, *Ex p.* Froggatt (1843) ... 210, 291
——— *v.* Farebrother (1853) ... 28
——— *v.* Gordon (1806) ... 225
——— *v.* Lewis (1873) ... 146, 260, 261
——— *v.* McKenna (1874) ... 146, 147
——— *v.* McQuesten (Can.) ... 144
——— *v.* South Eastern Ry. Co. (1877) ... 85
Parkinson *v.* Wakefield & Co. (1889) ... 219, 264
Parnell *v.* Tyler (1833) ... 22
——— *v.* Wood (1892) ... 309
Parr's Bank, Ltd. *v.* Ashby (Thomas) & Co. (1898) ... 223

PAGE
Parr's Banking Co., Ltd. *v.* Yates (1898) ... 267
Parsons *v.* Barclay & Co., Ltd. (1910) ... 305
——— *v.* Queen Insurance Co. (Can.) ... 353
Parsons' Trust, *Re* (1868) 359
Partridge *v.* Bank of England (1846) ... 129
Pater, *Re*, *Ex p.* Pater, R. *v.* Middlesex JJ. (1864)... 324
Paterson *v.* Dyce (Scot.) 363
——— *v.* Norris (1914) 83
Patrick *v.* Milner (1877) 26
Paul & Thain *v.* Royal Bank of Scotland (Scot.) 218, 219
Payne *v.* A.-G. (S. Af.) 138
——— *v.* Cave (1789) 19
——— *v.* Elsden (1900) 44
——— *v.* Ibbotson (1858) 353
——— *v.* Leconfield (Lord) (1882) 6
——— *v.* Wilson (1895) 97, 110,111
Peacock *v.* Anderson (N.Z.) 101
——— *v.* Freeman (1888) 33
Peak Hill Goldfields, Ltd. *v.* Simpson (Aus.)... 308
Pearce *v.* Brookes (1866) 86
——— *v.* Creswick (1843) 192, 193
Pearman *v.* Carter (1815) 344
Pearson *v.* A.-G., *Re* Perton (1885) 368
——— *v.* Bank of England (1789) 123
——— *v.* Heys (1881) 389, 401
Peary Mohan Das *v.* Weston (Ind.) 336
Pease, *Ex p.*, *Re* Boldero (1812) ... 210, 306
——— *v.* Hirst (1829) 270
——— *v.* McAloon (Can.) 110
Peatfield *v.* Childs (1899) 388
Pedder *v.* Preston Corpn. (1862) 171
——— *v.* Watt (1796)... ... ... 302, 303
Peel *v.* Weatherby (1844) 347
Peers *v.* Sampson (1824) 55
Pegg *v.* Plank (Can.) 351
Peirce *v.* Corf (1874) 8, 9, 10, 29
Pélégrin *v.* Coutts & Co. (1915) 191
——— *v.* Messel (L.) & Co. (1915) 191
Pemberton *v.* Barnes (1872) 4
Pendrell *v.* Pendrell (1732) 361
Penkivil *v.* Connell (1850) 158
Pennell *v.* Dawson (1856) 350
——— *v.* Roy (1853) 345
Penrice *v.* Parker (1673) 332
People's Bank *v.* Langlois (Can.) 301
——— *v.* Obbard (Ind.) 206
People's National Bank of Charleston *v.* Stewart (Can.) 45, 46
Pepper *v.* South Eastern Ry. Co. (1868) ... 83
Perara, *Re* (1887) 316
Perkins *v.* Bradley (1842) 128
Perreault *v.* Merchants Bank (Can.)... ... 205, 217
Perring *v.* Dunston (1826) 133
——— *v.* Rebutter (1842) 337, 338
Perry, *Re* (Aus.) 30
——— *v.* Meddowcroft (1846)... ... 370, 371
——— *v.* National Provincial Bank of England (1910) 296
——— *v.* Phosphor Bronze Co., Ltd. (1894)... 309
Perton, *Re*, Pearson *v.* A.-G. (1885) 368
Peterborough Hydraulic Power Co. *v.* McAllister (Can.) 168
Peters *v.* Borquet (1878) 48
——— *v.* Leeder (1878) 48
Peto *v.* Blades (1814) 43, 44
Peuchen *v.* Imperial Bank (Can.) 277
Phillimore *v.* Barry (1808) 10
Phillips, *Re*, *Ex p.* Phillips (1874) 350
———, *Re*, *Ex p.* Prescott (1839) 154
——— *v.* Bistolli (1824) 41
——— *v.* Canham (1872) 11
——— *v.* Conger (Can.) 22
Philpott *v.* Kelley (1835) 62, 63
Phipps *v.* New Claridge's Hotel, Ltd. (1905)...63, 74

PAGE
Pickard *v.* Central Bank (Can.) 167
Pickering *v.* Dowson (1813) 328
Pickett, *Re*, Evans *v.* Pickett (1896) ... 19, 20
Pickthall *v.* Dawes, *Re* Maitland (1903) ... 34
Pierce *v.* Corf (1874) 8, 9, 10, 29
Piers *v.* Piers (1849) 360
——— *v.* Tuite (Ir.) 361
Pike, *Ex p.*, *Re* Neville (Aus.) 333
——— *v.* Wilson (1854) 4, 15
Pillott *v.* Wilkinson (1864) 102
Pincoffs, *Re*, *Ex p.* Jacobson (1882)... ... 349
Pinto *v.* Santos (1814)... 188
Pioneer *v.* Litschle (Can.) 58, 59
Pitcairn *v.* Smith (Scot.) 397
Pitchers *v.* Edney (1838) 37
Plant *v.* Taylor (1861)... 368
Plaskett, *Re*, Bryant *v.* Knyvett (1861) ... 386
Plasycoed Collieries Co., Ltd. *v.* Partridge, Jones & Co., Ltd. (1912) 107
Plitt, *Ex p.*, *Re* Brown (1889) 299
Plowes *v.* Bossey (1862) 363
Pockinghall *v.* Hawkins (1713) 347
Polglass *v.* Oliver (1831) 198
Pollard, *Re* (Hong Kong) 323
——— *v.* Bank of England (1871) 229
——— *v.* Ogden (1853) 228, 229
Pollock *v.* Bank of New Zealand (N.Z.) ... 213
——— *v.* Garle (1898) 308
Pomfret *v.* Ricroft (1671) 70
Pontifex *v.* Wilkinson (1845)... ... 353, 354
Poole *v.* Whitcombe (1862) 352
Pope *v.* Garland (1841) 18
——— *v.* Sale (1831) 385
Porter *v.* Cooper (1834) 339
Portsmouth Banking Co., *Re*, Helby's, Stokes' & Horsey's Cases (1866) 155
Pott *v.* Bevan (Beavan) (1844) ... 262, 267
——— *v.* Clegg (1847) 169
Potter *v.* Minahan (Aus.) 359
Potts *v.* Cumbridge (1858) 391
Poucher *v.* Norman (1825) 355
Poulett Peerage, The (1903) ... 358, 366, 367
Powell *v.* Edmunds (1810) 17
——— *v.* Graves & Co. (1886) 63
——— *v.* Sadler (1806) 29
Power *v.* Barham (1835) 349
Powis *v.* Butler (1858)... 151
——— *v.* Harding (1857) 151
Powles *v.* Page (1846)... ... ... 147, 148
Practice Note (1910) 326
Pratt *v.* Rush (Aus.) 9
——— *v.* South Eastern Ry. Co. (1897) ... 84
Préfontaine *v.* Banque du Peuple (Can.) ... 147
——— *v.* Grenier (1907)... 148
Prehn *v.* Royal Bank of Liverpool (1870) ... 254, 297
Prentice *v.* Consolidated Bank (Can.) ... 278
Prescott, *Ex p.*, *Re* Phillips (1839) 154
——— *v.* Buffery (1845) 143
Prescott, Dimsdale, Cave, Tugwell & Co., Ltd. *v.* Bank of England (1894) 132
Preston *v.* Tubbin (1684) 346
Prevost *v.* Allaire (Can.) 135
Price, *Re*, *Ex p.* Bank of England (1867) ... 127
——— *v.* Marsh (1823) 247
——— *v.* Seeley (1843) 320
Price Jones, *Ex p.* (1850) 392
Prideaux *v.* Criddle (1869) 202
Prince *v.* Oriental Bank Corpn. (1878) ... 173, 209, 230
Pritchard *v.* Blick (1858) 113
Privilege of Parliament Case (1675) 325
Proctor *v.* City Bank of Sydney (Aus.) ... 258
Procurator-General, H.M. *v.* Williams (1862) 368
Prosser *v.* Bank of England (1872) 128
Provincial Bank of Ireland *v.* O'Reilly (Ir.)... 266

PAGE
Prynn's Case (1633) 326
Pryor *v.* Pryor & Shelford (1887) 365
Public Trustee *v.* Bank of New Zealand, Staples & Young (N.Z.) 276
——— *v.* Bishop (N.Z.) 376
Pullen *v.* Sanford (Can.) 205
Purcell *v.* Douglas (Ir.) 35
Purnis *v.* M'Brian (Ir.) 385
Purves *v.* Landell (1845) 338
Pye, *Ex p.*, *Ex p.* Dubost (1811) 380
Pyke, *Re* (Can.) 97, 98
——— *v.* Sovereign Bank (Can.) ... 162, 244

Q.

QUEBEC Bank *v.* Craig (Can.) ... 268, 269
Queen-Empress *v.* McGuire (Ind.) 307
——— *v.* Moss (Ind.)... 161
Queen's Counsel, *Re* (Can.) 327
Quiggin *v.* Duff (1836)... ... ... 75, 77
Quinn *v.* Quinn (Ir.) 385

R.

R. *v.* —— (1686) 325
— *v.* —— (1843) 325
— *v.* Adey (1831) 349
— *v.* Albertson (1698) 361
— *v.* Albutt (1910) 307, 308
— *v.* Allen (1834) 315
— *v.* Alverston (1698)... 361
— *v.* Anglesey JJ. (1892) 405, 406
— *v.* Anon. (1843) 325
— *v.* Armitage (1872) 388, 394
— *v.* Armstrong (Can.) 381
— *v.* Arnold (1845) 319
— *v.* Ashwell (1885) 54
— *v.* Atkins (1682) 354
— *v.* ——— (1908) 326
— *v.* Bailey, *Ex p.* Cassin (N.Z.) 382
— *v.* Baker (Can.) 351
— *v.* Balfour (1895) 327, 328
— *v.* Bank of England (1780) ... 123, 124
— *v.* ——— (1891) 133
— *v.* Bank of England, *Ex p.* Collis (1906)... 133
— *v.* Bank of Montreal (Can.) 201
— *v.* Bank of Nova Scotia (Can.) 156
— *v.* Bank of Upper Canada (Can.) 144
— *v.* Bank of Victoria (Aus.)... 156
— *v.* Banks (1916) 348
— *v.* Barber (1844) 327
— *v.* Barnard's Inn (1836) 316
— *v.* Barnardo, Jones' Case (1891) ... 382, 384
— *v.* Bartlett (1847) 328
— *v.* Beard (1837) 155
— *v.* Benjamin (1913)... 351
— *v.* Berens (1865) 348
— *v.* Berry (1859) 400
— *v.* Betts (1851) 352
— *v.* Bindon, *Ex p.* Fitzpatrick (Aus.) ... 401
— *v.* Blane (1849) 387
— *v.* Bolton Union (1892) 383, 384
— *v.* Bono, *Re* Bankers' Books Evidence Act, 1879 (1913) 309
— *v.* Brackenridge & King (1868) 134
— *v.* Bramley (Inhabitants) (1795) 368
— *v.* Bridgman (1846)... ... ... 390, 391
— *v.* Brighton (Inhabitants) (1861) 375
— *v.* Brisby (1849) 402, 403
— *v.* Brodie (Aus.) 23
— *v.* Brown (1859) 393, 406, 407
— *v.* Browne (Can.) 160
— *v.* Buckinghamshire JJ. (1849) 406
— *v.* Burdett (1855) 326
— *v.* Carson (Can.) 403
— *v.* Chamberlain (1833) 326
R. *v.* Chapman (1796) 2
— *v.* ——— (Can.) 3
— *v.* Cheadle Savings Bank (1834) 137
— *v.* Cheshire JJ. (1845) 402
— *v.* ——— (1846) 405
— *v.* Chugg (1870) 391
— *v.* Clark (1864) 399
— *v.* Clayton (1802) 394, 401
— *v.* Collingwood (1848) 388
— *v.* Cornforth (1742)... 381
— *v.* Crouch (1844) 352
— *v.* Curme (1868) 401
— *v.* Damarell (1867) 392
— *v.* Davis (1853) 392
— *v.* Daye (1908) 307
— *v.* Deaves (Ir.) 66
— *v.* De Brouquens (1811) 387
— *v.* Degan (Can.) 339
— *v.* Denbighshire JJ. (1846) 319
— *v.* Denoel (1916) 339
— *v.* Derbyshire JJ. (1844) 406
— *v.* Devama (Ind.) 320
— *v.* De Winton (1888) 393
— *v.* Diggens (N.Z.) 382
— *v.* Doutre (1884) 332
— *v.* Draper (Aus.) 159
— *v.* Durham JJ. (1895) 405
— *v.* Dutton (1892) 322
— *v.* Edmonton (1784) 375
— *v.* Edwards, Underwood & Edwards (1848) 339
— *v.* Ellis (1816) 2
— *v.* Essex (1857) 134
— *v.* Essex JJ. (1863)... ... ... 401, 405
— *v.* ——— (1880) 390
— *v.* ——— (1895) 405
— *v.* Evans (1896) 389
— *v.* Evans & Yale (1850) 392
— *v.* Exchange Bank of Canada (Can.) ... 156
— *v.* Exeter (Bp.) (1840) 327
— *v.* Farmer (1892) 393, 407
— *v.* Felton & Wenman (1758) ... 381, 383
— *v.* Fick (Can.) 350
— *v.* Flavell (1884) 398
— *v.* Fletcher (1871) 389
— *v.* ——— (1884) 400, 403
— *v.* Flintshire JJ. (1871) 390
— *v.* Fogarty (Ir.) 326
— *v.* Frith (Ir.) 326
— *v.* Garrett (1860) 54
— *v.* Gaunt (1867) 399, 400
— *v.* George (1909) 326
— *v.* Gibbons (1862) 397
— *v.* Ginner (Mayor of Hastings) (1855) ... 405
— *v.* Gloucestershire JJ. (1849) ... 390, 399
— *v.* Glyde (1868) 67
— *v.* Glynne (1871) 390
— *v.* Grafton (Duke) (1848) 402
— *v.* Grant (1867) 399, 400
— *v.* Gray's Inn (1780) 315, 316
— *v.* Great Western Ry. Co. (1849) ... 346, 347
— *v.* Green (1851) 401
— *v.* Greenland (1867) 165
— *v.* Greenwich County Court Registrar (1885) 339
— *v.* Griffin (Lord) (1708) 326
— *v.* Hall & Gillespie (1887) 390
— *v.* Hamilton (Ir.) 328
— *v.* Hardie (1820) 320
— *v.* Harrington (1864) 399
— *v.* Hart (1904) 326
— *v.* Hassall (1861) 54
— *v.* Hastings Corpn., *Ex p.* Carter (1855) ... 405
— *v.* Haurahan (Ir.) 319
— *v.* Helston Corpn. (1713) 347
— *v.* Henry (1854) 4
— *v.* Herrington (1864) 399
— *v.* Hertford (Viscount) (1681) 64

PAGE
R. *v.* Hezell (1844) 325
— *v.* Higham (1857) 393, 407
— *v.* Hinchliff (1847) 402
— *v.* Hincks (Can.) 191
— *v.* Hoare (1859) 54
— *v.* Hodnett (Inhabitants) (1786) 375
— *v.* Hope Young (Can.) 345
— *v.* Hopkins (1806) 381, 383
— *v.* Hughes (1857) 389
— *v.* Humphrys, *Ex p.* Ward (1914)... ... 387
— *v.* Huntingdonshire JJ. (1850) 405
— *v.* Jones (1840) 328
— *v.* Kams (1910) 353
— *v.* Kay (1873) 401
— *v.* Kea (Inhabitants) (1809) 365
— *v.* Keat (1696) 326
— *v.* Kelly & Maloney (1848) 337
— *v.* Kennedy (Can.) 401, 406
— *v.* Kerr (1837) 66
— *v.* —— (Can.) 345
— *v.* Kiernan (Ir.) 324
— *v.* Kinghorn (1908)... 309
— *v.* Kirby (N.Z.) 307
— *v.* Knill (1810) 406
— *v.* Lancashire JJ. (1845) 400
— *v.* ———— (1874) 391
— *v.* Lanyon (1872) 403
— *v.* Law Society of Upper Canada (Can.) ... 317
— *v.* Lawrence (1844)... 325
— *v.* Lebœuf (Can.) 328
— *v.* Lee (1888) 392, 393
— *v.* Leeds Recorder (1852) 406
— *v.* Leicestershire JJ. (1850) 406
— *v.* Lewis (1893) 382
— *v.* Lightfoot (1856) 393, 398
— *v.* Lincoln's Inn Benchers (1825) 316
— (Cochrane) *v.* Littledale (Ir.) ... 136, 137
— *v.* Littleton (1840) 325
— *v.* London JJ. (1896) 319
— *v.* Lovitt (Can.) 144, 173, 191
— *v.* Luffe (1807) 362, 388
— *v.* Lynch (1902) 326
— *v.* McCormick, *Ex p.* Brennan (Aus.) ... 398
— *v.* McDonald (1885) 54, 56, 113
— *v.* M'Gregor & Lambert (1844) 327
— *v.* Machen (1849) 390, 398, 399, 402
— *v.* M'Keay (1826) 134
— *v.* McKenzie (Can.)... 342
— *v.* Maidstone (Inhabitants) (1810) ... 361
— *v.* Mansel Jones (1889) 320
— *v.* Mansfield (Inhabitants) (1841)... ... 366
— *v.* Marsh (1829) 13
— *v.* Marshall (1855) 323, 324
— *v.* Martin (Ir.) 4
— *v.* May (1880) 390
— *v.* Maybury (1865) 345
— *v.* Meadows (1856) 327
— *v.* Mees (1849) 402
— *v.* Middlesex JJ. (1843) 338
— *v.* ———— (1848) 405
— *v.* ————, *Re* Pater, *Ex p.* Pater (1864) 324
— *v.* Middlesex Sheriffs (1819) 347
— *v.* Mildenhall Savings Bank (Trustees & Managers) (1837) 136
— *v.* Milner (1845) 401
— *v.* Montgomeryshire JJ. (1882) 405
— *v.* Moseley (1798) 381
— *v.* Mowbray (1912) 353
— *v.* Murphy (Can.) 387
— *v.* Murrey (1704) 361
— *v.* Myott (1863) 390
— *v.* Nash, *Re* Carey (1883) 381
— *v.* National Debt Comrs. (1870) 136
— *v.* New (1904) 384
— *v.* Northwich Savings Bank (1839) ... 137
— *v.* Nunzio Caliendo (1904)... 326

PAGE
R. *v.* Oxfordshire JJ. (1893) 405
— *v.* Padbury (1879) 402
— *v.* Page (1847) 325
— *v.* Parker & Bulteel (1916) 167
— *v.* Parkins (1824) 331
— *v.* Payne (1905) 327
— *v.* Pearcy (1852) 394, 395, 396
— *v.* Peterborough JJ. (1783) 315
— *v.* Philips (1844) 355
— *v.* Phillips (1880) 390
— *v.* Pickford (1861) 391
— *v.* Piercy (1852) 394, 395, 396
— *v.* Pilkington (1853) 388
— *v.* Poyser (1851) 107
— *v.* Pratt, *Ex p.* Cole (1870) 406
— *v.* Price (1913) 106
— *v.* Prince (1868) 165
— *v.* Prouse (1635) 322
— *v.* Puddick (1865) 348
— *v.* Ravenstone (Inhabitants) (1793) ... 394
— *v.* Rawson (Can.) 4
— *v.* Read (1839) 402
— *v.* Reading (1734) 364, 365
— *v.* Redhead (1795) 331
— *v.* Robinson (1898)... ... ... 389, 391
— *v.* Robson (1861) 54, 56
— *v.* Rook (1752) 365
— *v.* Rorke (Ir.) 196
— *v.* Rose (1845) 402
— *v.* Roshun Lall (Ind.) 384
— *v.* St. Marylebone (Inhabitants) (1863) ... 368
— *v.* St. Peter's (Inhabitants) (1735) ... 367
— *v.* Seddon, *Ex p.* Hall (1916) 390
— *v.* Shaw (1834) 335
— *v.* Shingler (1886) 405
— *v.* Shipp & Stockall (Aus.)... 307
— *v.* Shipperbottom (1847) 394, 402
— *v.* Simmonds (1859) 400
— *v.* Simpson (Can.) 402
— *v.* Soper (1793) 381
— *v.* Sourton (Inhabitants) (1836) 365
— *v.* Southey (1865) 331
— *v.* Stuart (Aus.) 404
— *v.* Suffolk JJ. (1848) 402
— *v.* Taylor (1824) 2, 3, 4
— *v.* ——— (1843) 213
— *v.* Thomas (1863) 391
— *v.* Thurborn (1849)... ... ...66, 67
— *v.* Thursfield (1838) 348
— *v.* Tomlinson (1872) 407
— *v.* Trentham Savings Bank (1843) ... 137
— *v.* W. (N.Z.)... 383
— *v.* Walker (*circ.* 1668) 338
— *v.* ——— (1845) 400
— *v.* ——— (1912) 382
— *v.* Watts (1850) 171
— *v.* Webb (1865) 348
— *v.* ——— (1896) 393
— *v.* West Riding JJ. (1882)... 406
— *v.* Westmorland JJ. (Can.) 399
— *v.* White (1811) 331
— *v.* Whitlock & Co. (Aus.) 76
— *v.* Whittaker (1844) 349
— *v.* Whittles (1849) 402
— *v.* Williams (1845) 196
— *v.* Williamson (1890) 320
— *v.* Witham Savings Bank (1834) 137
— *v.* Wood (1849) 66, 67
— *v.* Yscuado (1854) 326
R—'s Trusts, *Re* (1870) 363, 365, 366
Radford *v.* Merchants Bank (Can.) 168
Radwell's Case (1290) 362
Rai Sri Kishen *v.* Rai Huri Kishen (Ind.) ... 306
Rainbow *v.* Howkins (1904) 4, 42, 44
Rainsbury *v.* Ross (Can.) 72
Rainsford *v.* African Banking Corpn. (S. Af.) 295
Rainy *v.* Vernon (1840) 34, 35

PAGE
Rainy Lake Lumber Co., *Re*, Stewart *v.* Union Bank of Lower Canada (Can.) ... 281
Rakestraw *v.* Brewer (1728) 318
——— *v.* ——— (1729) 318
Ramnath Gagoi *v.* Pitambar Deb Goswami (Ind.) 111, 112
Ramsay, *Re* (Can.) 323
——— *v.* Bell (Can.) 66
Randleson, *Ex p.*, *Re* Hobson (1828) ... 131, 132
———, *Ex p.*, *Re* Hobson (1833) ... 131, 132, 181, 244
——— *v.* Murray (1838) 57
Randolph *v.* Randolph (Can.) 282
Ransford *v.* Bosanquet (1842) 149
Ranson *v.* Platt (1911) 77, 78, 106
Ransted *v.* Bank of England (1900) ... 130
Raphael *v.* Bank of England (1855) ... 130, 131
Rathven Parish *v.* Elgin Parish (1875) ... 315
Ravanni *v.* Robinson, *Ex p.* Robinson (Aus.) 385
Ravenga *v.* Mackintosh (1824) 346
Rawlings, *Ex p.*, *Re* Davis & Co. (1888) ...94, 96
Ray *v.* Jones (1836) 306
Rayment *v.* Dimbleby (1877) 328
Raynor *v.* Childs (1862) 114
Read *v.* Stedman (1859) 377
Reading *v.* Menham (1832) 91
Real Estate Bank, Ltd. *v.* Hunter (Aus.) ... 167
Rear *v.* Imperial Bank of Canada (Can.) ... 219
Redding's Case (1680) 325
Redmayne *v.* Burton, Lloyd & Co. (1860) ... 197
Reed *v.* Lynch (Aus.) 399
Reeve *v.* Palmer (1858) 109
Reeves *v.* Morris (Ir.) 109
Reffel *v.* Morton (1906) 397
Reid, *Ex p.*, *Re* Central Bank (Can.) ... 293
——— *v.* Bank of New Zealand (N.Z.) ... 181
——— *v.* Mill (Scot.) 359
——— *v.* Mitchell (Ir.) 140
Reidy *v.* Casey (Ir.) 177
Reilander *v.* Bengert (Can.) 342
Reilly *v.* ——— (Ir.) 324
Revelstoke Sawmill Co. *v.* Fawcett (Can.) ... 167, 299, 300
Reynolds, *Ex p.*, *Re* Barnett (1885) ... 319
———, *Re*, M'Mahon *v.* Fetherstonhaugh (Ir.) 188
——— *v.* Chettle (1811) 226
——— *v.* Roxburgh (Can.) 86
Rhoades, *Re* (1866) 377
Rhodes *v.* Cooper (N.Z.) 398
——— *v.* Gent (1821) 227
——— *v.* London & County Bank (1880) ... 255
——— *v.* Morse (1850) 205
——— *v.* Swithinbank (1889) 341
Richards, *Re*, Uglow *v.* Richards (1901) ... 330
——— *v.* Bank of British North America (Can.) 292
——— *v.* Bank of Nova Scotia (Can.) ... 162
Richardson *v.* Canadian Pacific Ry. Co. (Can.) 80
——— *v.* Gray (Can.) 102
——— *v.* Grice (Aus.) 104
——— *v.* North Eastern Ry. Co. (1872) 82
——— *v.* Peto (1840) 345
——— *v.* Richardson (1895) 332
——— *v.* Sutton (1728) 325
Richardson's Case (1622) 324
Richdale, *Ex p.*, *Re* Palmer (1882) ... 203, 204, 224
Riches, *Re*, *Ex p.* Darlington District Joint Stock Banking Co. (1865) 260
Rickford *v.* Ridge (1810) 201
Riddell *v.* Bank of Upper Canada (Can.) ... 206
Rideout's Trusts, *Re* (1870) ... 363, 365, 366
PAGE
Ridge's Claim, *Re*, *Re* Canadian Gas Power & Launches (Can.) 268
Ridley, *Ex p.* (Aus.) 395
Ring *v.* Potts (Can.) 31
Ritchie *v.* Cunningham (Scot.) 397
Ritter *v.* Charlton (Aus.) 320
Rivers *v.* Roe (Can.) 166
Robarts *v.* Tucker (1851) 228, 234
Robbins *v.* M'Culloch (Aus.) 16
Roberts, *Re*, Evans *v.* Roberts (1887) ... 20
——— *v.* A.-G., *Re* Johnson (1903) ... 376
——— *v.* Croft & Miller (1836) 349
——— *v.* M'Dougall (1887) 91
——— *v.* Rowlands (1838) 26
——— *v.* Wyatt (1810) 108
Roberts & Co. *v.* Marsh (1915) 221
Robertson *v.* Amazon Tug & Lighterage Co. (1881) 88, 89, 90
——— *v.* Macdonogh (Ir.) ... 331, 337
——— *v.* Sheward (1840) 143
Robertson's Claim, *Re* Commercial Bank of Manitoba (Can.) 300
Robertson's Trustee *v.* Royal Bank of Scotland (Scot.) 285
Robins *v.* Burke (1846) 35
Robinson, *Ex p.*, Ravanni *v.* Robinson (Aus.) 385
——— *v.* Chartered Bank of India (1865) 153
——— *v.* Ladbroke (1822) ... 228, 293, 294
——— *v.* Musgrove (1838) 26
——— *v.* National Bank of Scotland (Scot.)... 163
——— *v.* Oriental Bank (Aus.) ... 168, 169
——— *v.* Palmer (Can.) 354
——— *v.* Rutter) (1855) 39
——— *v.* Shaw, *Re* Shaw (1894) ... 379
——— *v.* Wall (1847) 12
Robson *v.* Bennett (1810) 202, 225
——— *v.* Drummond (1831)... 107
——— *v.* Oliver (1847) 199
——— *v.* Rowland (1838) 26
——— *v.* Spearman (1820) 404
Roby *v.* Oriental Bank Corpn. (Aus.) ... 220, 221
Roche *v.* Cork (Ir.) 83
Roe *v.* Fuller (1852) 142
Rogers *v.* Kelly (1809) 249
——— *v.* Langford (1833) 200
——— *v.* Macnamara (1853) 62
——— *v.* Whiteley (1892) 176, 177, 221
Rogers, Sons & Co. *v.* Lambert & Co. (1891) 101
Rogerson *v.* Ladbroke (1822) ... 228, 293, 294
Rohan *v.* Molony (Ir.) 33
Rolin *v.* Steward (1854) 217, 228
Rolland *v.* Caisse D'Economie De Quebec (Can.) 134
Rollin *v.* Steward (1854) 217, 228
Ronneberg *v.* Falkland Islands Co. (1864) ... 62
Rooth *v.* Wilson (1817) ... 62, 112, 113
Rosbach & Carlyle, *Re* (Can.) 320
Roscoe (James) (Bolton), Ltd. *v.* Winder (1915) 185
Rose, *Ex p.* (Aus.) 398
——— *v.* Lowe (Aus.) 27
——— *v.* Ross (1840) 374
Rose-Belford Printing Co. *v.* Montreal Bank (Can.) 221
Rosenbloom *v.* Grand Trunk Ry. Co. (Can.) 59
Ross *v.* Chandler (Can.) 187, 204
——— *v.* Edwards & Co. (1895) 102
——— *v.* Fraser (Scot.) 395

PAGE
Ross v. Hannan (Can.) 59
—— v. Hill (1846) 61
—— v. Johnson (1772) 108
—— v. Molsons Bank (Can.) 288
Ross Alston v. Pitamber Das (Ind.) ... 333
Rosslyn (Earl) v. Jodrell (1815) 318
Roupell v. Haws (1863) 352
Rouse v. Bradford Banking Co., Ltd. (1894) 219
Routledge v. Carruthers (Scot.) ... 360, 398
Roux v. Wiseman (1857) 62
Rowbottom v. Bull (1846) 323
Rowe v. May (1854) 24
—— v. Young (1820) 226
Rowlands, *Ex p.* (Aus.) 381, 382
Rowley v. Rowley (1864) 341
—— v. —— (1866) 341
Rowton, *Ex p.* (1810) 210
Roxburghe v. Cox (1881) 286
Royal Bank of Australia, *Re*, Cockburn's Case (1850) 148
Royal Bank of Canada v. Ball (Can.) ... 281
Royal Bank of India's Case, *Re* Asiatic Banking Corpn. (1869) 270, 271
Royal Bank of Liverpool, *Re*, *Ex p.* Molyneux (1868) 301
Royal Bank of Scotland v. Greenshields (Scot.) ... 163
—— v. Tottenham (1894) 204, 214
Royal British Bank, *Re*, *Ex p.* Banes (1857) 294
——, *Re*, *Ex p.* Walton, *Ex p.* Hue (1857) 153
——, *Re*, Mixer's Case (1859) 158
Royal Canadian Bank v. Miller (Can.) ... 279
—— v. Ross (Can.) ... 279
—— v. Shaw (Can.) ... 259
—— v. Yates (Can.) ... 166
Royal Trust Co. v. Molsons Bank (Can.) ... 293
Rubbi v. Harvey (S. Af.) 104
Rudra Narain Roy, *Re* (Ind.) 316
Rufford v. Bishop (1829) 266
Rumball v. Metropolitan Bank (1877) ... 273
Rumbold v. London County Council & Scott (1909) 348
Rumsey v. King (1876) 343
Russ v. Carr (Aus.) 386
Russel v. Beavan (Ir.) 328
Russell, *Ex p.*, *Re* Elderton (1887) 319
—— v. Beakey (Ir.) 328
—— v. Hankey (1794) 205
Russo-Chinese Bank v. Li Yau Sam (1910) 175
Ruttinger v. Temple (1863) 384
Ryan v. Bank of Montreal & Montgomery (Can.) 305
—— v. Miller (Can.) 359
—— v. Montreal Bank (Can.) 235
Ryder v. Willett (1836) 209
Ryves v. A.-G. (1865) 370
—— v. —— (1866) 351
—— v. —— (1868) 370

S.

S. K. H., *Re* (Ind.) 329
Sackville-West v. A.-G. (1910) 370
—— v. Holmesdale (Viscount) (1877)... 318
Saderquist v. Ontario Bank (Can.) 192
Sadler, *Re*, *Ex p.* Davies (1881) ... 30, 101
—— v. Belcher (1843) 304
—— v. Lee (1843) 178
St. Alban's Bank, *Re*, *Re* Gibson & Sturt (1850) 169
PAGE
St. Andrews (Parish) v. St. Brides' (Parish) (1717)... 362
St. George's v. St. Margaret's, Westminster (Parishes of) (1706) 360
St. Mary Abbotts, Kensington, Guardians, *Re* An Illegitimate Child (1887) 383
St. Marylebone Joint Stock Banking Co., *Re*, Busk's Case (1850) 148
St. Marylebone Joint Stock Banking Co., *Re*, Busk's Case (1852) 148
St. Marylebone Joint Stock Banking Co., *Re*, Stanhope's Case (1850) 148
St. Marylebone Joint Stock Banking Co., *Re*, Walker's Case (1856) 148
St. Patrick's Overseers v. Foyle (Can.) ... 402, 403
St. Stephen's Bank v. Bonness (Can.) ... 269
Salaman v. Donovan (Ir.) 177
Salisbury v. Bontems (1872) 348
Salter v. Ponsford (1840) 321
—— v. Woollams (1841) 42
Samuel v. Robinson (1847) 30, 31
Sandeman & Sons v. Tyzack & Branfoot S.S. Co., Ltd. (1913) 72
Sanders v. McConnell (1885) 350
Sanderson v. Collins (1904) 91
Sandford v. O'Donohue (Can.) 9
Sanford v. Bowles (Can.) 112
Sarbadhicary, *Re* (Ind.) 323
Sargeant, *Ex p.*, *Re* Burrough (1810) ... 211
Saskatchewan & Western Elevator Co. v. Bank of Hamilton (Can.) 160
Saul v. Jones (1858) 226
Saunders v. Dence (1885) 6, 7
Saunderson v. Bowes (1811) 197
—— v. Collins (1904) 91
—— v. Judge (1795) 229
Savage v. Norton (1908) 128
Savage's Case (1777) 317
Saville v. Tankred (1748) 60
Savings Bank of New South Wales, *Ex p.*, *Re* Australian Joint Stock Bank (Aus.) ... 158
Saye & Sele Barony (1848) 362
Scaramanga v. A.-G. (1889) 370
Scarborough v. Cosgrove (1905) 83
Scheyer v. Wontner (1890) 343
Scholey v. Ramsbottom (1810) ... 215, 216
Schotsmans v. Lancashire & Yorkshire Ry. Co. (1865) 115
—— v. Lancashire & Yorkshire Ry. Co. (1867) 115
Schroder v. Ward (1863) 92
Schroeder v. Central Bank of London, Ltd. (1876)... ... ... 175, 223
Schwanfelter v. Lepage (1844) 350
Schwent v. Roetter (Can.) 137
Scott, *Re*, Scott v. Hanbury (1891) 377
—— v. Bank of New Brunswick (Can.) ... 192
—— v. Beale & Bishop (1859) 171
—— v. Dawson (Scot.) 395
—— v. Ebury (Lord) (1867)... ... 262, 263
—— v. Franklin (1815) 290, 291
—— v. Hanbury, *Re* Scott (1891) 377
—— v. Merchants Bank (Can.) 225
—— v. Stuart (Can.) 22
Scottish Co-operative Wholesale Society, Ltd. v. Glasgow Fleshers' Trade Defence Assocn. (Scot.) 19
Scrimgeour v. Stewart (Scot.) 397
Scully, *Ex p.*, *Re* Tipperary Joint Stock Bank (Ir.) 155
Seaborne v. Maddy (1840) 385
Seal, *Re*, *Ex p.* Crickett (1893) 332
Searle v. Laverick (1874) 73
Seaton v. Burnand (1900) 353
Sebag v. Abitbol (1816) 227
Sech v. Rodnicke (Can.) 63

PAGE
Secretary of State *v.* Administrator-General of Bengal (Ind.) ... 377
Seddon *v.* Connell (1840) ... 140
Sednaoni Zariffa Nakes & Co. *v.* Anglo-Austrian Bank (1909) ... 221
Seeley *v.* Cox (Can.) ... 165
——— *v.* Mercantile Bank of Australia (Aus.) 188
Segge *v.* Bain (Scot.) ... 395
Segrave *v.* Kirwan (Ir.) ... 334
Seligmann *v.* Huth (1877) ... 249, 250
Senecal *v.* Banque D'Exchange (Can.) ... 300
Serchuck *v.* Banque Nationale (Can.) ... 166
Sethna *v.* Hemingway (Ind.) ... 191
Seton *v.* Slade (1802) ... 6
Seton, Laing & Co. *v.* Lafone (1887) ... 103
Sewell, *Ex p.* (1860) ... 11
——— *v.* Taylor (1859) ... 11
Seymour *v.* Brecon Corpn. & Treasurer (Garnishee) (1860) ... 176
——— *v.* Butterworth (1862) ... 317
Shankar Murlidhar *v.* Mohanlal Jaduram (Ind.) ... 110
Sharp *v.* Sherwood (1857) ... 327
Sharples *v.* Rickard (1857) ... 342
Shaw, *Re*, Robinson *v.* Shaw (1894) ... 379
———, *Re*, Shaw *v.* Jones (1906) ... 263
——— *v.* Dartnall (1826) ... 246, 247
——— *v.* Jones, *Re* Shaw (1906) ... 263
——— *v.* Picton (1825) ... 246, 265
Shaw & Co. *v.* Symmons & Sons (1917) ... 99
Shedden *v.* A.-G. (1867) ... 370
——— *v.* Patrick (1854) ... 375
——— *v.* Patrick & A.-G. (1869) ... 370, 375
Shedden & Shedden, *Re* (1859) ... 370
——— *v.* A.-G. & Patrick & Patrick (1860) ... 370
Shediac Boot & Shoe Co., *Re* (Can.) ... 277
Shee *v.* Larkin (Aus.) ... 400, 401
Sheet Harbour Overseers *v.* Kennedy (Can.) ... 407
Sheffield (Earl) *v.* London Joint Stock Bank, Ltd. (1888) ... 273, 274
Sheffield Corpn. *v.* Barclay (1905) ... 276
Shelbury *v.* Scotsford (1602) ... 101
Shelley *v.* Ford (1832) ... 110
Shelton *v.* Livius (1832) ... 17
Shenstone & Co. *v.* Hilton (1894) ... 46
Shepheard *v.* Broome (1904) ... 347
Sherborne *v.* Napier (Ir.) ... 365
Shiel *v.* Hook (N.Z.) ... 407
Shields *v.* Bank of Ireland (Ir.) ... 186
——— *v.* McGrath (Can.) ... 336
——— *v.* Wilkinson (Ind.) ... 89
Shields' Estate, *Re*, Bank of Ireland (Governor & Co.) Petitioners (Ir.) ... 167
Shiell *v.* Guthrie's Trustees (Scot.) ... 19
Shiells *v.* Blackburne (1789) ... 68
Shillibeer *v.* Glyn (1836) ... 169
Shingler *v.* Smith (1886) ... 405
Short, *Ex p.*, Cox *v.* Short (Aus.) ... 385, 386, 394
——— *v.* City Bank of Sydney (Aus.) ... 277, 278
Shortridge, *Re* (1895) ... 126, 127
Shusler, *Ex p.* (Aus.) ... 399
Shuttleworth *v.* Nicholson (1833) ... 331
Sibbet *v.* Ainsley (1860) ... 363
Sibley *v.* Sibley (Can.) ... 106, 110
Sidaways *v.* Todd (1818) ... 77, 105
Sidley *v.* M'Donnell (Ir.) ... 38
Sidney *v.* Sidney (1734) ... 361, 362
Sigurdson, *Re* (Can.) ... 404
Sikes & Co., *Re*, *Ex p.* Frere (1829) ... 212
Sills *v.* Bickford (Can.) ... 77
——— *v.* Laing (1814) ... 114
Silverstone *v.* Bank D'Hochelaga (Can.) ... 218
Simm *v.* Anglo-American Telegraph Co. (1879) 232
Simmons *v.* London Joint Stock Bank (1891) 271

PAGE
Simmons *v.* Taylor (1858) ... 230, 241
Simon *v.* Motivos (1766) ... 7, 8
Simpson *v.* Dolan (Can.) ... 223
——— *v.* Margetson (1847) ... 31
——— *v.* Milltown (Earl) (1843) ... 32
——— *v.* Molsons Bank (Can.) ... 155
——— *v.* Sikes (1817) ... 198
Sims *v.* Bond (1833) ... 169
——— *v.* Brutton & Clipperton (1850) ... 139
——— *v.* Landray (1894) ... 10
Simson *v.* Ingham (1823) ... 245
Sinclair *v.* Brougham (1914) ... 159
——— *v.* Sinclair (1853) ... 364
——— *v.* Stuart (N.Z.) ... 31
Singer Manufacturing Co. *v.* Clark (1879) ... 97, 98
Skapholme *v.* Hart (1680) ... 334
Skerratt, *Ex p.* (1884) ... 349
Skinner *v.* Andrews & Hall (1910) ... 33
——— *v.* Lane (Can.) ... 323
Skipwith *v.* Great Western Ry. Co. (1888) ... 84
Skottowe *v.* Young (1871) ... 375
Slabber's Trustee *v.* Neezer's Executor (S. Af.) ... 136
Slater, *Re* (Can.) ... 381
Sleech's Case, Devaynes *v.* Noble (1816) ... 304
Sleeman *v.* Wilson (1871) ... 383
Sligo Union Guardians *v.* Curran (Ir.) ... 395
Slingsby *v.* A.-G. (1915) ... 370
——— *v.* ——— (1916) ... 370
——— *v.* ——— (1918) ... 370
Sloman *v.* Bank of England (1845) ... 125
Sly *v.* Campbell (Aus.) ... 110
Smith, *Ex p.*, *Re* Bishop, *Ex p.* Langley (1879) ... 28
———, *Re* (Can.) ... 384
——— *v.* Allan & Paynter (Scot.) ... 78
——— *v.* Bailey (1891) ... 115
——— *v.* Bank of Nova Scotia (Can.) ... 154
——— *v.* Beeman (1842) ... 345
——— *v.* Clarke (1806) ... 14
——— *v.* Commercial Banking Co. of Sydney (Aus.) ... 238
——— *v.* Craven (1831) ... 187
——— *v.* Egmont (Earl) (1877) ... 26
——— *v.* Everett (1859) ... 196
——— *v.* General Motor Cab Co., Ltd. (1911) ... 57, 86
——— *v.* Gwynne, *Ex p.* Gwynne (Aus.) 385, 401
——— *v.* Hallen (1861) ... 337
——— *v.* Harrison (1857) ... 15
——— *v.* Jackson (1816) ... 23, 24
——— *v.* Kearney (Aus.) ... 367
——— *v.* Kerr (1902) ... 315
——— *v.* ——— (1905) ... 315
——— *v.* Lancaster (1869) ... 318
——— *v.* Mercer (1815) ... 172, 235
——— *v.* Mundy (1860) ... 199
——— *v.* Plomer (1812) ... 56
——— *v.* Roche (1859) ... 386
——— *v.* Rogers (Can.) ... 272
——— *v.* Sexton (Ir.) ... 177
——— *v.* Sierra Leone JJ. (Sierra Leone) 323, 324
——— *v.* Tebbitt (1867) ... 368
——— *v.* Thorpe (1850) ... 115
——— *v.* Traders' Bank of Canada (Can.) ... 232
——— *v.* Union Bank of London (1875) ... 241
——— *v.* Vertue (1860) ... 226, 227
——— *v.* Wheeler (1670) ... 328
Smith, Fleming & Co., *Re*, *Ex p.* Kelly & Co. (1879) ... 179
Smith, Knight & Co., *Re* (1869) ... 305
Smith (D. A.), Ltd. *v.* Campbell (Can.) ... 97
Smyth *v.* Chamberlayne (1792) ... 360
Smythies *v.* Bank of New Zealand (N.Z.) ... 223
Snead *v.* Williams (1863) ... 245
Snodgrass *v.* Ritchie & Lamberton (Scot.) ... 77

PAGE
Snow v. Etty (1887) 333
—— v. Peacock (1826) 131
—— v. Saddler (1826) 131
Société Coloniale Anversoise v. London & Brazilian Bank, Ltd. (1911) 188
Société Générale v. Metropolitan Bank, Ltd. (1873) 236
Sollers, *Ex p.*, *Re* Burrough (1811) ... 211, 212
Solomons, *Ex p.*, *Re* Maberly (1833)... ... 298
—— v. Bank of England (1791) ... 131
Soltau v. De Held (1851) 327
Somers v. O'Donohue (Can.) 43
Sorel v. Weilbrenner (Can.) 3
Sornberger v. Canadian Pacific Ry. Co. (Can.) 353
Sotheron v. Scott (1881) 404
Souch v. Strawbridge (1846) 386
Soucy v. Beaupre (Can.) 395
South Australian Banking Co. v. Horner (Aus.) 265
South Australian Insurance Co. v. Randell (1869)... ... ... 54, 55
South Staffordshire Tramways Co. v. Ebbsmith (1895) 309
South Staffordshire Water Co. v. Sharman (1896)... 65
Southcot v. Bennet (1601) 64
Southcote's Case (1601) 64
Southeran v. Scott (1881) 404
Southport & West Lancashire Banking Co., *Re* (1885) 162
Sovereign Bank, *Re*, Clark's Case (Can.) ... 157
—— v. Bellhouse (Can.) ... 253, 255
Sparke v. Middleton (1663) 335
Spearing v. Delacour (Ir.) 167
Spedding v. Spedding & Smith (1862) ... 341
Spelman v. —— (1747) 322
Spelman's Case (1747)... 322
Spence v. Coleman (1901) 177
—— v. Union Marine Insurance Co., Ltd. (1868)... ... ... 71, 72
Spencer v. Wakefield (1887) ... 245, 296, 297
Spensley, *Re* (Aus.) 316
Spicer v. Ayers (N.Z.) 386
Spiller v. Johnson (1840) 141
Spinlove, *Re* (Can.) 381
Spittle v. Lavender (1821) 42
Spong v. Hog (1772) 339
Springer v. Exchange Bank of Canada (Can.) 165
Spruce v. Edwards (Can.) 137
Spurling, *Re* (1909) 126
Spurrier v. Elderton (1803) 36
Squire's Case (1624) 116
Srinivasa Rau v. Pichai Pillai (Ind.)... 330
Stacey v. Lintell (1879) 387
Staffordshire Joint Stock Bank, *Re* (1891) ... 147
Stallard v. Great Western Ry. Co. (1862) ... 83
Standard Bank v. Brodrecht (Can.) 265
—— v. Thomas, Ltd. (Can.) ... 282
—— v. Union Boating Co. (S. Af.) 103, 278, 279
Standing v. Bowring (1885) 123
Stanhope v. Roberts (1741) 337
Stanhope's Case, *Re* St. Marylebone Joint Stock Banking Co. (1850) 148
Stannard, *Ex p.*, *Re* Mills, Bawtree & Co. (1893)... ... ... 218, 298
Stanner v. Great Western Ry. Co. (1862) ... 83
Stansfield v. Johnson (1794) 8
Staple of England (Mayor, etc., of Merchants of the) v. Bank of England (Governor & Co.) (1887) 125
Staples v. Staples (1879) 389, 392
Stapleton v. Stapleton (1844)... 184
Stark, *Ex p.* (Aus.) 405, 406
Starkey v. Bank of England (1903) 125
State Savings Bank of Victoria Comrs. v. Permewan Wright & Co., Ltd. (Aus.) ... 167
Stavely, *Re*, A.-G. v. Brunsden (Can.) ... 364
Stead v. Bligh (1898) 91
Steadman v. Hockley (1846) 337, 355
Steedman v. Steedman (Scot.) 363
Steele v. Stuart (1866)... 284
Steinhoff v. Merchants Bank (Can.) ... 208, 209
Stenning, *Re*, Wood v. Stenning (1895) ... 189
Stephen v. Costor (1763) 75
Stephenson v. London Joint Stock Bank, Ltd. (1903) 166
Sterling Bank v. Laughlin (Can.) 205
Sterling Bank of Canada v. Zuber (Can.) ... 286
Stevens v. Adamson (1818) 26
—— v. Legh (1853) 31
—— (Goodright d.) v. Moss (1777) 365, 367
—— v. Webb (1835) 352
Stevenson v. Brown (1902) 229
—— v. Moncreiff (Scot.) 17
—— v. Rice (Can.) 94
Steward, *Ex p.*, *Re* Blake (1843) 286
—— v. Dunn (1843) 140
—— v. —— (1844) 140, 143
—— v. Greaves (1842) 143
Stewart v. Bank of Australasia (Aus.) ... 169
—— v. Central Bank of Scotland (Scot.) 192
—— v. Fry (1817) 248
—— v. Lee (1828) 183, 205
—— v. Sculthorp (Can.) 54, 55
—— v. Stewart (Ir.) 266
—— v. Union Bank of Lower Canada, *Re* Rainy Lake Lumber Co. (Can.) ... 281
Stillwell v. Rennie (Can.) 342
Stobart v. Axford (Can.) 176
Stoer, *Re* (1884) 371
Stokes v. Kromshroder (1879) 351
—— v. Latham (1888) 340
—— v. Roughan (Aus.) 394
Stokes' Case (1866) 155
Stonard v. Dunkin (1809) 103
Stone v. Marsh (1827) 124, 178, 179
Stones v. Byron (1846) 336
Strachan v. Auld (Scot.) 6
Stracy v. Bank of England (1830) 125
Strange v. Wigney (1830) 200
Strangeways v. Robinson (1812) 385
Strathmore (Earl) v. Vane, *Re* Bowes (1886) 289
Strathmore Peerage Case (1821) 372
Strauss v. Francis (1866) 343
Streatfeild, Lawrence & Co., *Re*, *Ex p.* Mackenna, City Bank Case (1861) 288
Streeter v. Horlock (1822) 61, 67, 68
Strickland (Doe d.) v. Strickland (1849) ... 353
Stringfield v. Lanezzari (1867) 205
Strong v. Land Credit Bank of Australasia (Aus.) 147
Struthers v. Commercial Bank (Scot.) 254, 255
Stuart, *Ex p.* (Aus.) 394
Suffell v. Bank of England (1882) 130
Sugrue v. Hibernian Bank (Ir.) 147
Sullerman Hussein v. New Oriental Bank Corpn. (Ind.) 236, 237
Sullivan v. Francis (Can.) 22
—— v. Kelleher (Ir.) 62
—— v. Sullivan (1818) 375
Summers v. City Bank (1874) 217
Suse, *Re*, *Ex p.* Dever (1884)... ... 250, 251
Suter v. Merchants Bank (Can.) 287
Sutherland v. Bell & Schiesel (Can.)... ...60, 63
—— v. Hodges (Ir.) 149
—— v. McGimpsey (N.Z.) 389
Sutton v. Bank of England (1824) ... 127, 128
—— v. Buck (1810)... ... ... 66, 112
—— v. Temple (1843) 86
—— v. Toomer (1827) 194
Suttons Proprietary, Ltd. v. Richards (Aus.) 92
Swaisland v. Dearsley (1861) 18

PAGE
Swale *v.* Canadian Pacific Ry. Co. (Can.) ... 58
Swan, *Re*, Witham *v.* Swan (1915) 55
——— *v.* Bank of Scotland (1835) ... 169, 230
——— *v.* Blair (1835) 230
Sweeting *v.* Turner (1871) 6
Swift *v.* Jewsbury & Goddard (1874) 163, 164
Swinfen *v.* Chelmsford (Lord) (1860) ... 338
——— *v.* Swinfen (1856) 339, 340
——— *v.* ——— (1857) ... 339, 340, 343
——— *v.* ——— (1858) 343
Swinton (Doe d.) *v.* Sinclair (1836) 338
——— *v.* Swinton (Scot.) 358
Sykes *v.* Giles (1839) 5
Symons *v.* Mulkern (1882) 289
Szek *v.* Lloyds Bank (1908) ... 217, 218, 220

T.

TANNER *v.* Scovell (1845) 75, 76, 104
Tanton *v.* Harris (1626) 101
Taplin *v.* Florence (1851) 7, 28
Tarbuck *v.* Bispham (1836) 243
Tassell *v.* Cooper (1850) 188, 222
Tate *v.* Wilts & Dorset Bank (1899)... ... 240
Taylor, *Re* (Ir.)... 323
——— *v.* Ashton (1843) 144
——— *v.* Caldwell (1863) 53, 90, 100
——— *v.* Campbell (Ir.) 149
——— *v.* Chester (1869) 109
——— *v.* Clarke (Ir.) 329
——— *v.* Crowland Gas & Coke Co. (1854) 355
——— *v.* Forbes (1830) 182
——— *v.* Forbes & Co. (Scot.) 186
——— *v.* Hughes (Ir.) 155
——— *v.* Rowan (1835) 62
Taylor & Wylie *v.* Lochhead, Ltd. (Scot.) ... 95
Taynton, *Re* (1858) 341
Teed *v.* Beere (1859) 323
——— *v.* Elworthy (1811) 139
Temple *v.* Bank of England (1802) 127
Tennant *v.* Strachan (1829) 211
——— *v.* Union Bank of Canada (Can.) ... 280
Tennent *v.* Tennent (Scot.) 364, 365
Thakur Jawahir Singh *v.* Lachman Das (Ind.) 265
Thein *v.* Bank of British North America (Can.)... 281
Thellusson *v.* Rendlesham (1859) 331
Thimblethorp *v.* Hardesty (1702) 318
Thimblethorpe *v.* Thimblethorpe (1631) ... 335
Thirkell *v.* McPherson (Can.)... ... ...79, 80
Thom *v.* North British Bank (Scot.) ... 306
Thomas *v.* Benning (S. Af.) 84
——— *v.* Cooper (1855) 267, 297
——— *v.* Day (1803)... 75
——— *v.* Harris (1858) 340
——— *v.* Hewes (1834) 342
——— *v.* Howell (1874) 219, 294
——— *v.* Newton (1826) 349
——— *v.* Ross (Can.) 10
——— *v.* Smith (Can.) 293
——— *v.* Williams (1830) 48
Thomas, Ltd. *v.* Standard Bank (Can.) ... 282
Thompson, *Ex p.*, *Re* Dilworth (1828) ... 211
——— *v.* Bell (1854) 160, 161
——— *v.* Fowler (Can.) 55, 91
——— *v.* Gamble (Ir.) 45, 97
——— *v.* Giles (1824) 210, 211, 259
——— *v.* Guy (Ir.) 23
——— *v.* Kelly (Ir.) 141
——— *v.* Maskery (1882) 329
——— *v.* Molsons Bank (Can.) 280
Thompson & Shackell, Ltd. *v.* Veale (1896)... 93
Thomson *v.* Birnie (Ir.) 141
——— *v.* Clydesdale Bank, Ltd. (1893) ... 188
——— *v.* Harding (1857) 151
——— *v.* Simpson (1870) 162
Thomson *v.* Stikeman (Can.) 268
Thorne *v.* Tilbury (1858) 102
Thornett *v.* Haines (1846) 12, 14
Thornhill *v.* Evans (1742) 334
Thorold Manufacturing Co. *v.* Imperial Bank (Can.)... 215
Thorpe *v.* Jackson (1837) 263
Tidd, *Re*, Tidd *v.* Overell (1893) 193
Tikam Singh *v.* Dhan Kunwar (Ind.) ... 362
Tiley *v.* Courtier (1817) 200
Tilling *v.* Balmain (1892) 89
Tilling, Ltd. *v.* James (1906) 107, 108
Timmins *v.* Gibbins (1852) 194, 199
Tindall *v.* Hayward (Can.) 68
Tipperary Joint Stock Bank, *Re*, *Ex p.* Scully (Ir.) 155
Tirlok Nath Shukul *v.* Lachmin Kunwari (Ind.)... 359
Tobin *v.* City Bank (Aus.) 225
——— *v.* Murison (1845) 105
Todd *v.* Gore Bank (Can.) 174, 175
——— *v.* Union Bank of Canada (Can.) ... 219
——— *v.* Wright (1847) 142
Tollit *v.* Kortzow (1860) 385, 400
Tomlinson *v.* Bullock (1879) 387
Tompson (Goodright d.) *v.* Saul (1791) ... 364
Tondeur, *Ex p.*, *Re* Agra Bank (1867) ... 251
Tooke's Case (1794) 316
Tool *v.* Ewing (Ir.) 370, 371
Topping *v.* Bull (1861) 7
Toronto Club *v.* Dominion Bank (Can.) ... 215
——— *v.* Imperial Bank (Can.) ... 215
——— *v.* Imperial Trusts Co. (Can.)... 215
Toronto Cream & Butter Co., Ltd. *v.* Crown Bank of Canada (Can.) 280
Torrance *v.* Bank of British North America (Can.) 257
——— *v.* Bolton (1872) 16
Touch *v.* Strawbridge (1846) 386
Toulmin *v.* Copland (1839) 138
Tower *v.* Outhouse & Knapp (Can.)... ... 345
Towers *v.* Talbot (Can.) 77
Towle (John) & Co. *v.* White (1873)... ... 184
Townsend, *Ex p.* (Aus.) 387
——— *v.* Bankruptcy Assignee & Comrs. (1724)... 322
——— *v.* Northern Crown Bank (Can.)... 281
Townshend Peerage, The (1843) 369
Tozer *v.* Lake (1879) 387
Traders' Bank *v.* Goodfallow, *Re* Goodfallow (Can.)... 279
Trapp *v.* Prescott (Can.) 39, 44
Travers (Joseph) & Sons, Ltd. *v.* Cooper (1915)... ... ...74, 75
Traynor *v.* Larkin (Ir.) 40
Treacher *v.* Hinton (1821) 228
Trefftz *v.* Canelli (1872) 61
Trent & Humber Co., *Re*, *Ex p.* Cambrian Steam Packet Co. (1868) 99
Tribe *v.* Wingfield (1836) 319
Trigg *v.* Kettle (Aus.) 399
Troke *v.* Felton (1897) 62, 64
Trotter's Claim, *Re* Hull & County Bank (1879)... 345
Trout's Case, *Re* Essex Land & Timber Co. (Can.)... ... ... 267, 268
Trowell *v.* Evans (1710) 208
Trustee, *Ex p.*, *Re* Jane (1914) ... 294, 295
Tucker *v.* Burrow (1865) 380
Turner, *Re*, Glenister *v.* Harding (1885) ... 367
——— *v.* Ford (1846) 45
——— *v.* Hardcastle (1862) 113
——— *v.* Hayden (1825) 227
——— *v.* Hockey (1887) 46, 47
——— *v.* London & Provincial Bank, Ltd. (1903) 242
——— *v.* Merrylees (1892) 62

PAGE
Turner v. Philipps (1792) 337
——— v. Stallibrass (1898) 109
——— v. Stones (1843) 200
——— v. Turner (1852) 341
Turnock v. Turnock (1867) 359
Turquand v. Marshall (1869) 146
Turton v. Jackson (N.Z.) 140
Twibell v. London Suburban Bank (1869) ... 187
Twining v. Morrice (1788) 21
——— v. Oxley (Can.) 104
Twogood, *Ex p.* (1812) 259
Twyn's Case (1663) 351

U.

UDNY v. Udny (1869) 372, 375, 376
Uglow v. Richards, *Re* Richards (1901) ... 330
Ullee, *Re*, Nawab Nazim of Bengal's Infants (1885)... ... ... 381, 383
Ulster Bank v. Synnott (Ir.) 250
Ultzen v. Nicols (1894) 57, 73
Ulverstone Union Guardians v. Park (1889) 365
Union Bank v. Dominion Bank (Can.) ... 216
——— v. Elliott (Can.) 284
——— v. Munster (1887) ... 14, 352
——— v. Quebec Bank (Can.)... ... 174
Union Bank of Australia v. Mercantile Bank of Sydney (Aus.) 216
Union Bank of Australia, Ltd. v. Murray-Aynsley (1898) 182, 183
Union Bank of Canada v. Cole (1877) ... 255
Union Bank of Halifax v. Spinney (Can.) ... 278
Union Bank of Lower Canada v. Ontario Bank (Can.)... 236
Union Bank of Newfoundland (Winding-up) (Nfld.) 157
Union Bank Trustees v. Commercial Bank Trustees (Nfld.) 299
Union Bank's Liquidators v. Beit (S. Af.) ... 236
Union Credit Bank, Ltd. v. Mersey Docks & Harbour Board & North & South Wales Bank, Ltd. (1899) 78
Union Investments Co. v. Grimson (Can.) ... 269
Union of London & Smiths Bank, Ltd. v. Swiss Bankverein (1913) 276
United Service Co., *Re*, Johnston's Claim (1870)... ... ... 256, 291
Unwin v. Adams (1858) 105
Upton v. A.-G. (1863)... 370
Upton's Petition, *Re* (1860) 369
Urquhart v. Bank of Scotland (Scot.) ... 236
——— v. Butterfield (1887) 346

V.

VACHER & Sons, Ltd. v. London Society of Compositors (1912) 350, 351
Vagliano v. Bank of England (1891) 228, 237, 244, 245
Vagliano Brothers v. Bank of England (1889) 170
Valentine v. Bank of British North America (Can.)... ... ... 244, 285
Vance v. Lowther (1876) 234
Vanderzee v. Willis (1789) 287
Vandrink & Archers Case (1590) 65
Vanier v. Kent & Renshaw (Can.) 257
Van Praagh v. Everidge (1903) 9
Van Rooyen v. Werner (Scot.) 381
Vanstone v. Scott (Can.) 14
Van Toll v. South Eastern Ry. Co. (1862) ... 83
Van Wart v. Wolley (1823) 321
——— v. ——— (1824) 206
Vaucher v. Treasury Solicitor, *Re* Grove (1888)... 373
PAGE
Vaughan v. Menlove (1837) 69
Venables v. Baring Brothers & Co. (1892) ... 276
Vere, *Ex p.*, *Re* Bentley (1835) ... 287, 288
Vevers v. Mains (1888) 390
Victor Varnish Co., *Re*, Clare's Claim (Can.) 281
Victoria v. Belyea (Can.) 316
Vidal v. Upper Canada Bank (Can.)... ... 351
Vigne v. Leo (S. Af.) 34, 38
Vint & Sons, *Re* (Ir.) 275
Vipond v. Canada Cold Storage Co. (Can.) ... 76
Viviers v. Juta & Co. (S. Af.)... 105
Vogan & Co. v. Oulton (1899) 88
Von Minden v. Pyke (1865) 68, 69
Voyer v. Richer (Can.) 195
Vyse v. Bird (1845) 351

W.

WADDEL v. McCabe (Can.) 20
Waddington & Sons v. Neale & Sons (1907) ... 46
Wakefield v. Gorrie (Can.) 38
Wakefield Bank, *Ex p.*, *Re* Boldero (1812)..212, 305
Waldron v. Ward (1654) 335
Walford, *Re*, Walford v. Walford (1889) ... 33
Walgrave v. Ogden (1591) 65
Walker, *Ex p.*, *Re* Ah Kee (Aus.) 382
———, *Ex p.*, *Re* Joint Stock Companies Winding-up Acts, 1848 and 1849, and Royal Bank of Australia (1854) 145
———, *Re*, *Ex p.* Childe (1909) 349
———, *Re*, *Re*, Jackson (1885) 366
——— v. Advocate-General (1813) 2
——— v. Bradford Old Bank, Ltd. (1884) 176
——— v. British Guarantee Assocn. (1852) 91
——— v. Brooks (1856) 269
——— v. Constable (1798) 7
——— v. Crabb (1916) 3, 48
——— v. Goodyere (1857) 134
——— v. Manchester & Liverpool District Banking Co., Ltd. (1913) ... 232, 245
——— v. Rostron (1842) 170
Walker's Case, *Re* St. Marylebone Joint Stock Banking Co. (1856) 148
Wall, *Re*, Jackson v. Bristol & West of England Bank, Ltd. (1885) 184
——— v. Pennington (1660) 346
Wallace v. Cook (1903) 339, 352
Waller v. Wilder (1857) 6
Walley v. Holt (1876) 56
Walmsley v. Child (1749) 196
Walters v. Canadian Pacific Ry. Co. (Can.)... 80
Walton, *Ex p.*, *Ex p.* Hue, *Re* Royal British Bank (1857) 153
Ward, *Ex p.*, R. v. Humphrys (1914) ... 387
——— v. Evans (1703) 198
——— v. Galsworthy (1854) 353
——— v. Greenland (1865) 163
——— v. London & South Western Bank, *Ex p.*, *Re* Montague (1897) ... 190
——— v. St. Paul (1789) 383
——— v. Scott (1812) 25
Warde v. Æyre (1613)... 70
Waring, *Ex p.*, *Ex p.* Inglis, *Re* Brickwood & Co., *Re* Bracken & Co. (1815) ... 302
———, *Ex p.*, *Re* Agra & Mastermans' Bank (1866) 169
Warlow v. Harrison (1859) ... 3, 7, 12, 13, 36, 44
Warner, *Ex p.* (1842) 316
Warren v. Baring Brothers (1910) 257
Warrington v. Vigne (S. Af.) 41
Warry (Doe d.) v. Miller (1876) 318
Warter v. Warter (1890) 370
Warwick v. Rogers (1843) 227

PAGE
Waterhouse *v.* Bank of Ireland (Ir.)... ... 272
Waters *v.* Monarch Fire & Life Assurance Co. (1856) 106
Waterston *v.* City of Glasgow Bank (Scot.)... 224
——— *v.* Edinburgh & Glasgow Bank (Scot.) 253
Watkin *v.* Crisford (Aus.) 33, 34
Watkins *v.* Rymill (1883) 85
Watson *v.* James (Can.) 22
——— *v.* Little (1860) 367
Watson & Co., *Re*, *Ex p.* Lloyd (1904) ... 299
Watt *v.* National Bank of Scotland (Scot.)... 257
Watts *v.* Christie (1849) 292, 301
Wauchope *v.* North British Ry. Co. (Scot.)... 341
Way *v.* Bassett (1845)... 194
Weaver, *Re* (1837) 32
Webb, *Re* (1818) 80
——— *v.* Murrel (1904) 388
——— *v.* Smith (1885) 35, 36
——— *v.* Taylor (1843) 142
Webster *v.* Threlfall (1823) 321
Wedge, *Re*, Wedge *v.* Panter (1908) ... 344
Weese *v.* Weese (Can.) 180
Weiser *v.* Segar (1904) 354
Welchman *v.* Coventry Union Bank (1860)... 290
Wellesley *v.* McFaddin (Can.) 204
Wells *v.* Crew (Can.) 108
——— *v.* Wells (1914) 333
——— & MacMurchy's Case, *Re* Central Bank of Canada (Can.) 300
Welwyn Farmers' Elevator Co. *v.* Byrne (Can.) 72
Wendt *v.* Lind, *Ex p.* Lind (Aus.) 396
Wenham, *Ex p.*, *Re* Wood (1872) 342
——— *v.* Banque Du Peuple (Can.) ... 231
Wentworth County *v.* Smith (Can.) 173
West *v.* Sackville (Lord) (1903) 371
West Derby Union Guardians *v.* Atcham Union Guardians (1889) 321
West Devon Great Consols Mine, *Re* (1888) ... 344
West Hopetown Tea Co., *Re* (Ind.) 355
West of England & South Wales District Bank, *Re*, *Ex p.* Booker (1880) 147
West of England & South Wales District Bank, *Re*, *Ex p.* Dale & Co. (1879) ... 299
West of England & South Wales District Bank *v.* Evans (1881) 267
Westerman, *Ex p.* (1851) 390
Western Bank *v.* Bairds (Scot.) 144
Western Bank of Scotland *v.* Baird's Trustee (Scot.) 144
Westhead's Settlement Trusts, *Re* (1885) ... 364
Westmoreland, The (1845) 47
Westmorland Bank, *Re*, *Ex p.* Allison (Can.) 154
Weston *v.* Peary Mohan Dass (Ind.)... 315, 323, 329, 336, 351
Wetherman *v.* London & Liverpool Bank of Commerce, Ltd. (1914) 99, 176
Wetmore *v.* McKenzie (Can.) 55
Wettenhall *v.* Wakefield (1833) 323
Wheatley *v.* Low (1623) 68
——— *v.* Patrick (1837) 116
——— *v.* Purr (1837) 184
——— *v.* Smithers (1906) 3
——— *v.* ——— (1907) 3
Wheeler *v.* Collier (1827) 12
Wheeler & Wilson Manufacturing Co. *v.* Charters (Can.) 96, 97
Whitaker *v.* Bank of England (1835) ... 226
——— *v.* Johnston (N.Z.) ... 364, 396
White, *Ex p.*, *Re* Nevill (1871) 184
———, *Ex p.*, *Re* White (1848) 382
———, *Re* (1893) 384
———, *Re*, *Ex p.* White (1848) 382
——— *v.* Bartlett (1832) 6
——— *v.* Brown (Can.) 101

PAGE
White *v.* Grand Trunk Pacific Ry. Co. & Hislop (Can.) 351, 352
——— *v.* Humphery (1847) 59, 81
——— *v.* Hunter (Can.) 164
——— *v.* London Chartered Bank of Australia (Aus.) 169
——— *v.* Proctor (1811) 8, 10, 11
——— *v.* Steadman (1913) 114, 115
——— & Co., Ltd. *v.* Dougherty (Scot.) ... 15
Whitehead, *Re*, *Ex p.* Burton Bank (1814)... 212
Whiteley *v.* Hilt (1918) 97, 107
Whitelocke's Case (1613) 324
Whiteway *v.* Newfoundland Government (Nfld.) 332
Whitlock *v.* Marriot (1686) 321
Whitmarsh *v.* Genge (1828) 306
Whitnash *v.* George (1828) 306
Whittenbury *v.* Law (1840) 149
Whittingham *v.* Mitchell (Ir.) 300
Whitworth *v.* Smith (1832) 45
Whurr *v.* Devenish (1904) 14, 15, 16
Whyte *v.* Bank of New South Wales (Aus.)... 170, 171
——— *v.* Millar & Young (Scot.) ... 107, 108
——— *v.* Whyte (Scot.) 398
Wiehe *v.* Dennis Brothers (1913) 63
Wiener *v.* Phillips (Belfast), Ltd. (Ir.) ... 96
Wigan *v.* Fowler (1816) 133
Wight *v.* Forman (Scot.) 94
Wilde *v.* Stanner (1857) 151
Wilder *v.* Turner, *Re* Harrington (1908) ... 404
Wilding *v.* Sanderson (1897) 336
Wilkes *v.* Ellis (1795) 3
Wilkie *v.* Fattorini (Aus.) 46
Wilkins *v.* Hemsworth (1838) 403
——— *v.* Roebuck (1858) 146
Wilkinson *v.* Adam (1813) 377
——— *v.* ——— (1823) 377
——— *v.* London & County Banking Co. (1884) 289
——— *v.* Verity (1871) 60, 109
——— *v.* Wilkinson (1842) 379
Willett *v.* Flahertie (Ir.) 19
William, The (1806) 61
Williams, *Re* (1861) 337
———, *Re* (Aus.) 34
———, *Re* (Can.) 108, 285
———, *Re* (Ir.) 285, 287, 288
——— *v.* Canadian Bank of Commerce (Can.) 266
——— *v.* Davies (1864) 190
——— *v.* ——— (1883) 401
——— *v.* Deacon (1849) 298
——— *v.* Evans (1866) 5, 6
——— *v.* Everett (1811) 249
——— *v.* Griffith (1839) 181
——— *v.* Jones (1865) 55
——— *v.* Lister & Co., Llewellyn Brothers, Third Parties (1913) ... 36, 37
——— *v.* Lloyd (1628) 63, 70, 90
——— *v.* Millington (1788)... ... 35, 38, 45
——— *v.* Smith (1819) 198
——— *v.* Steward (1817) 19
——— *v.* Tuckett (1900) 34
Williams & Kettle, Ltd. *v.* Harding's Official Assignee (N.Z.) 4
Williams & Son, *Re*, *Re* Newport Old Bank, *Ex p.* Ashwin (1853) 303
Williams, Deacon & Co. *v.* Shadbolt (1885)... 207
Williamson *v.* Barton (1862) 8
——— *v.* Gray (Ir.) 74
——— *v.* M'Clelland (Scot.) 398
——— *v.* Verity (1871) 60, 109
——— *v.* Williamson (1869) ...245, 266, 296
Willis *v.* Bank of England (1835) ... 123, 173
Willis, Percival & Co., *Re*, *Ex p.* Morier (1879) 301, 302

PAGE
Wills *v.* Brown (Can.) 68
Willson *v.* Carey (1843) 37
Wilmot *v.* Maitland (Can.) 100
Wilson, *Ex p.*, Heward *v.* Wheatley (1852)... 150
———, *Ex p.*, ——— *v.* ——— (1853)... 150
——— *v.* Anderton (1830) 115
——— *v.* Atkinson (1864) 378, 379
——— *v.* Balfour (1811) 302
——— *v.* Bank of Montreal (Can.) 277
——— *v.* Banque Ville Marie (Can.) ... 225
——— *v.* Birchall, *Re* Birchall (1880) ... 341
——— *v.* Brett (1843)... 68
——— *v.* Craven (1841) 143
——— *v.* Powis (1826) 99
——— *v.* Rastall (1792) 335
Wilts & Dorset Bank *v.* Cook (1889) ... 202
Winch *v.* Fenn (1786) 259
——— *v.* Winchester (1812) 18
Wingfield's Case (1670) 322
Winkfield, The (1902) ... 105, 111, 112, 113, 114
Winter *v.* Mair (1811) 354
Wisconsin Marine & Fire Insurance Co. Bank *v.* Bank of British North America (Can.)... 206, 250
Wise, *Re*, *Ex p.* Atkins (1842) 211
———, *Re*, *Ex p.* Cole (1843) 300
———, *Re*, *Ex p.* Edwards (1842) ... 211, 269
——— *v.* Newton (1846) 333
Wiseman & Denham's Case (1623) 60
Witham *v.* Swan, *Re* Swan (1915) 55
Witts *v.* Steere (1807)... 129
Wolstenholm *v.* Sheffield Union Banking Co., Ltd. (1886) 288
Wong Kwau Kee *v.* Woong Thing (Hong Kong) 62
Wood, *Re*, *Ex p.* McGae (1816) 302
———, *Re*, *Ex p.* Wenham (1872) 342
——— *v.* Baxter (1883) 41, 44
——— *v.* Clydesdale Bank, Ltd. (Scot.) ... 192
——— (Doe d.) *v.* Elias (1846) 331
——— *v.* Midgley (1854) 8
——— *v.* Stenning, *Re* Stenning (1895) ... 189
——— *v.* Stephenson (Can.) 213
Woodhouse *v.* Whiteley (1866) 138
Woodland *v.* Fear (1857) 201, 217
Woodlands, *Ex p.* (Aus.) 405
Woodley *v.* Coventry (1863) 105
Woodman *v.* Home Bank (Can.) 160
Woods *v.* Thiedemann (1862)... 251
Woodward *v.* Miller (1845) 14
Woolfe *v.* Horne (1877) 42
Woosnam *v.* Merchants Bank (Can.) ... 231
Worsley *v.* Scarborough (Earl) (1746) ... 346

PAGE
Wostenholm *v.* Sheffield Union Banking Co., Ltd. (1886) 288
Wrayton *v.* Naylor (Can.) 23
Wright, *Ex p.* (1875) 407
———, *Re*, *Ex p.* Eyre (1843) 256
——— *v.* Bentley (Can.) 12
——— *v.* Buchanan (Scot.) 14
——— *v.* Dickenson (1861) 380
——— *v.* Hearson (1916) 348, 349
——— *v.* Holdgate (1850) ... 358, 360, 365
——— *v.* Melville (1828) 92
——— *v.* Murphy (Ir.) 141
——— *v.* Reed (1790)... ... ... 129, 130
——— *v.* Robotham (1886) 116
——— *v.* Soresby (1834) 342
——— *v.* Standard Trust Co. (Can.)... 76, 77
——— *v.* Woodham (1851) 330
Wright's Trust, *Re* (1856) 372
Wylde *v.* Legge (1901) 93
——— *v.* Radford (1863) ... 285, 288, 289
Wylie, *Ex p.*, *Re* Maberley (1833) 298
——— *v.* Nisbet, Kirk, Claimant (Aus.) ... 94
Wynne *v.* Newborough (Lord) (1808) ... 322

Y.

YATES *v.* Bell (1820) 248, 249
——— *v.* Carlisle (1761) 325
——— *v.* Chippindale (1862)... 366
——— *v.* Farebrother (1819)... 23
Yearwood's Trusts, *Re* (1877) 366
Yelverton *v.* Yelverton (1867) 331
Yeo *v.* Wallace (Scot.)... 22
Yool *v.* Ewing (Ir.) 363
Yorke's Case, *Re* Central Bank of Canada (Can.)... 301
Young, *Ex p.*, *Re* Commercial Bank of South Australia (Aus.) 157
——— *v.* Bank of Bengal (1836) 294
——— *v.* Grote (1827)... 232
——— *v.* Hall (Aus.) 3
——— *v.* Hill (N.Z.) 29
——— *v.* Nicol (Scot.)... 396
Yourell *v.* Hibernian Bank, Ltd. (1918) ... 181

Z.

ZEEB *v.* Bank of New South Wales (Aus.) ... 223
Zinck *v.* Walker (1777) 210
Zulueta's Claim, *Re* London, Hamburg & Continental Exchange Bank (1870) ... 140

AUCTION AND AUCTIONEERS.

PAGE

PART I. DEFINITIONS 2

PART II. AUCTIONEER'S LICENCE 3

PART III. AUTHORITY OF AUCTIONEER 4

SECT. 1. IN GENERAL 4

SECT. 2. IN REGARD TO SIGNATURE OF MEMORANDUM 7

PART IV. CONDUCT OF THE SALE 11

SECT. 1. TIME AND PLACE OF SALE 11

SECT. 2. STATUTORY REGULATIONS. 11

SECT. 3. SALES SUBJECT TO RESERVE AND VENDOR'S RIGHT TO BID 11

SUB-SECT. 1. UNDER SALE OF LAND BY AUCTION ACT, 1867, AND SALE OF GOODS ACT, 1893, s. 58 11

SUB-SECT. 2. APART FROM SALE OF LAND BY AUCTION ACT, 1867, AND SALE OF GOODS ACT, 1893, s. 58 12

SECT. 4. ADVERTISEMENT OF THE AUCTION 15

SECT. 5. PARTICULARS AND CONDITIONS OF SALE 15

SECT. 6. VERBAL STATEMENTS BY AUCTIONEER 16

SECT. 7. BIDDING 19

SECT. 8. CONTRACT OF SALE 20

SECT. 9. DAMPING THE SALE, ETC.. 20

PART V. DEPOSIT 23

PART VI. INTERPLEADER AND PAYMENT INTO COURT 27

PART VII. RIGHTS AND DUTIES IN RELATION TO VENDOR 27

SECT. 1. DUTY GENERALLY 27

SECT. 2. AS TO GOODS 28

SECT. 3. DUTY TO MAKE BINDING CONTRACT 29

SECT. 4. PURCHASE BY AUCTIONEER 29

SECT. 5. LIABILITY FOR PROCEEDS OF SALE AND TO ACCOUNT 29

SECT. 6. AUCTIONEER'S RIGHT TO REMUNERATION 31

SUB-SECT. 1. IN GENERAL 31

SUB-SECT. 2. WHERE SALE BY AUCTION 32

SUB-SECT. 3. WHERE SALE NOT BY AUCTION 33

SECT. 7. LIEN 35

SECT. 8. REIMBURSEMENT AND INDEMNITY BY VENDOR 36

PAGE

PART VIII. RIGHTS AND LIABILITIES IN RELATION TO PURCHASER . . . 38
SECT. 1. AUCTIONEER'S RIGHT TO SUE PURCHASER IN HIS OWN NAME 38
SECT. 2. LIABILITY OF AUCTIONEER TO PURCHASER 41
SUB-SECT. 1. IN GENERAL 41
SUB-SECT. 2. FOR BREACH OF IMPLIED WARRANTIES 43

PART IX. RIGHTS AND LIABILITIES IN RELATION TO THIRD PARTIES . . 45
SECT. 1. RIGHT OF AUCTIONEER TO SUE THIRD PARTIES 45
SECT. 2. LIABILITY OF AUCTIONEER TO THIRD PARTIES 45

Agency, generally . *See* AGENCY.

Appraisers . . ,, VALUERS & APPRAISERS.

Contracts, generally . ,, CONTRACT.

Hawkers . . . ,, MARKETS & FAIRS.

House Agents . . ,, AGENCY; SALE OF LAND; VALUERS & APPRAISERS.

Licences, generally . ,, REVENUE.

Necessity of Sale by Auction in certain Cases . . . *See* TRUSTS & TRUSTEES; WILLS; *& other titles passim.*

Sales by Order of Court . ,, ADMIRALTY; COUNTY COURTS; PRACTICE & PROCEDURE; SALE OF LAND.

Sales in General . ,, SALE OF GOODS; SALE OF LAND.

Valuers . . . ,, VALUERS & APPRAISERS.

Part I.—Definitions.

1. Sale by auction — What is—Auction Duties Act, 1779 (c. 56).]—The agent of the owner of an estate, to be sold at auction, attended at the place & time of sale, & mentioned the upset price, but there were no bidders. He gave notice that he would be ready to treat for a sale by private bargain. Soon after he was called into a private room by some of those who attended at the public meeting, & they gave him offers in writing. He engaged, before inspecting the offers, that the highest offer should be accepted; & it was accepted accordingly: —*Held:* this was a sale at auction under 17 Geo. 3, c. 50, & Auction Duties Act, 1779.

When I was A.-G. there was a case in the Exchequer of a female auctioneer. She continued silent during the whole of the sale, but whenever any one bid she gave him a glass of brandy. The sale broke up, & in a private room he that got the last glass of brandy was declared to be the purchaser. This was decided to be an auction (LORD ELDON, C.).—WALKER *v.* ADVOCATE-GENERAL (1813), 1 Dav. 111; 3 E. R. 640.

2. —— —— —— Letting of tithes.]—Tithes are a tenement, & are, as such, within the exemption in s. 14 of the above Act, from the duty on sales by auction imposed by 43 Geo. 3, c. 69, Sched. A. A letting by auction of tithes of corn, then standing & growing on the ground to be transferred by way of lease for one year, to commence from before the day of the auction, is a letting by auction of the tenement, & not a sale of the tithes; even though no actual lease should be afterwards made of such tithes.—R. *v.* ELLIS (1816), 3 Price, 323; 146 E. R. 276.

3. —— —— —— Written bids.]—A sale was appointed for two certain days, by public advertisement, for the disposal of property (a house & furniture); but some of the furniture not being then sold, an announcement was made to the persons assembled that at a future day then named for that purpose the whole of the remainder would be sold. The persons who attended upon the second occasion & were desirous of purchasing were directed to retire to another room, where each was to write two different sums on a piece of paper, & whoever should be found, on giving in those pieces of paper, to have written the largest sum, was to be declared the purchaser:—*Held:* this was a mode of sale at auction within ss. 3 & 4 of the above Act.—R. *v.* TAYLOR (1824), M'Cle. 362; 148 E. R. 151; *sub nom.* A.-G. *v.* TAYLOR, 13 Price, 636.

4. —— —— —— Private sale without advertisement.]—The above Act only applies to a public auction, not to a sale where goods are sold by auction privately without advertisement of the sale or catalogue.—R. *v.* CHAPMAN (1796), 3 Anst. 811; 145 E. R. 1047.

5. —— —— —— Sealed tender.]—Property was directed to be sold by the Ch. Ct. The advertisement announcing the sale described it as a "sale by private contract." The sale was to be made subject to receiving the sanction of the V.-C., & subject to conditions (*inter alia*) that persons intending to purchase were to send in sealed tenders, which would be opened by the chief clerk to the V.-C., under whose orders the sale was made, that the chief clerk, after the lapse of four days, would certify who was the purchaser, & that such certificate was "in due course to be signed & filed, & become binding without further notice or expense to the purchaser":—*Held:* (1) though this was described as a "sale by private contract," it had all the incidents of a sale by auction, under the direc-

tion of the ct.; (2) the practice of opening biddings might be applied to it.

A sale on sealed tenders is in effect the same as a sale by auction (LORD CRANWORTH, C.).—BARLOW *v.* OSBORNE (1858), 6 H. L. Cas. 556; 27 L. J. Ch. 308; 31 L. T. O. S. 45; 4 Jur. N. S. 367; 6 W. R. 315; 10 E. R. 1412, H. L.

Annotations:—**Folld.** Ewing *v.* Waite (1866), L. R. 1 Eq. 440. **Mentd.** Waterhouse *v.* Wilkinson (1864), 1 Hem. & M. 636; Re Bartlett, Newman v. Hook (1880), 16 Ch. D. 561.

See, now, Sale of Land by Auction Act, 1867 (c. 48).

6. —— Not sale in market overt.]—A public sale of a horse at a repository for the sale of horses is not a sale in market overt.—LEE *v.* BAYES & ROBINSON (1856), 18 C. B. 599; 25 L. J. C. P. 249; 27 L. T. O. S. 157; 20 J. P. 694; 2 Jur. N. S. 1093; 139 E. R. 1504.

Annotations:—**Consd.** Clayton *v.* Le Roy, [1911] 2 K. B. 1031, C. A. **Refd.** Hargreave *v.* Spink, [1892] 1 Q. B. 25.

7. —— Parties to.]—In a sale by auction there are three parties, viz., the owner of the property to be sold, the auctioneer, & the portion of the public who attend to bid, which of course includes the highest bidder (MARTIN, B.).—WARLOW *v.* HARRISON (1859), 1 E. & E. 309; 29 L. J. Q. B. 14; 1 L. T. 211; 6 Jur. N. S. 66; 8 W. R. 95; 120 E. R. 925, Ex. Ch.

Annotations:—**Mentd.** Wiley *v.* Crawford (1861), 1 B. & S. 265; Mainprice *v.* Westley (1865), 6 B. & S. 420; *Re* Agra & Masterman's Bank, *Ex p.* Asiatic Banking Corpn. (1867), 2 Ch. App. 391, L.JJ.; Harris *v.* Nickerson (1873), L. R. 8 Q. B. 286; Woolf *v.* Horne (1877), 46 L. J. Q. B. 534; Johnston *v.* Boyes (1899), 68 L. J. Ch. 425; Rainbow *v.* Howkins, [1904] 2 K. B. 322; McManus *v.* Fortescue & Branson, [1907] 2 K. B. 1, C. A.

8. Broker — Distinguished from auctioneer.]—The right of a broker to sue differs from that of a factor or an auctioneer, both of whom have rights of possession or property in the goods intrusted to them, & a special interest in the performance of the contracts entered into by them for their principals.—FAIRLIE *v.* FENTON (1870), L. R. 5 Exch. 169; 39 L. J. Ex. 107; 22 L. T. 373; 18 W. R. 700.

Annotations:—**Mentd.** Paice *v.* Walker (1870), L. R. 5 Exch. 173; Mollett *v.* Robinson (1870), L. R. 5 C. P. 646; Fleet *v.* Murton (1871), L. R. 7 Q. B. 126; Sharman *v.* Brandt (1871), L. R. 6 Q. B. 720; Hutchinson *v.* Tatham (1873), L. R. 8 C. P. 482; Southwell *v.* Bowditch (1876), 1 C. P. D. 374, C. A.; Harper *v.* Vigars, [1909] 2 K. B. 549.

9. —— ——.]—*Semble*: the selling of goods by auction within the city of London, by an auctioneer who had paid the duty of 20*s.* for a licence required by 17 Geo. 3, c. 50, but who had not been admitted as a broker, by the ct. of mayor & aldermen, did not make him liable to the penalty of 6 Ann., c. 16, for acting as a broker without being so admitted.—WILKES *v.* ELLIS (1795), 2 Hy. Bl. 555; 126 E. R. 699.

See, now, London Brokers' Relief Acts, 1870 (c. 60) & 1884 (c. 3).

10. Auctioneer — Independent contractor.]—An auctioneer is a skilled agent, to whom complete control of the operations at a sale is intrusted, & he is in the position of an independent contractor.—WALKER *v.* CRABB (1916), 33 T. L. R. 119; 61 Sol. Jo. 219, D. C.

11. —— Not trader.]—An auctioneer is not a "trader" within that term as applicable to the law relating to bills of exchange, & a partnership of auctioneers is not a trading firm, & one partner has no implied authority to bind the firm by accepting a bill of exchange in the firm name without the knowledge or authority of the other partners.—WHEATLEY *v.* SMITHERS, [1906] 2 K. B. 321; 75 L. J. K. B. 627; 95 L. T. 96; 54 W. R. 537; 22 T. L. R. 591; 50 Sol. Jo. 513; *revsd.* on another point, [1907] 2 K. B. 684, C. A.

Annotation:—**Refd.** Higgins *v.* Beauchamp, [1914] 3 K. B. 1192.

Part II.—Auctioneer's Licence.

12. Selling without licence — Penalty—Auction Duties Act, 1779 (c. 56), ss. 3 & 4.]—A sale was appointed for two certain days, by public advertisement, for the disposal of property (a house & furniture); but some of the furniture not being then sold, an announcement was made to the persons assembled that at a future day then named for that purpose the whole of the remainder would be sold. The persons who attended upon the second occasion & were desirous of purchasing were directed to retire to another room, where each was to write two different sums on a piece of paper, & whoever should be found, on giving in those pieces of paper, to have written the largest sum, was to be declared the purchaser:—*Held*: this was a sale by auction within the above sects., & the person who had so conducted the sale had incurred the penalty of £100 thereby imposed for having acted

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PART I.

6 i. *Sale by auction — Not sale in market overt.*]—A sale by public auction at a place not authoritatively appointed by law for public buying & selling is not a market overt.—FITZGERALD *v.* LUCK (1839), 1 Legge, 118.—**AUS.**

6 ii. —— ——.]—A sale by auction in a hotel yard is not a sale in market overt.—GUY *v.* BOOTH, 4 R. L. 565.—**CAN.**

a. —— *Not sale by retail.*]—Sale by auction by a licensed auctioneer is not "sale by retail" within Factories & Shops Act of 1900, s. 4.—YOUNG *v.* HALL, [1905] S. R. Q. 151.—**AUS.**

11 i. *Auctioneer—Not trader.*]—One member of a firm of auctioneers has no implied authority to sign notes binding the firm.—HOFFNUNG *v.* SIMPSON & PINKSTONE (1881), 2 N. S. W. L. R. 133.—**AUS.**

b. —— *Not professional man.*] — Auctioneers are not professional men within Table E of the Code of Civil Procedure.—*Re* LAING'S CLAIM (1907), 26 N. Z. L. R. 703.—**N. Z.**

PART II.

12 i. *Selling without licence—Penalty—Sales by Auction Statute*, 1864, *s.* 18.]—An unlicensed partner of a firm which has the word "auctioneers" painted up on its business premises is liable to the penalty under the above stat., though all sales by auction are conducted by the partner who holds the licence.—*Re* ALLEY, *Ex p.* MILLS (1882), 8 V. L. R. 316.—**AUS.**

12 ii. —— —— *Person selling his own goods—54 Geo. III. c. 82 (Ir.).*]—Deft. having been in treaty with two persons for the sale of a farm, gave notice to them to come to his house at a particular time, when the property should be set up & sold. They attended at the appointed time, a few of deft.'s friends being present, one of whom put down in writing the names of the bidders & the conditions of the sale. After several biddings by both the persons who had been negotiating for the purchase, one of them was declared by deft. to be the purchaser:—*Held*: not such a sale by auction as subjected the seller to the penalty imposed by the above Act on a person acting as an auctioneer without being licensed.—A.-G. *v.* CATHEW (1840), 3 I. L. R. 149; 1 Leg. Rep. 24.—**IR.**

12 iii. —— —— *How recovered.*]—If an auctioneer, in Sorel, carries on his business without a licence, he is subject to a fine at the suit of the city, but not to an action to recover the value of the licence.—SOREL *v.* WEILBRENNER (1915), 16 Q. P. R. 405.—**CAN.**

12 iv. —— *Sale by court.*]—The sale of land by auction under a decree of a high ct. is not within a municipal bye-law prohibiting the sale of goods, wares, or merchandise by auction without a licence.—R. *v.* CHAPMAN (1883), 1 O. R. 582.—**CAN.**

12 v. —— *Sale by insolvent's assignee.*]—An official assignee, or his agent acting under an Insolvent Act of the Parliament of Canada, may sell by auction the goods of a bkpt. without

Parts II. & III. Sect. 1.]

as an auctioneer without first taking out a licence.—R. *v.* TAYLOR (1824), M'Cle. 362; 148 E. R. 151; *sub nom.* A.-G. *v.* TAYLOR, 13 Price, 636.

13. Sale in public market — Hawker & pedlar holding licence.]—Where a person duly licensed as a hawker & pedlar, & also as an auctioneer, sells by auction in a public market, & during market hours, such sale by auction is not an offence against the tenor of his licence.—R. *v.* HENRY (1854), 24 L. T. O. S. 108; 19 J. P. 133; 3 W. R. 103.

See, further, MARKETS & FAIRS.

14. Sale by court exempted—Court of Chancery Act, 1852 (c. 87), s. 42—Sale by chief clerk.]—The ct. has power, since the passing of Ct. of Chancery Act, 1852 (c. 80), to have a sale of real estate, directed to be sold under the ct., made by auction in chambers before the chief clerk; & where all parties interested are *sui juris*, & before the ct., they may, if they think it expedient, have a sale effected in this manner. Where, however, there are parties not before the ct., or not *sui juris*, the duty is thrown upon the ct. of determining what is the most beneficial mode of conducting the sale, & the fact of the power having fallen into disuse tending to show that its exercise was in general inexpedient, the ct. directed a sale by an auctioneer.—PEMBERTON *v.* BARNES (1872), L. R. 13 Eq. 349; 41 L. J. Ch. 209; 26 L. T. 389.

15. Apprenticeship deed — Implied representation.] — An auctioneer who takes an apprentice under a deed, in which he describes himself as an auctioneer, thereby impliedly represents that he is licensed as an auctioneer, & his failure to take out a licence avoids the deed.—CREASER *v.* HURLEY (1915), 32 T. L. R. 149, D. C.

See, further, CONTRACT; MASTER AND SERVANT.

Part III.—Authority of Auctioneer.

SECT. 1.—IN GENERAL.

See, also, Part IV., *post.*

16. To sell without reserve—Secret limitation.]—An auctioneer has an implied authority to sell without reserve, &, if he does so, the vendor cannot set up against the buyer a limitation of that authority not made known to the buyer.

Deft., an auctioneer, was instructed by the owner of a pony to sell it at a public auction, with a reserve price of £25. When the pony was put up at the sale the name of the vendor was disclosed, but deft. inadvertently stated that the sale was without reserve. The pony was knocked down to pltf. for 15 guineas. Deft. immediately afterwards discovered his error, & thereupon put the pony up for sale again, when it was bought in for 17 guineas. No note or memorandum of the sale to pltf. was made. Pltf. brought an action against deft. claiming (*inter alia*) damages for breach of warranty of authority by deft.:—*Held:* there was in the circumstances a contract binding on the vendor, on which he could (but for the absence of a written memorandum) have been successfully sued by pltf., & there had been no breach of warranty of authority by deft.—RAINBOW *v.* HOWKINS, [1904] 2 K. B. 322; 73 L. J. K. B. 641; 91 L. T. 149; 53 W. R. 46; 20 T. L. R. 508; 48 Sol. Jo. 494, D. C.

Annotation:—**Dbtd.** McManus *v.* Fortescue, [1907] 2 K. B. 1, C. A.

17. —— Derived from conduct of vendor.]—W. having casually mentioned to S., an auctioneer & land agent, that he had three properties, one being at B., all of which he would be willing to sell, S. replied that from the description B. would be worth £600, & that he had other property in the same neighbourhood to sell by auction at the end of the month, which would be a good opportunity. On a subsequent occasion S., having viewed the property, informed W. that he thought it would not fetch more than £300, & accordingly, W. not being willing to attend to the business, his brother & partner fixed the reserved price at £250. W. then withdrew one of the other lots from the sale. The printed particulars & conditions of sale were sent to W.'s office a day or two before the sale. The B. estate was knocked down at £330. W. then refused to complete, alleging he had never authorised S. to sell at that price, & that his price was £700:—*Held:* W. had by his acts bound himself to the sale.—PIKE *v.* WILSON (1854), 1 Jur. N. S. 59.

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taking out a licence therefor; & this right cannot be restricted by a provincial enactment.—COTÉ *v.* WATSON (1877), 3 Q. L. R. 157; 2 Cart. 343.—**CAN.**

12 vi. —— ——.]—A sale by auction of the stock in trade of an insolvent by the agent of his assignee without a licence is within a municipal bye-law prohibiting persons from selling by auction or acting as auctioneers unless licensed; & it is immaterial that the insolvent carried on business in the district or that the agent acted as auctioneer on this occasion only.—R. *v.* RAWSON (1892), 22 O. R. 467.—**CAN.**

12 vii. —— *Sale by sheriff.*]—Sales by sheriffs or officers selling goods in discharge of their duty are not within Consol. Stat., c. 94, licensing auctioneers.—*Ex p.* FITZPATRICK (1893), 32 N. B. R. 182.—**CAN.**

12 viii. —— *Sale by special bailiff—Excise Licences Act,* 1825, *s.* 26.]—It is not necessary for the special bailiff of a sheriff to take out a licence as an auctioneer, or to employ a licensed auctioneer, in order to entitle him to sell by public auction goods taken by him in execution, he not being thereby a person carrying on the trade & business of an auctioneer, within s. 26 of the above stat.—R. *v.* MARTIN (1841), 4 I. L. R. 153; 2 Leg. Rep. 76; Jebb & B. 81.—**IR.**

12 ix. —— —— ——.]—A special bailiff nominated by pltf., & appointed by the sheriff, is not entitled to sell, by auction, goods taken in execution, without being licensed as an auctioneer, or procuring the assistance of a licensed auctioneer.—A.-G. *v.* MALONE (1844), 9 I. L. R. 245.—**IR.**

c. *Right to refuse licence—Municipal corporation.*]—An auctioneer's licence could not, under Municipal Act, R.S.O., 1887 (c. 184), s. 495 (2), be refused to an appct. on the ground of his bad character. It is otherwise since stat. 1894 (57 Vict. c. 50, s. 8 (Ont.)).—MERRITT *v.* THE CITY OF TORONTO (1895), 25 O. R. 256; 22 A. R. 205.—**CAN.**

d. *Licence taken out by employer in name of employee—Ownership of master—Retention by employee.*]—Pltfs., partners, employed deft. as an auctioneer for six months, & took out an auctioneer's licence in his name. The licence was for a period of twelve months. Pltfs. dismissed deft. before the end of the six months. He refused to transfer the licence to pltfs.:—*Held:* the licence belonged to the partnership & deft. must pay as damages the cost of a new licence for the balance of the twelve months.—LEVIEN & ROLLET *v.* FABIAN (1908), 28 N. Z. L. R. 569.—**N. Z.**

PART III. SECT. 1.

f. *To sell — Auctioneers Act,* 1891.]—S. 19 of the above Act does not of itself give any right to auctioneers to sell goods coming into their hands. That right must depend entirely upon the instructions or the contract under which the goods are received.—WILLIAMS & KETTLE, LTD. *v.* THE OFFICIAL ASSIGNEE OF HARDING (1908), 27 N. Z. L. R. 871.—**N. Z.**

16 i. *To sell without reserve.*]—When goods are sent to an auctioneer, without a price limit, the fact that they are accompanied by an invoice does not mean that the goods shall not be sold at less than the prices therein set forth. The business of auctioneers, when selling movable effects, is to knock them down to the last & highest bidder, &, in the absence of special instructions to the contrary, they are entitled to do so, & are not liable for more than the prices so obtained.—NELSON *v.* HICKS (1899), Q. R. 15 S. C. 465.—**CAN.**

18. To sell his own property—Agent of purchaser.]—Though the auctioneer at a sale by auction is the agent of the purchaser, he is not his agent for all purposes, & there is no reason why he may not sell property of which he himself is the owner.—FLINT *v.* WOODIN (1852), 9 Hare, 618; 22 L. J. Ch. 92; 19 L. T. O. S. 240; 16 Jur. 719; 68 E. R. 660.

Annotations:—**Mentd.** Mortimer *v.* Bell (1865), 1 Ch. App. 10, L. C.; McMurray *v.* Spicer (1868), L. R. 5 Eq. 527.

19. Sale subject to reserve—To fix second reserve—Two equal bidders.]—An estate being directed by decree to be sold, the conditions of sale fixed a reserved bidding, under which the auctioneer announced a sum, & there being two bidders & an uncertainty as to who had bid, the estate was bought in at another sum. Upon petition by a person claiming to be the purchaser that he might be declared the highest bidder, or for a resale:—*Held:* the auctioneer had no right to fix more than one reserved bidding.—NOTLEY *v.* SALMON (1853), 1 W. R. 240.

20. —— To accept bid lower than reserve.]—A principal who gives authority to an auctioneer to sell subject to a reserve price gives no power to the auctioneer, either expressly or impliedly, to accept a less price (FLETCHER MOULTON, L.J.).—MCMANUS *v.* FORTESCUE, [1907] 2 K. B. 1; 76 L. J. K. B. 393; 96 L. T. 444; 23 T. L. R. 292, C. A.

21. To receive deposit—Within ordinary authority of auctioneer's clerk.]—The receipt of money, as, for instance, for the deposit, is within the ordinary scope of the duty of an auctioneer's clerk.—GOSBELL *v.* ARCHER (1835), 2 Ad. & El. 500; 1 Har. & W. 31; 4 Nev. & M. K. B. 485; 4 L. J. K. B. 78; 111 E. R. 193.

Annotations:—**Mentd.** Casson *v.* Roberts (1862), 31 Beav. 613; Scott *v.* Alvarez (1895), 43 W. R. 694, C. A.

22. —— By cheque.]—On a sale by auction on behalf of a mtgee. in exercise of the power of sale contained in his mtge. deed, the acceptance by the auctioneer, on behalf of the vendor & with his concurrence, of a cheque (dishonoured on presentation) in lieu of cash for the deposit is not, having regard to the common practice at sales by auction, unreasonable, & is not such an act of negligence on the part of the mtgee. as to deprive him of his right to the costs of the abortive sale.—FARRER *v.* LACY, HARTLAND & CO. (1885), 31 Ch. D. 42; 55 L. J. Ch. 149; 53 L. T. 515; 34 W. R. 22; 2 T. L. R. 11, C. A.

Annotations:—**Mentd.** Bissett *v.* Jones (1886), 32 Ch. D. 635; Instone *v.* Elmslie (1886), 54 L. T. 730; Jones *v.* Harris (1887), 55 L. T. 884; Faithfull *v.* Woodley (1889), 43 Ch. D. 287; Poulett *v.* Hill, [1893] 1 Ch. 277, C. A.; Powell *v.* Brodhurst, [1901] 2 Ch. 160; Williams *v.* Hunt, [1905] 1 K. B. 512, C. A.; White, Son & Pill *v.* Stennings, [1911] 2 K. B. 418, C. A.

23. To receive purchase price—No implied authority—Bill of exchange.]—An auctioneer derives his authority, with respect to the sale of goods, from the instructions he receives from the vendor; &, in the absence of any general agency, the extent of his authority can only be ascertained from the conditions of sale.

At a public sale of growing timber, advertised as the property of pltf., the following conditions of sale were read: "That each purchaser should pay down a deposit of 10 per cent. in part of the purchase-money, & pay the remainder on or before Aug. 17, but in case any purchaser should prefer to pay the whole amount of his purchase-money at an earlier period, discount after the rate of 5 per cent. was to be allowed"; also, "that each purchaser should enter into a proper agreement & bond if required, with such one, two, or more sureties as should be approved by the vendor or his agent, for the performance of his agreement, pursuant to the conditions of sale." Deft. became the purchaser of one lot, & paid the deposit. Some days after the sale, which was on Feb. 14, deft. gave the auctioneer, at his request, a bill of exchange for the residue of the purchase-money. The bill, which was dated on the day of sale, became due on Aug. 17, when it was duly paid:—*Held:* (1) the auctioneer was the agent of the vendor only for the purposes of the sale, & of receiving the deposit; (2) he had no authority to receive the residue of the purchase-money, either before or after Aug. 17, nor to take any security for the payment of it; (3) assuming the contract to be for payment to the auctioneer, & not to the vendor, the terms of it required a payment in cash, & the auctioneer would have had no authority to take a bill of exchange.—SYKES *v.* GILES (1839), 5 M. & W. 645; 9 L. J. Ex. 106; 151 E. R. 273.

Annotations:—**Follld.** Williams *v.* Evans (1866), L. R. 1 Q. B. 352. **Mentd.** Sweeting *v.* Pearce (1859), 7 C. B. N. S. 449.

24. —— By bill of exchange.]—Deft., an auctioneer, was employed by pltf. to sell some furniture, & was desired to sell it for ready money only. Deft., however, sold the furniture to M. on his giving him a bill of exchange for the amount, drawn by himself upon, & accepted by D. Pltf. afterwards applied for payment of the amount of the sale, & the bill, though at first refused to be taken by pltf., was ultimately taken by an agent of pltf., in order to get it discounted. The bill never was presented, nor was any notice of dishonour given either to M. or deft. until ten days after the bill had become due. In an action against deft. for negligence in selling the furniture otherwise than for ready money, the jury having found that pltf. had not accepted the bill in satisfaction for the furniture:—*Held:* the negligence of pltf. in not presenting the bill, & not giving notice of dishonour, by which M. was discharged from any liability on the bill, was no answer to the action. *Semble:* if, by the negligence of pltf., any of the parties to the bill were discharged, deft. might maintain a cross-action against pltf. to recover such damages as he could prove he had sustained thereby.—FERRERS (EARL) *v.* ROBINS (1835), 2 Cr. M. & R. 152; 1 Gale, 70; 5 Tyr. 705; 4 L. J. Ex. 178; 150 E. R. 65.

25. —— ——.]—The general authority of an auctioneer as to receiving payment of purchase-money is to take cash, unless he has express authority, or is justified by some usage to the contrary.

An auctioneer sold at an auction some goods, on conditions which required the purchaser to make full cash payment to the auctioneer or the clerk of sale before delivery of the goods. Before the goods were delivered the auctioneer received from the purchaser a bill of exchange in part payment of the goods, & agreed to take it as cash, & it was discounted for him at his banker's. After this, but before the bill came to maturity, the vendor gave the purchaser notice not to pay any money to the auctioneer. The bill was paid at maturity. The auctioneer having failed to pay over the whole of the receipts of the sale, the vendor sued the purchaser for payment for the goods:—*Held:* the auctioneer had no authority to take payment by a bill, & the vendor was entitled to a verdict for the amount of the bill.

If the bill had come to maturity before the vendor revoked the authority of the auctioneer to receive payment, the payment by the bill would have been

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20 i. *Sale subject to reserve — To accept bid lower than reserve.*]—30 & 31 Vict. c. 48, settled the conflict between the practice of cts. of equity & of law on the subject of auctioneers instructed not to sell under a certain price selling under that price.—MASON *v.* CHAMBERLAIN, 1 Thom. (2nd ed.) 7.—CAN.

a good payment (BLACKBURN, J.).—WILLIAMS *v.* EVANS (1866), L. R. 1 Q. B. 352 ; 35 L. J. Q. B. 111 ; 13 L. T. 753 ; 30 J. P. 692 ; 14 W. R. 330.

26. —— By cheque—Ratification by lapse of time.]—Pltf., as exor., sued deft., an auctioneer, for selling part of his testator's goods on credit to pltf.'s brother, whereby the value of the goods was lost. The sale took place in 1852, and afterwards documents & a cheque were handed to pltf. The judge in directing the jury drew attention to the fact that the action was only brought in 1855. The jury having found a verdict for deft., pltf. moved for a new trial on the ground of misdirection & that the verdict was against the weight of evidence, but the ct. refused to interfere, & the rule was refused.—WALLER *v.* WILDER (1857), 29 L. T. O. S. 80.

27. To make payment—To avoid distress threatened after sale.]—Deft., an auctioneer, sold certain goods for pltf., the owner, on premises occupied by pltf. & another, in respect of which the latter owed the landlord rent. By the conditions of sale each lot was to be taken to be delivered at the fall of the hammer, after which time it was to remain at the exclusive risk of the purchaser. After the sale, & before the goods were removed, the landlord threatened to distrain on the goods, whereupon the auctioneer paid the rent, & deducted it from the amount the goods had realised, & paid over the balance to pltf. :—*Held :* the auctioneer was not justified, as against pltf., in paying the rent, as, on the sale of each lot, the property passed to the purchaser, who would have had to bear the loss if the landlord had distrained. *Semble :* the auctioneer might have been justified if the threat to distrain had been made before the sale.—SWEETING *v.* TURNER (1871), L. R. 7 Q. B. 310 ; 41 L. J. Q. B. 58 ; 25 L. T. 796 ; 36 J. P. 597 ; 20 W. R. 185.

28. —— Of purchase price to vendor's solicitor—Sale by order of court.]—In a partition action real estate was ordered to be sold out of ct. by pltf., the purchase-moneys to be paid into ct. The sale took place under conditions which disclosed that the sale was made under an order of the ct. The auctioneers paid the balance of the deposit after deducting their charges to the vendor's solr., who did not pay it into ct. :—*Held :* the auctioneers had discharged their liability in respect of the deposit. *Semble :* a custom on the part of auctioneers to pay sale-moneys to the vendor's solr., without authority for that purpose, could not be supported in law.—BROWN *v.* FAREBROTHER (1888), 58 L. J. Ch. 3 ; 59 L. T. 822.

29. —— —— ——.]—An auctioneer selling property under an order of the ct. who sends the deposit money to the solrs. of the party having the conduct of the sale is not liable to refund the money in the event of its being misappropriated by the solrs.—BIGGS *v.* BREE (1881), 51 L. J. Ch. 64 ; 45 L. T. 648 ; 30 W. R. 132 ; *affd.* on another point (1882), 51 L. J. Ch. 263, C. A.

Annotation :—**Apld.** Brown *v.* Farebrother (1888), 58 L. J. Ch. 3.

See, further, SOLICITORS.

30. —— To vendor in embarrassed circumstances—Good against assignees.]—Deft., an auctioneer, was employed by C., a person in embarrassed circumstances, to sell his property. Deft. sold, & paid the proceeds to the order of C., who was shortly afterwards declared insolvent :—*Held :* deft. was not liable to C.'s assignee, although deft., when he sold the property, was aware of C.'s embarrassment.—WHITE *v.* BARTLETT (1832), 9 Bing. 378 ; 2 Moo. & S. 515 ; 2 L. J. C. P. 43 ; 131 E. R. 657.

Annotation :—**Mentd.** Wainwright *v.* Clement (1838), 8 L. J. Ex. 25.

31. To warrant—In general no implied authority.]—An auctioneer is only an agent to sell, & cannot give a warranty without the vendor's authority. If he warrants further than he is instructed, the vendor is not bound.—PAYNE *v.* LECONFIELD (LORD) (1882), 51 L. J. Q. B. 642 ; 30 W. R. 814, D. C.

32. Authority ends on sale—No authority to settle questions arising subsequently.]—The moment after a sale the auctioneer is no longer the agent of the vendor. He was his agent only to sue, not to deal with the terms upon which a title was to be made. The purchaser must show that the auctioneer had acquired a character to bind the vendor in that respect (LORD ELDON, C.).—SETON *v.* SLADE, HUNTER *v.* SETON (1802), 7 Ves. 265 ; 32 E. R. 108.

Annotations :—**Mentd.** Halsey *v.* Grant (1806), 13 Ves. 73 ; Hall *v.* Smith (1808), 14 Ves. 426 ; Jenkins *v.* Reynolds (1821), 6 Moore, C. P. 86 ; Hipwell *v.* Knight (1835), 1 Y. & C. Ex. 401 ; Laythoarp *v.* Bryant (1836), 2 Bing. N. C. 735 ; Hicks *v.* Gardner (1837), 1 Jur. 541 ; Parkin *v.* Thorold (1851), 2 Sim. N. S. 1 ; Roberts *v.* Berry (1853), 3 De G. M. & G. 284, L.JJ. ; Stains *v.* Banks (1863), 9 Jur. N. S. 1049 ; Leeds & Hanley Theatre of Varieties *v.* Broadbent, [1898] 1 Ch. 343, C. A.

33. —— No authority to rescind contract.]—A declaration in *assumpsit* against an auctioneer for having rescinded a contract of sale (which he had made) contrary to his duty as auctioneer may be supported by an implication of law arising upon the facts of the employment of the auctioneer by pltf. & his sale of the goods without proof of an express contract on his part not to rescind the contract. In such case it is incumbent on deft. to establish a legal excuse for deviating from the usual practice, although the proof involve the proof of a negative.—NELSON *v.* ALDRIDGE (1818), 2 Stark. 435.

34. To sell by private bargain—Order of court to sell by auction.]—The ct. will not carry into effect after a lunatic's decease a sale of his estate previously made by private contract, there having been only an order to sell by public auction.—*Re* LOFT (1844), 2 L. T. O. S. 397 ; 8 Jur. 206.

35. —— After abortive auction—Alleged custom.]—On the employment of an auctioneer to sell by auction there is no employment to sell by private contract if the public sale proves abortive, & evidence of a custom to that effect among auctioneers is not admissible.—MARSH *v.* JELF (1862), 3 F. & F. 234.

36. —— Sale at reserve sanctioned by court.]—Suits were compromised with the sanction of the ct. (infants being interested), & it was agreed that the estate should be sold by auction for the purpose of division, & that A. should have the conduct of the sale. At the auction the property could not be sold & it was afterwards sold by private contract at the reserved bidding :—*Held :* this was a valid sale.

It was not *ultra vires* to accept the price which would have been taken at the auction if it had been offered, & it was competent for him to sell the property by private contract at the amount of the reserved bidding (ROMILLY, M.R.).—BOUSFIELD *v.* HODGES (1863), 33 Beav. 90 ; 55 E. R. 300.

Annotation :—**Mentd.** *Re* Haedicke & Lipski's Contract, [1901] 2 Ch. 666.

37. —— Resale on behalf of purchaser—Express authority.]—At a sale by auction D. became

32 i. *Authority ends on sale — No authority to settle questions arising subsequently.*]—A judge of a roup has no power to determine questions arising after the determination of the sale.—STRACHAN *v.* AULD (1884), 11 R. (Ct. of Sess.) 756 ; 21 Sc. L. R. 747.—**SCOT.**

33 i. —— *No authority to rescind contract.*]—An auctioneer has no implied authority to rescind the sale.—FARQUHAR *v.* BILLMAN (1901), 40 N. S. R. 289.—**CAN.**

g. *Sale after countermand of authority—Purchaser without notice.*]—A sale by an auctioneer of goods, remaining in his possession after his authority has been revoked, to a *bonâ fide* purchaser without notice is valid.—GUNN *v.* GILLESPIE (1845), 2 U. C. R. 151.—**CAN.**

the purchaser for £6,000 of certain real estate. Before the sale the auctioneer had received a letter from S., stating he had been prevented from attending the sale, & asking if any of the lots remained unsold. After the sale the auctioneer informed D. that a client of his was inquiring about the property, & D. then said he was willing to resell same for £6,600, of which £100 should be paid to the auctioneer as commission, provided the offer was accepted within a specified time. The offer was communicated by the auctioneer by letter to S., who wrote a reply to the auctioneer accepting it. In an action by S. against D. for specific performance of the agreement it was contended that the auctioneer's authority did not extend to making a contract, but only to bringing the parties together: —*Held:* the auctioneer was authorised to make a binding contract for a sale of D.'s interest under his contract.—SAUNDERS *v.* DENCE (1885), 52 L. T. 644.

Annotation:—**Refd.** Rosenbaum *v.* Belson, [1900] 2 Ch. 267.

38. Revocable before sale — Without notice to intending purchasers.]—An authority given to an auctioneer to sell may be revoked by the vendor at any time before the sale, & such revocation is valid against parties dealing without knowledge of it.

In a suit by a purchaser to enforce specific performance of a contract, entered into by the auctioneer by mistake or inadvertence, for the sale of property as to part of which—a right of way over the land sold—his authority had been revoked:—*Held:* it was competent to the vendor to insist upon such revocation, & parol evidence was admissible in support of such defence.—MANSER *v.* BACK (1848), 6 Hare, 443; 67 E. R. 1239.

Annotations:—**Mentd.** Tamplin *v.* James (1880), 15 Ch. D. 215; *Re* Hare & O'More's Contract, [1901] 1 Ch. 93; Rainbow *v.* Howkins, [1904] 2 K. B. 322; Douglas *v.* Baynes, [1908] A. C. 477, P. C.

39. —— Subject to rights of indemnity — What is revocation.]—An owner may, at any time before the contract is legally complete, interfere & revoke the auctioneer's authority, but he does so at his peril; & if the auctioneer has contracted any liability in consequence of his employment & the subsequent revocation or conduct of the owner, he is entitled to be indemnified. *Semble:* a bidding by the owner after the last genuine bidding is not a revocation of the auctioneer's authority.—WARLOW *v.* HARRISON (1859), 1 E. & E. 309; 29 L. J. Q. B. 14; 1 L. T. 211; 6 Jur. N. S. 66 8 W. R. 95; 120 E. R. 925, Ex. Ch.

Annotations:—**Mentd.** Wiley *v.* Crawford (1861), 1 B. & S. 265; Mainprice *v.* Westley (1865), 6 B. & S. 420; *Re* Agra & Masterman's Bank, *Ex p.* Asiatic Banking Corpn. (1867), 2 Ch. App. 391, L.JJ.; Harris *v.* Nickerson (1873), L. R. 8 Q. B. 286; Woolf *v.* Horne (1877), 46 L. J. Q. B. 534; Johnson *v.* Boyes (1899), 68 L. J. Ch. 425; Rainbow *v.* Howkins, [1904] 2 K. B. 322; McManus *v.* Fortescue & Branson, [1907] 2 K. B. 1, C. A.

40. —— ——.]—Where a person agrees with an auctioneer for the sale of property & afterwards changes his mind, the rule is that, subject to the auctioneer's claim for expenses incurred, a ct. of equity will not enforce the agreement (ROMILLY, M.R.).—CHINNOCK *v.* SAINSBURY (1860), 30 L. J. Ch. 409; 3 L. T. 258; 6 Jur. N. S. 1318; 9 W. R. 7.

41. —— Licence to enter premises.] — An auctioneer, who is employed to sell goods by public auction, has not such an interest as will make the licence to enter the premises for that purpose irrevocable.—TAPLIN *v.* FLORENCE (1851), 10 C. B. 744; 20 L. J. C. P. 137; 17 L. T. O. S. 63; 15 Jur. 402; 138 E. R. 294.

Annotations:—**Refd.** Campanari *v.* Woodburn (1854), 15 C. B. 400. **Mentd.** Hurst *v.* Picture Theatres, [1915] 1 K. B. 1, C. A.

42. Irrevocable after sale.]—A person having given an unlimited authority to an auctioneer may not, when dissatisfied with the price at which it is sold, revoke his authority (ROMILLY, M.R.).—DAY *v.* WELLS (1861), 30 Beav. 220; 54 E. R. 872.

Annotations:—**Apprvd.** Bell *v.* Balls, [1897] 1 Ch. 663.

43. ——.]—*Semble:* upon a sale by auction in ordinary circumstances the vendor or the purchaser cannot say, after a lot has been knocked down, "I am not satisfied with the price & withdraw the authority given to the auctioneer" (STIRLING, J.).—BELL *v.* BALLS, [1897] 1 Ch. 663; 66 L. J. Ch. 397; 76 L. T. 254; 45 W. R. 378; 13 T. L. R. 274; 41 Sol. Jo. 331.

44. Qualification of authority.] — An agreement with an auctioneer, in a letter to him, employing him to sell goods in consideration of an advance obtained by him: — *Held:* not capable of being qualified by any condition, as to time, to be implied from previous letters.—TOPPING *v.* BULL (1861), 2 F. & F. 408.

SECT. 2.—IN REGARD TO SIGNATURE OF MEMORANDUM.

45. Statute of Frauds applies — Sale of land.]—A sale of lands, though by auction, is within s. 4 of the above Act.—WALKER *v.* CONSTABLE (1798), 1 Bos. & P. 306; 2 Esp. 659; 126 E. R. 919.

Annotations:—**Refd.** Buckmaster *v.* Harrop (1802), 7 Ves. 341; Coles *v.* Trecothick (1804), 9 Ves. 234; Kenworthy *v.* Schofield (1824), 2 B. & C. 945. **Mentd.** Fruhling *v.* Schroeder (1835), 2 Bing. N. C. 77; Glengal *v.* Barnard (1836), 1 Keen, 769.

46. —— ——.] — Sales of land by auction are within the above Act, except sales under decree.—BLAGDEN *v.* BRADBEAR (1806), 12 Ves. 466; 33 E. R. 176.

Annotations:—**Mentd.** Wood *v.* Midgley (1854), 2 Sm. & G. 115; Shardlow *v.* Cotterill (1881), 51 L. J. Ch. 353, C. A.; *Re* Holland, Gregg *v.* Holland, [1901] 2 Ch. 145.

47. —— Sale of goods.] — *Semble:* sales of goods by public auction are not within the above Act.—SIMON *v.* MOTIVOS (1766), as reported in 3 Burr. 1921; 97 E. R. 1170.

Annotations:—**Distd.** Stansfield *v.* Johnson (1794), 1 Esp. 101; Walker *v.* Constable (1798), 2 Esp. 659. **Consd.** Blagden *v.* Bradbear (1806), 12 Ves. 466; Mason *v.* Armitage (1806), 13 Ves. 25. **Refd.** Buckmaster *v.* Harrop (1807), 13 Ves. 456; Maddison *v.* Alderson (1883), 8 App. Cas. 467, H. L. **Mentd.** Williams *v.* Millington (1788), 1 Hy. Bl. 81; Rondeau *v.* Wyatt (1792), 2 Hy. Bl. 63; Rucker *v.* Cammeyer (1794), 1 Esp. 105; Coles *v.* Trecothick (1804), 9 Ves. 234; Hinde *v.* Whitehouse (1806), 7 East, 558; Emmerson *v.* Heelis (1809), 2 Taunt. 38.

48. —— ——.] — *Qu.:* whether sales by auction of goods are within the above Act.—HINDE *v.* WHITEHOUSE (1806), 7 East, 558; 3 Smith, K. B. 528; 103 E. R. 216.

Annotations:—**Refd.** Kenworthy *v.* Schofield (1824), 2 B. & C. 945. **Mentd.** Emmerson *v.* Heelis (1809), 2 Taunt. 38; Dickenson *v.* Lilwal (1815), 1 Stark. 128; Carruthers *v.* Payne (1828), 5 Bing. 270; Alexander *v.* Gardner (1835), 1 Bing. N. C. 671; Spartali *v.* Benecke (1850), 10 C. B. 212; North Staffordshire Ry. Co. *v.* Peek (1860), E. B. & E. 986; Turley *v.* Bates (1863), 2 H. & C. 200; Sweeting *v.* Turner (1871), L. R. 7 Q. B. 310; Pierce *v.* Corf (1874), L. R. 9 Q. B. 210; Rossiter *v.* Miller (1878), 39 L. T. 173 H. L.; Oliver *v.* Hunting (1890), 44 Ch. D. 205.

49. —— ——.] — Sales of goods by auction are within s. 17 of the above Act.—KENWORTHY *v.* SCHOFIELD (1824), 2 B. & C. 945; 4 Dow. & Ry. K. B. 556; 2 L. J. O. S. K. B. 175; 107 E. R. 633.

Annotations:—**Refd.** Maddison *v.* Alderson (1883), 8 App. Cas. 467, H. L. **Mentd.** Dale *v.* Humfrey (1858), E. B. & E. 1004, Ex. Ch.; North Staffordshire Ry. Co. *v.* Peek (1860), E. B. & E. 986, Ex. Ch.; Rishton *v.* Whatmore (1878), 8 Ch. D. 467; Oliver *v.* Hunting (1890), 44 Ch. D. 205.

See, now, Sale of Goods Act, 1893 (c. 71) s. 4 (1).

50. Signature for undisclosed proprietor.] — *Semble:* a contract signed by an auctioneer on

Sect. 2.—In regard to signature of memorandum.]

behalf of an undisclosed proprietor is a valid contract under Stat. Frauds.—BEER *v.* LONDON & PARIS HOTEL CO. (1875), L. R. 20 Eq. 412; 32 L. T. 715.

Annotations :—**Mentd.** Cartwright *v.* Miller (1877), 36 L. T. 398; Rossiter *v.* Miller (1877), 5 Ch. D. 648, C. A.

51. Whether auctioneer agent for both parties.]—An auctioneer is the agent of both parties upon a sale of land or goods so as to be enabled to bind them both under Stat. Frauds (POLLOCK, B.).—MURPHY *v.* BOESE (1875), 44 L. J. Ex. 40; 32 L. T. 122.

52. —— Sale of goods.]—After the fall of the hammer the auctioneer must be considered as agent for the buyer as well as for the seller.—SIMON *v.* MOTIVOS (1766), 3 Burr. 1921; 1 Wm. Bl. 599; 97 E. R. 1170.

Annotations :—**Refd.** Williams *v.* Millington (1788), 1 Hy. Bl. 81; Rondeau *v.* Wyatt (1792), 2 Hy. Bl. 63; Rucker *v.* Cammeyer (1794), 1 Esp. 105; Emmerson *v.* Heelis (1809), 2 Taunt. 38. **Mentd.** Stansfield *v.* Johnson (1794), 1 Esp. 101; Walker *v.* Constable (1798), 2 Esp. 659; Coles *v.* Trecothick (1804), 9 Ves. 234; Hinde *v.* Whitehouse (1806), 7 East, 558; Blagden *v.* Bradbear (1806), 12 Ves. 466; Mason *v.* Armitage (1806), 13 Ves. 25; Buckmaster *v.* Harrop (1807), 13 Ves. 456; Maddison *v.* Alderson (1883), 8 App. Cas. 467, H. L.

53. —— ——.]—Whether an auctioneer be the agent of both purchaser & seller depends upon the facts of the particular case.—BARTLETT *v.* PURNELL (1836), 4 Ad. & El. 792; 6 Nev. & M. K. B. 299; 2 Har. & W. 16; 5 L. J. K. B. 169; 111 E. R. 981.

Annotation :—**Mentd.** Manley *v.* Birkett (1912), 81 L. J. K. B. 1232.

54. —— Sale of land.]—In cases of the sale of lands, the auctioneer is not to be considered as the agent for both parties, & his entering the name of the buyer of a lot of land in his book as purchaser is not a note in writing within Stat. Frauds.—STANSFIELD *v.* JOHNSON (1794), 1 Esp. 101.

Annotations :—**Folld.** Buckmaster *v.* Harrop (1802), 7 Ves. 341. **Refd.** Buckmaster *v.* Harrop (1807), 13 Ves. 456; Glengal *v.* Barnard (1836), 1 Keen, 769.

55. —— ——.]—An auctioneer employed to sell real estate on behalf of the vendor, who signs a receipt for the deposit and gives it to the purchaser, acts as agent of both parties.—WOOD *v.* MIDGLEY (1854), 2 Sm. & G. 115; 23 L. J. Ch. 555, n.; 2 W. R. 185, 65 E. R. 327; *revsd.* on another point, 5 De G. M. & G. 41, L.JJ.

Annotations :—**Mentd.** Pain *v.* Coombs (1857), 3 Sm. & G. 447; Morgan *v.* Worthington (1878), 38 L. T. 443; Lucas *v.* Dixon (1889), 22 Q. B. D. 357, C. A.

56. —— Auctioneer also vendor.]—*Qu.:* whether Stat. Frauds is satisfied by the auctioneer, as the agent of both parties, putting down the biddings, etc., that fact not being proved to be contemporary, & the auctioneer being also vendor.—BUCKMASTER *v.* HARROP (1807), 13 Ves. 456; 33 E. R. 365, L. C.

Annotation :—**Consd.** Bell *v.* Balls, [1897] 1 Ch. 663.

57. Implied authority to sign.]—An auctioneer is an agent lawfully authorised by the buyer to sign a contract for him, whether it be for a purchase of an interest in land, or of goods. His authority is given by the buyer bidding aloud.—EMMERSON *v.* HEELIS (1809), 2 Taunt. 38; 127 E. R. 989.

Annotations :—**Folld.** White *v.* Proctor (1811), 4 Taunt. 209. **Consd.** Glengal *v.* Barnard (1836), 1 Keen, 769; Laythoarp *v.* Bryant (1836), 2 Bing. N. C. 735; Bell *v.* Balls, [1897] 1 Ch. 663. **Refd.** Kemeys *v.* Proctor (1820), 1 Jac. & W. 350; Kenworthy *v.* Schofield (1824), 2 B. & C. 945; Murphy *v.* Boese (1875), L. R. 10 Exch. 126; Dewar *v.* Mintoft, [1912] 2 K. B. 373. **Mentd.** Baldey *v.* Parker (1823), 2 B. & C. 37; Evans *v.* Roberts (1826), 5 B. & C. 829; Seaton & Edwards *v.* Booth (1836), 1 Har. & W. 742; Jones *v.* Flint (1839), 10 Ad. & El. 753; Sims *v.* Landray (1894), 8 R. 582.

58. ——.]—An auctioneer is by implication an agent duly authorised to sign a contract for the purchase of a real estate on behalf of the highest bidder. If the highest bidder is agent for another, the auctioneer's signature of the bidder's name will bind the principal, at least if the principal is present, & consulting with the agent during the sale, & makes no objection before the entry made in the book.—WHITE *v.* PROCTOR (1811), 4 Taunt. 209; 128 E. R. 309.

Annotations :—**Refd.** Ogilvie *v.* Foljambe (1817), 3 Mer. 53; Kenworthy *v.* Schofield (1824), 2 B. & C. 945; Bell *v.* Balls, [1897] 1 Ch. 663; Dewar *v.* Mintoft, [1912] 2 K. B. 373. **Mentd.** Graham *v.* Mosson (1839), 8 L. J. C. P. 324.

59. ——.]—The mode in which contracts are made by an auctioneer, & which must now be considered as recognised at law, is, that when an auctioneer is selling he has a catalogue to which are annexed the conditions of sale, & he has authority from the highest bidder to sign the catalogue on his behalf, & if the auctioneer signs the catalogue with the conditions, that is sufficient memorandum in writing of a contract within Stat. Frauds to bind the purchaser. But, in order to make a valid contract, the document the auctioneer signs on behalf of the buyer must contain all the terms of the contract.—PEIRCE *v.* CORF (1874), L. R. 9 Q. B. 210; 43 L. J. Q. B. 52; *sub nom.* PIERCE *v.* CORF, 29 L. T. 919; 38 J. P. 214; 22 W. R. 299.

Annotations :—**Mentd.** Rishton *v.* Whatmore (1878), 8 Ch. D. 467; McCaul *v.* Strauss (1883), Cab. & El. 106; Wylson *v.* Dunn (1887), 34 Ch. D. 569; Potter *v.* Peters (1895), 64 L. J. Ch. 357; Bell *v.* Balls, [1897] 1 Ch. 663; Dewar *v.* Mintoft, [1912] 2 K. B. 373.

60. ——.]—*Semble :* a contract signed by an auctioneer on behalf of an undisclosed proprietor is a valid contract under Stat. Frauds.—BEER *v.* LONDON & PARIS HOTEL CO. (1875), L. R. 20 Eq. 412; 32 L. T. 715.

Annotations :—**Mentd.** Cartwright *v.* Miller (1877), 36 L. T. 398; Rossiter *v.* Miller (1877), 5 Ch. D. 648, C. A.

61. —— Question for jury.]—Pltf. put up for sale by auction his farm produce. Deft. attended, & some lots of hay & corn were knocked down to him as the highest bidder, whereupon the auctioneer asked him his name, & having given it, the auctioneer, believing that he was buying for himself, wrote his name in a book as the purchaser, & sent in the account to him. Deft., before & at the time of the auction, was foreman to a contractor, & had on previous occasions purchased stone of pltf. for him. Pltf. was present at the auction, but did not interfere. The auctioneer did not know deft. or the contractor, or their relation to each other:—*Held :* it was properly left to the jury to say whether deft. authorised the auctioneer to write his name as purchaser (POLLOCK, C.B.).—WILLIAMSON *v.* BARTON (1862), 7 H. & N. 899 31 L. J. Ex. 170; 5 L. T. 800; 8 Jur. N. S. 341; 10 W. R. 321; 158 E. R. 733.

See, generally, AGENCY, Vol. I., p. 628.

62. —— At time of sale — Signature on behalf of purchaser.]—Upon a sale by auction on May 9 of a

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PART III. SECT. 2.

51 i. *Whether auctioneer agent for both parties—Test of authority.*]—The authority of an auctioneer as agent for a vendor is of a more permanent character than his authority as agent for a purchaser—the test being: was the memo. in substance made at the time & as part of the transaction of sale.—M'MEEKIN *v.* STEVENSON, [1917] 1 I. R. 510.—**IR.**

52 i. —— *Sale of goods.*]—An auctioneer of goods is the agent both of his vendor & of the purchaser, & his entry in the auction book is sufficient to bind either of them. — HOLE *v.* KINNISH (1837), Bluett, 106 — **I. OF M.**

54 i. —— *Sale of land — Revocation of authority as purchaser's agent.*]—A purchaser of land at auction may at any time after the land has been knocked down to him, but before the auctioneer has signed the purchaser's name to the contract of sale, revoke the auctioneer's authority to sign the contract as his agent.—ECROYD *v.* DAVIS (1872), 3 V. L. R. 228.—**AUS.**

62 i. *Implied authority to sign — At time of sale—Signature on behalf of purchaser.*]—An auctioneer at an auction of

house & premises, same were upon deft.'s bidding knocked down to him; but, being the worse for liquor, he did not then sign the contract of sale. On May 17 the auctioneer wrote his name & the date across the stamp upon the conditions of sale, & went with the vendor's solr. to deft. upon the subject, but deft. then repudiated the purchase on the ground of drunkenness:—*Semble:* if the auctioneer had any implied legal authority to bind the vendee by signing the contract, he must sign it at the time of the sale & not subsequently.—MATTHEWS *v.* BAXTER (1873), 28 L. T. 669; 21 W. R. 741.

63. —— —— ——.]—Upon a sale by auction of real estate a memorandum of the contract, in order to bind the purchaser, must be signed by the auctioneer himself & at the time of the sale unless the purchaser has, by word, sign, or otherwise, authorised the clerk to sign as his agent.

Where an auctioneer signed a memorandum as agent for the purchaser a week after the sale, & the purchaser had repudiated the purchase at the time:—*Held:* the auctioneer's authority had ceased, & there was no memorandum in writing sufficient to satisfy the requirements of Stat. Frauds.—BELL *v.* BALLS, [1897] 1 Ch. 663; 66 L. J. Ch. 397; 76 L. T. 254; 45 W. R. 378; 13 T. L. R. 274; 41 Sol. Jo. 331.

64. —— —— **Signature on behalf of vendor.**]—*Assumpsit* on a special count, stating a sale of premises by auction to deft., & a resale by him to pltf., that deft. failed to make out a title & refused to pay the expenses of investigating it. There was also a count for money had & received. The premises had been put up for sale by auction, & deft. was the highest bidder. After the sale, pltf. agreed to give deft. an advance of £7 10*s.* for his bargain, & a paper was signed by pltf. acknowledging that he had purchased the premises of deft.; it was not signed by deft., but it was signed by C., the auctioneer, with the word "witness" prefixed to his name. In about a week after the sale pltf. paid the deposit on the purchase-money, & the premium of £7 10*s.*, upon which the auctioneer gave a memorandum, signed by him, acknowledging such payment. It was objected that there was no note in writing of the contract sufficient to satisfy Stat. Frauds, & pltf. was nonsuited. Pltf. moved to set aside the nonsuit, & to enter a verdict for pltf. for £18 12*s.* on the count for money had & received, or for a new trial, on the ground of misdirection, because (1) there was a sufficient memorandum to satisfy the stat. since the signature by C. was as agent for deft., & (2) he was entitled to recover the deposit & premium, if there was no contract, & the money was in the hands of C., not as a stakeholder, but as agent for deft.; his character as auctioneer having ceased with the first sale. A rule *nisi* was granted.—CONSTABLE *v.* MARTIN (1846), 8 L. T. O. S. 115.

65. —— **Not on subsequent sale by bargain.**]—Pltf. put up for sale by public auction a quantity of timber, several lots of which were unsold. A few days afterwards deft. called on the auctioneer & selected from the catalogue two of the unsold lots, which he agreed to purchase. The auctioneer then wrote in deft.'s presence his name in the catalogue opposite these lots:—*Held:* the auctioneer was not the agent of deft. so as to bind him by signing his name.—MEWS *v.* CARR (1856), 1 H. & N. 484; 26 L. J. Ex. 39; 156 E. R. 1292.

Annotation:—**Consd.** Bell *v.* Balls, [1897] 1 Ch. 663.

66. —— **Not where contract bears wrong date.**]—Applt. on Nov. 18 attended an auction with the intention of bidding for a property, forming lot 2, but, entirely by his own blunder, bid for lot 1, which was knocked down to him. On discovering his mistake he refused to sign the contract, which the auctioneer thereupon signed for him. The sale of lot 1 had been originally fixed for Oct. 17, & the particulars & conditions of sale & contract had been prepared for that date. The date Oct. 17 had been corrected to Nov. 18 on the particulars, but not in the conditions or contract:—*Held:* the auctioneer had no authority to sign the contract for sale bearing the wrong date.—VAN PRAAGH *v.* EVERIDGE, [1903] 1 Ch. 434; 72 L. J. Ch. 260; 88 L. T. 249; 51 W. R. 357; 19 T. L. R. 220; 47 Sol. Jo. 318, C. A.

67. Auctioneer's clerk no implied authority.]—The authority of an auctioneer, upon a sale by auction of real estate, to sign a memorandum of the contract as agent for the purchaser does not extend to the auctioneer's clerk. Such a memorandum, in order to bind the purchaser must be signed by the auctioneer himself unless the purchaser has, by word, sign, or otherwise, authorised the clerk to sign as his agent.—BELL *v.* BALLS, [1897] 1 Ch. 663; 66 L. J. Ch. 397; 76 L. T. 254; 45 W. R. 378; 13 T. L. R. 274; 41 Sol. Jo. 331.

68. ——.]—*Semble:* the entry by an auctioneer's clerk of the name of the purchaser of a horse & the price in the auctioneer's sales ledger was not by an authorised agent so as to bind the purchaser.

I take it as quite clear that the auctioneer's clerk

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land indorsed on the conditions of sale memoranda of the names of purchasers & their bids, but the vendor's name did not appear:—*Held:* the memorandum was insufficient under Stat. Frauds, & the affixing of his signature by the auctioneer a short time after the auction, being after the determination of his implied authority as agent of the vendee, could not cure the defect.—MCLEA *v.* DES BARRES (1849), 3 Nfld. L. R. 84.—**NFLD.**

65 i. —— *Not on subsequent sale by private bargain.*]—An auctioneer, instructed to sell land in lots by auction for three defts., after selling some of the lots announced in the presence of two of defts. that if any one wanted to buy he should come to his office & he would be prepared to treat for the purchase of the balance. Pltf. purchased a lot at the private sale from the auctioneer, & a memorandum of the transaction was signed by the auctioneer & the purchaser:—*Held:* even assuming an acquiescence of the two defts., who were present at the invitation given by the auctioneer, binding upon themselves & the other deft., yet as that invitation was only to come to his office, when he would be prepared to treat as to the balance of the lots, the acquiescence did not give him any authority to bind defts. by a private sale.—HART *v.* PRYOR (1875), 1 R. & C. 53.—**CAN.**

h. —— *Limited to the real contract.*]—A corn-broker, on pltf.'s instructions, put up for sale a quantity of maize, which was stored at a distance from the auction room. Samples of maize were exhibited at the auction, & deft., who had not inspected the bulk, became the purchaser, the biddings being signed by the auctioneer under the heading in his ledger—which was not shown to deft.—"Sale of mixed maize, *Ex* Emma Peasant." Deft. having subsequently refused to accept delivery, pltf. effected a resale & sued him for the loss thereon:—*Held:* as pltf. intended to sell one bulk, & deft. to buy another, there was no contract between them, or if there was, it was a contract as to the bulk of which a sample had been exhibited at the auction, & the auctioneer had no authority to sign deft.'s name to any but the real contract.—MEGAW *v.* MOLLOY (1878), 2 L. R. Ir. 530.—**IR.**

k. —— *Sheriff or bailiff.*]—A sale of goods by a sheriff or his bailiff under execution is within s. 17 of Stat. Frauds, & either of them may sign for the purchaser the memorandum in writing, in the same manner as an auctioneer or his clerk.—FLINTOFT *v.* ELMORE (1868), 18 C. P. 274.—**CAN.**

67 i. *Auctioneer's clerk implied authority to sign.*]—The auctioneer himself need not sign the purchaser's name, it may be done by his clerk at the time; & the clerk of the owner of the goods sold, acting openly at the sale for the auctioneer, is his clerk to bind the purchaser.—SANDFORD *v.* O'DONOHUE (1841), 1 Ont. Dig. 379.—**CAN.**

67 ii. ——.]—The signature of the clerk of an auctioneer on behalf of a purchaser is sufficient to charge the party purchasing, within Stat. Frauds.—CLARKSON *v.* NOBLE (1845), 2 U. C. R. 361.—**CAN.**

67 iii. *Auctioneer's clerk no implied authority.*]—At a sale by auction, certain flour was knocked down to deft., whose name was entered in the book by the auctioneer's clerk:—*Held:* deft. was not liable.—PRATT *v.* RUSH (1879), 5 V. L. R. 421.—**AUS.**

Sect. 2.—In regard to signature of memorandum. Part IV. Sects. 1, 2 & 3: Sub-sect. 1.]

has no authority to sign by general custom, although there may be special circumstances to show that an auctioneer's clerk had authority to sign; where the bidder by word or sign authorises the auctioneer's clerk to sign on his behalf, he makes him his agent to sign, although by the general custom the auctioneer's clerk would not be the bidder's agent (BLACKBURN, J.).—PEIRCE *v.* CORF (1874), L. R. 9 Q. B. 210; 43 L. J. Q. B. 52; *sub nom.* PIERCE *v.* CORF, 29 L. T. 919; 38 J. P. 214; 22 W. R. 299.

Annotations:—**Apprvd.** Bell *v.* Balls, [1897] 1 Ch. 663. **Mentd.** Rishton *v.* Whatmore (1878), 8 Ch. D. 467; McCaul *v.* Strauss (1883), Cab. & El. 106; Wylson *v.* Dunn (1887), 34 Ch. D. 569; Potter *v.* Peters (1895), 64 L. J. Ch. 357; Dewar *v.* Mintoft, [1912] 2 K. B. 373.

69. —— Unless by conduct of purchaser.]—In *assumpsit* by an auctioneer against a purchaser for goods sold, an entry in the sale book by the auctioneer's clerk who attended the sale, & as each lot was knocked down named the purchaser aloud, & on a sign of assent from him made a note accordingly in the book, is a memorandum in writing by an agent lawfully authorised within Stat. Frauds, s. 17; for the clerk is not identified with the auctioneer (who sues), & in the business which he performs of entering the names, etc., he is impliedly authorised by the persons attending the sale to be their agent.—BIRD *v.* BOULTER (1833), 4 B. & Ad. 443; 1 Nev. & M. K. B. 313; 110 E. R. 522.

Annotations:—**Consd.** Peirce *v.* Corf (1874), L. R. 9 Q. B. 210. **Distd.** Bell *v.* Balls, [1897] 1 Ch. 663. **Refd.** Graham *v.* Musson (1839), 5 Bing. N. C. 603; Durrell *v.* Evans (1862), 1 H. & C. 174, Ex. Ch.; Murphy *v.* Böese (1875), 44 L. J. Ex. 40; *Re* Roberts, Evans *v.* Roberts (1887), 36 Ch. D. 196.

70. —— —— Clerk taking down bids openly.]—An auctioneer's clerk who takes down the biddings openly is considered the agent of both the seller & purchaser.—MURPHY *v.* BOESE (1875), L. R. 10 Exch. 126; 44 L. J. Ex. 40; 32 L. T. 122; 23 W. R. 474.

71. —— —— Standing by.]—At a sale of real estate by public auction a lot was knocked down to A. as the highest bidder, & A. at the request of the auctioneer's clerk, who was acting under the direction of the auctioneer, gave his name & address as the purchaser, & stood by while the clerk filled his name & address in the memorandum in the usual way, but did not otherwise sign the memorandum:—*Held:* there was a sufficient signature by or on behalf of A. within Stat. Frauds.—SIMS *v.* LANDRAY, [1894] 2 Ch. 318; 63 L. J. Ch. 535; 70 L. T. 530; 42 W. R. 621; 8 R. 582.

Annotations:—**Distd.** Potter *v.* Peters (1895), 64 L. J. Ch. 357; Dewar *v.* Mintoft, [1912] 2 K. B. 373.

72. —— Knowledge of vendor.]—A vendor of real estate:—*Held:* bound by the signature of the auctioneer's clerk, thus: "Witness E. P. for Mr. S., agent for the seller," upon evidence of assent.—COLES *v.* TRECOTHICK (1804), 9 Ves. 234; 1 Smith, K. B. 233; 32 E. R. 592.

Annotations:—**Distd.** Gosbell *v.* Archer (1835), 2 Ad. & El. 500. **Refd.** Emmerson *v.* Heelis (1809), 2 Taunt. 38; Henderson *v.* Bornewall (1827), 1 Y. & J. 387; *Re* Robinson, *Ex p.* Holdsworth & Farrand (1841), 1 Mont. D. & De G. 475; Potter *v.* Peters (1895), 64 L. J. Ch. 357. **Mentd.** Randall *v.* Errington (1805), 10 Ves. 423; Blagden *v.* Bradbear (1806), 12 Ves. 466; Morse *v.* Royal (1806), 12 Ves. 355; Buckmaster *v.* Harrop (1807), 13 Ves. 456; Peacock *v.* Evans (1809), 16 Ves. 512; Kemeys *v.* Proctor (1813), 3 Ves. & B. 57; Copis *v.* Middleton (1817), 2 Madd. 410; Kenney *v.* Wexham (1822), 6 Madd. 355; Graham *v.* Musson (1839), 7 Scott, 769; Carter *v.* Palmer (1842), 8 Cl. & Fin. 657, H. L.; Strickland *v.* Turner (1852), 7 Exch. 208; Tottenham *v.* Green (1863), 32 L. J. Ch. 201; Coles *v.* Bristow (1868), L. R. 6 Eq. 149; Seal *v.* Claridge (1881), 7 Q. B. D. 516, C. A.; Plowright *v.* Lambert (1885), 52 L. T. 646; Luddy's Trustee *v.* Peard (1886), 33 Ch. D. 500.

73. —— —— Signature as witness to purchaser's signature insufficient.]—A signature by an auctioneer's clerk, in the character of witness merely to a contract for the sale of property, which is signed by the purchaser alone, is not a sufficient signing of an agreement or memorandum or note thereof by an agent of the seller to satisfy Stat. Frauds. *Qu.:* whether a person who signs a document, expressly purporting to sign it as a witness, can be considered in any circumstances as signing the document in the character of a party or agent.—GOSBELL *v.* ARCHER (1835), 2 Ad. & El. 500; 1 Har. & W. 31; 4 Nev. & M. K. B. 485; 4 L. J. K. B. 78; 111 E. R. 193.

Annotations:—**Mentd.** Casson *v.* Roberts (1862), 31 Beav. 613; Scott *v.* Alvarez (1895), 43 W. R. 694, C. A.

74. Sufficiency of memorandum — Entry of agent's name—Ratification.]—Goods were sold by auction to an agent, & the auctioneer wrote the initials of the agent's name, together with the prices opposite the lots purchased by him, in the printed catalogue. The principal afterwards, in a letter to the agent, recognised the purchase:—*Held:* the entry in the catalogue & the letter, coupled together, were a sufficient memorandum of the contract within Stat. Frauds.—PHILLIMORE *v.* BARRY (1808), 1 Camp. 513.

75. —— —— Purchaser present.]—An auctioneer is by implication an agent duly authorised

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69 i. —— *Unless by conduct of purchaser.*]—At a sale by auction, where the auctioneer's clerk writes the names of the purchasers for them in the auctioneer's book the purchaser is not bound, in the absence of evidence that he knew of this mode of proceeding, &, by acquiescence, authorised the clerk to write his name for him.—HILL *v.* WILLIS, EXORS., ETC. (1880), 6 V. L. R. 193.—**AUS.**

69 ii. —— —— *Payment of deposit insufficient.*]—In an action for land sold, it appeared that the land in question was put up at auction under hand bills signed by pltfs., & having been knocked down to deft., his name was entered as purchaser in a book by the auctioneer's clerk, & he paid the deposit required down, but he afterwards refused to pay the subsequent instalments:—*Held:* there was no contract for sale sufficient to satisfy Stat. Frauds.—THOMAS *v.* ROSS (1860), 19 U. C. R. 370.—**CAN.**

69 iii. —— *Unless announced at sale that clerk would sign for purchaser.*]—A paper used at the sale by auction of certain lands contained the conditions of sale, & the numbers of the lots bid off by the several purchasers, upon which their names were written in pencil opposite the lots purchased, & afterwards covered over with ink by the auctioneer's clerk, it having been announced before the sale that he would sign for the several purchasers:—*Held:* a sufficient signing of the contract within Stat. Frauds.—CROOKS *v.* DAVIS (1857), 6 Gr. 317.—**CAN.**

69 iv. —— *Clerk's duty.*]—An auctioneer employed his clerk at a sale by auction to act as amanuensis, by writing down in the sales book the name of each person to whom the lots were respectively knocked down:—*Held:* to comply with the requirements of Stat. Frauds, s. 17, the name of each purchaser should be called out by the clerk before making the entry of the name in the sales book.—MOSS *v.* COHEN (1872), 3 V. L. R. 305.—**AUS.**

74 i. *Sufficiency of memorandum — Entry of purchaser's surname.*]—A memorandum is "signed," within Stat. Frauds, if only the surname of the purchaser is written on it by the auctioneer.—FARQUHAR *v.* BILLMAN (1901), 40 N. S. R. 289.—**CAN.**

74 ii. —— *Entry of name on separate sheets.*]—The conditions of sale appeared in the printed bill of the sale, & were announced by the auctioneer. The purchaser's name was entered by the auctioneer's clerk on one of several sheets of paper used by him at the sale for entering the purchasers' names, but these sheets were not attached to the printed bill:—*Held:* no contract within Stat. Frauds.—KAITLING *v.* PARKIN (1874), 23 C. P. 569.—**CAN.**

74 iii. —— *Signature given as agent for unnamed vendor.*]—A contract for sale of land entered into by an auctioneer "on account of the vendor" & "as agent for the vendor," but not naming the vendor, is void under Stat. Frauds. But, where the vendor signed replies to requisitions on title referring to such contract:—*Held:* there was then a sufficient signature under Stat. Frauds.—BUXTON *v.* BELLIN (1877), 3 V. L. R. 243.—**AUS.**

to sign a contract for the purchase of a real estate on behalf of the highest bidder, & his writing down the name of the highest bidder in the auctioneer's book is a sufficient signature to satisfy Stat. Frauds. If the highest bidder is agent for another, the auctioneer's signature of the bidder's name will bind the principal, at least if the principal is present & consulting with the agent during the sale & makes no objection before the entry made in the book.—WHITE *v.* PROCTOR (1811), 4 Taunt. 209 ; 128 E. R. 309.

Annotations :—**Refd.** Kenworthy *v.* Schofield (1824), 2 B. & C. 945. **Mentd.** Ogilvie *v.* Foljambe (1817), 3 Mer. 53 ; Graham *v.* Mosson (1839), 8 L. J. C. P. 324 ; Bell *v.* Balls, [1897] 1 Ch. 663 ; Dewar *v.* Mintoft, [1912] 2 K. B. 373.

76. —— —— Specific performance.]—Specific performance was decreed against the purchaser of an estate by an agent upon the signature of the agent's name by the auctioneer, who is an agent lawfully authorised for that purpose within Stat. Frauds.—KEMEYS *v.* PROCTOR (1820), 1 Jac. & W. 350 ; 37 E. R. 409 ; *affg.* 3 Ves. & B. 57.

Annotations :—**Refd.** Kenworthy *v.* Schofield (1824), 2 B. C. 945. **Mentd.** Bell *v.* Balls, [1897] 1 Ch. 663.

—— *See, also,* Nos. 279, 290, 291, *post.*

—— **Generally.**] — *See* CONTRACT ; SALE OF GOODS ; SALE OF LAND.

Stamp duty on memorandum.]—*See* CONTRACT ; REVENUE.

Part IV.—Conduct of the Sale.

SECT. 1.—TIME AND PLACE OF SALE.

77. Auction held in place adjoining street—Place of public resort under Vagrancy Act, 1824 (c. 83).]—A sale by auction, called by public placards, & held in a house & garden in & adjoining a public street to which sale the public had free access, & where a large number of persons were assembled :—*Held :* a "place of public resort" within the above sect.—SEWELL *v.* TAYLOR (1859), 7 C. B. N. S. 160 ; 29 L. J. M. C. 50 ; 1 L. T. 37 ; 23 J. P. 792 ; 8 W. R. 26 ; 141 E. R. 776 ; *sub nom. Ex p.* SEWELL (1860), 6 Jur. N. S. 582.

78. Auction held in street—May be obstruction when improperly conducted.]—A bye-law imposed a penalty on any person who collected a crowd by brawling, fighting, singing, shouting, or otherwise so as to impede any part of a street. C. held an auction & collected a crowd :—*Held :* (1) though holding an auction would not ordinarily amount to the offence, yet it might be so conducted as to amount to the offence if the degree of noise was excessive ; (2) it was for the justices to say if there was such excess.—PHILLIPS *v.* CANHAM (1872), 36 J. P. 310.

See, also, No. 337, *post.*

Auction held on Sunday.]—*See* TIME.

Whether auction disturbance of market rights.]—*See* MARKETS & FAIRS.

Whether sale at auction is sale in market overt.]—*See* MARKETS & FAIRS ; SALE OF GOODS.

SECT. 2.—STATUTORY REGULATIONS.

79. Exhibition of board with name at time of auction—Not bound to exhibit "licensed auctioneer" over door.]—An auctioneer is not now bound to exhibit over his door his name with the words "licensed auctioneer" after it, but he is bound, under a penalty not exceeding £20, to exhibit in a conspicuous manner, during the whole time of holding a sale by auction, his full christian name, surname, & residence.—INLAND REVENUE *v.* SEIGENBERG (1910), *Daily Telegraph,* July 29.

80. —— Primâ facie evidence of identity of auctioneer.]—In trover against an auctioneer, proof that the name was written up in the auction-room, & that the person who was selling was addressed by that name by the bystanders, is *primâ facie* proof of identity.—COLLIER *v.* NOKES (1849), 2 Car. & Kir. 1012 ; 15 L. T. O. S. 189.

Production of licence.]—*See* REVENUE.

Regulations governing sale of unredeemed pledges.]—*See* PAWNS & PLEDGES.

Regulations governing sale of cattle in marts, etc.]—*See* MARKETS & FAIRS.

SECT. 3.—SALES SUBJECT TO RESERVE AND VENDOR'S RIGHT TO BID.

SUB-SECT. 1.—UNDER SALE OF LAND BY AUCTION ACT, 1867 (c. 48), AND SALE OF GOODS ACT, 1893 (c. 71), s. 58.

81. Right to employ puffer—Must be specially reserved.]—Upon a sale of real estate by auction, under conditions stating that the sale is subject to a reserved bidding, it is illegal to employ a person to bid up to the reserved price, unless the right to do so is expressly stipulated for.—GILLIAT *v.* GILLIAT (1869), L. R. 9 Eq. 60 ; 39 L. J. Ch. 142 ; 21 L. T. 522 ; 34 J. P. 196 ; 18 W. R. 203.

82. —— Must be exercised strictly as reserved.]—Landed property was sold by public auction under conditions which stated that the highest bidder should be the purchaser, & which reserved to the vendor the right to bid once by himself or his agent. The auctioneer bid three times with the sanction of the vendor, & then the vendor stated what the reserve price was, when a person bid beyond that sum & was thereupon declared the purchaser :—*Held :* (1) by reason of the biddings of the auctioneer the vendor had exceeded the limited right reserved to him by the condition of bidding once by himself or agent ; (2) the sale was voidable at the option of the purchaser, both at law & under the above Act of 1867.—PARFITT *v.* JEPSON, (1877), 46 L. J. Q. B. 529 ; 36 L. T. 251 ; 41 J. P. 600.

PART IV. SECT 1.

l. *Sale after sunset — Dutch auction —Auctioneers' Act,* 11 *Vict.* (*No.* 16).]—A sale after sunset by "Dutch auction" —*i.e.,* where goods are offered at a diminishing price & the first bidder is the purchaser—is not prohibited by s. 24 of the above Act.—*Ex p.* HAMILTON (1882), 3 N. S. W. L. R. 89.—**AUS.**

PART IV. SECT. 2.

m. *Tax sale — Fairly & openly conducted—Land Registry Act Amendment Act,* 1901.]—The fact that an auctioneer, selling at a tax sale, acts as agent for the purchaser is not sufficient to set aside the sale as not being "fairly & openly conducted" within s. 3 of the above Act.—BEAVIS *v.* STEWART, 20 B. C. R. 450.—**CAN.**

PART IV. SECT. 3, SUB-SECT. 2.

n. *"Puffer" defined — Ambiguous expression apart from Statute.*]—In an action by vendor against purchaser for breach of contract in not completing the purchase of land sold by auction, & non-payment of the purchase-money, a paragraph of the statement of the defence alleged that the bidding at the auction was not *bonâ fide.* three of the biddings being made by a "puffer" :—*Held :* although s. 3 of 30 & 31 Vict. c. 48, defined the word "puffer" for the purposes of that stat., the term as used in the statement of defence was objectionable as conveying no definite legal signification, there being nothing to show that the word was used in its statutory sense.—JONES *v.* QUINN (1878), 2 L. R. Ir. 516 ; 13 I. L. T. 16 ; 40 L. T. 135.—**IR.**

Sect. 3.—Sales subject to reserve and vendor's right to bid: Sub-sect. 2.]

SUB-SECT. 2.—APART FROM SALE OF LAND BY AUCTION ACT, 1867 (c. 48), AND SALE OF GOODS ACT, 1893 (c. 71), s. 58.

83. Employment of puffer vitiates sale.]—The basis of all dealings ought to be good faith; so, more especially in these transactions, where the public are brought together upon a confidence that the articles set up to sale will be disposed of to the highest real bidder; that could never be the case, if the owner might secretly & privately enhance the price, by a person employed for that purpose; yet tricks & practices of this kind daily increase, & grow so frequent, that good men give in to the ways of the bad & dishonest in their own defence. But such a practice was never openly avowed. An owner of goods set up to sale at an auction never yet bid in the room himself. If such a practice were allowed, no one would bid. It is a fraud upon the sale, & upon the public. The disallowing it is no hardship upon the owner. For if he is unwilling his goods should go at an under price, he may order them to be set up at his own price, & notl ower: such a direction would be fair (LORD MANSFIELD, C.J.).—BEXWELL *v.* CHRISTIE (1776), 1 Cowp. 395; 98 E. R. 1150.

Annotations:—**Folld.** Howard *v.* Castle (1796), 6 Term Rep. 642. **Refd.** Twining *v.* Morrice (1788), 2 Bro. C. C. 326; Smith *v.* Clarke (1806), 12 Ves. 477; Crowder *v.* Austin (1825), 2 C. & P. 208; Green *v.* Baverstock (1863), 14 C. B. N. S. 204.

84. ——.]—Pltf. put up a horse for sale at a public auction, & sent his servant to bid for him to enhance the price. The last *bonâ fide* bid was £12, & the horse was ultimately knocked down at £29: —*Held:* the bidding by the servant was a fraud upon the purchaser, & the sale was void.—CROWDER *v.* AUSTIN (1826), 3 Bing. 368; 11 Moore, C. P. 283; 4 L. J. O. S. C. P. 118; 130 E. R. 555.

85. —— **Without declaring employment.**]—If the owner of goods or an estate put up to sale at an auction employ puffers to bid for him, without declaring it, it is a fraud on the real bidders, & the highest bidder cannot be compelled to complete the contract.—HOWARD *v.* CASTLE (1796), 6 Term Rep. 642; 101 E. R. 748.

Annotations:—**Consd.** Bramley *v.* Alt (1798), 3 Ves. 620. **Expld.** Smith *v.* Clarke (1806), 12 Ves. 477; Crowder *v.* Austin (1826), 11 Moore, C. P. 283. **Consd.** Thornett *v.* Haines (1846), 15 M. & W. 367. **Refd.** Bexwell *v.* Christie (1776), 1 Cowp. 395; Fuller *v.* Abrahams (1821), 6 Moore, C. P. 316; Green *v.* Baverstock (1863), 14 C. B. N. S. 204.

86. —— ——.]—If the owner of an estate put up for sale by auction employs a person to bid for him, the sale is void, although only one such person is employed, & although he is only to bid up to a certain sum, unless it is announced at the time that there is a person bidding for the owner.—WHEELER *v.* COLLIER (1827), Mood. & M. 123.

Annotations:—**Dbtd.** Birch *v.* Hanson (1831), 1 L. J. Ch. 42. **Consd.** Thornett *v.* Haines (1846), 15 M. & W. 367. **Refd.** Green *v.* Baverstock (1863), 14 C. B. N. S. 204. **Mentd.** Dobell *v.* Hutchinson (1835), 3 Ad. & El. 355; Laythorpe *v.* Bryant (1836), 2 Hodg. 25; Williams *v.* Byrnes (1863), 1 Moo. P. C. C. N. S. 154.

87. ——**Where sale declared without reserve.**]—Estates were put up to sale, & in the particulars of sale it was stated that they were to be sold "without reserve." The vendors employed a puffer, who actually bid at the sale:—*Held:* a bill for specific performance would not lie against the purchaser at such sale.—MEADOWS *v.* TANNER (1820), 5 Madd. 34; 56 E. R. 807.

Annotations:—**Refd.** Thornett *v.* Haines (1846), 15 M. & W. 367; Robinson *v.* Wall (1847), 2 Ph. 372.

88. —— ——.]—Where a sale by auction is advertised or stated by the auctioneer to be "without reserve," the employment by the vendor of a puffer to bid for him, without notice, renders the sale void, & entitles the purchaser to recover back his deposit from the auctioneer.—THORNETT *v.* HAINES (1846), 15 M. & W. 367; 15 L. J. Ex. 230; 7 L. T. O. S. 264; 153 E. R. 892.

Annotations:—**Folld.** Green *v.* Baverstock (1863), 14 C. B. N. S. 204. **Refd.** Warlow *v.* Harrison (1859), 1 E. & E. 309, Ex. Ch.; Parfitt *v.* Jepson (1877), 46 L. J. Q. B. 529.

89. —— ——.]—Where property is advertised to be sold "without reserve," such advertisement is understood to exclude any interference by the vendor, either direct or indirect, which can in any possible circumstances affect the right of the highest bidder, whatever may be the amount of his bidding, to be declared the purchaser; & any evasion of that engagement on the part of the vendor, being a violation of his contract with the public, will disentitle him to the aid of a ct. of equity to enforce the sale. Where previous to a sale of a life interest, advertised to be "without reserve," the vendor entered into a private agreement with another that the latter should bid a certain sum at the auction, & be purchaser at that sum unless a higher sum were bid, a bill by the vendor for specific performance against a third party who had been declared purchaser at the auction, though for a much higher price, was dismissed.—ROBINSON *v.* WALL (1847), 2 Ph. 372; 16 L. J. Ch. 401; 9 L. T. O. S. 389; 11 Jur. 577; 41 E. R. 986.

90. —— ——.]—A declaration alleged that deft. exercised the trade of an auctioneer & was employed to sell by public auction certain horses, & advertised that there would be sold by auction a

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83 i. *Employment of puffer vitiates sale.*]—The fact of puffers being employed by a vendor at a public sale of a number of lots, although none were proved to have bid on the particular lots which the vendee agreed to purchase, was a good ground of answer to a bill by the vendor for specific performance.—JENNINGS *v.* HART (1875), 1 R. & C. 15. —**CAN.**

83 ii. ——.]—Pltf. filed a bill for specific performance of a contract alleged to be made at an auction sale of lands, at which pltf. was a bidder. Deft. set up that pltf. was a puffer, & the sale illegal. Pltf moved to strike out the allegations as scandal & impertinence; & deft. moved that pltf. submit to examination, he having refused to answer questions relating to the alleged fraudulent features of the transaction:—*Held:* the matter was not scandalous, & pltf. must answer all proper questions.—JONES *v.* HUNTINGDON (1870), 3 Ch. Ch. 117.—**CAN.**

83 iii. ——.]—Where the vendor's bidder after all real bidders except the vendee had dropped out ran the vendee up by small bids to a price far in advance of the value of the article sold, it was held that a fraud had been practised on the vendee & the sale could not stand.—WRIGHT *v.* BENTLEY (1913), N. S. R. 534.—**CAN.**

83 iv. ——.]—It is unlawful for a vendor to bid at a sale of his own goods, & for the auctioneer to take such bid, unless the right to bid was reserved to him.—CHRISTIE *v.* QUAIFE (1906), 26 N. Z. L. R. 495.—**N. Z.**

87 i. —— *Upset price.*]—The objection to allowing a person who has the conduct of a sale to bid disappears when the property is sold at an upset price instead of subject to a reserve bid.—GRIESBACH *v.* HOGAN (1915), 8 W. W. R. 356.—**CAN.**

p. —— *Bidding by cestui que trust.*]—Trustees exposed the trust-property to sale by public auction. The upset price was offered by A., & after a competition between him & B. the property was knocked down to the latter. There was no other offerer. A. was the sole residuary legatee under the trust settlement:—*Held:* A. was, though not the nominal, the virtual seller, & his biddings were, therefore, illegal, as being contrary to the *bona fides* of the contract between a seller by public auction & the public.—FAULDS *v.* CORBETT & MILLER (1859), 31 Sc. Jur. 313; 21 Dunl. (Ct. of Sess.) 587.—**SCOT.**

q. —— *Buying in without notice.*]—The vendor cannot agree with the auctioneer to buy in at a reserve price without giving notice that the sale is subject to reserve.—BRODIE *v.* DOWELL (1894), 2 S. L. T. 9.—**SCOT.**

r. —— ——.] — At the sale of a ship announced to be at the pleasure of the co., A. bid £260. The auctioneer then bought in the ship for £300. Subsequently the ship was put up for sale a second time & sold for £325:—*Held:* the auctioneer was not entitled to buy in the ship.—CREE *v.* DURIE (1810), 16 Fac. Coll. 66.—**SCOT.**

mare, "the property of a gentleman, without reserve," that pltf. attended the sale & became the highest bidder, & "deft. became & was the agent of pltf. to complete the contract, on behalf of pltf., for the purchase of the mare, but wholly omitted & refused so to do," whereby pltf. was deprived of the benefit of the contract. Pleas: (1) not guilty; (2) that pltf. was not the highest bidder; (3) that deft. did not become pltf.'s agent as aforesaid. On the trial it was proved that deft. advertised the sale of the mare & issued particulars stating it to be "the property of a gentleman, without reserve." Pltf. made a bid; the owner of the mare bid higher. Pltf., having found out that the last bidder was the owner, refused to make a further bid, & deft. knocked the mare down to the owner, but it did not appear that deft. knew that the last bidder was the owner. Pltf. tendered the amount of his own bid, & required deft. to deliver to him the mare, which deft. refused to do:—*Held:* (1) deft. was entitled to judgment, the issue on the third plea not having been sustained by pltf.; (2) deft. might have been liable to pltf. on a declaration complaining that deft. had undertaken to sell the mare without reserve, & had not done so.

The sale was announced by them to be "without reserve." This means that neither the vendor nor any person in his behalf shall bid at the auction, & that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not. The auctioneer has contracted that the sale shall be "without reserve," & the contract is broken upon a bid being made by or on behalf of the owner, whether it be during the time when the property is under the hammer, or it be the last bid upon which the article is knocked down; in either case the sale is not "without reserve," and the contract of the auctioneer is broken (MARTIN, B.).—WARLOW *v.* HARRISON (1859), 1 E. & E. 309; 29 L. J. Q. B. 14; 1 L. T. 211; 6 Jur. N. S. 66; 8 W. R. 95; 120 E. R. 925, Ex. Ch.

Annotations:—**Consd.** Mainprice *v.* Westley (1865), 6 B. & S. 420; McManus *v.* Fortescue, [1907] 2 K. B. 1, C. A. **Refd.** Harris *v.* Nickerson (1873), L. R. 8 Q. B. 286. **Mentd.** Wiley *v.* Crawford (1861), 1 B. & S. 265, Ex. Ch.; *Re* Agra & Masterman's Bank, *Ex p.* Asiatic Banking Corpn. (1867), 2 Ch. App. 391, L.JJ.; Woolf *v.* Horne (1877), 46 L. J. Q. B. 534; Johnston *v.* Boyes (1899), 68 L. J. Ch. 425; Rainbow *v.* Howkins, [1904] 2 K. B. 322.

91. —— Where sale not announced to be without reserve.]—The vendor of goods at a sale by public auction not announced to be without reserve secretly employed a person to bid for him. The goods were knocked down to deft. the highest bidder, who subsequently refused to complete his contract, & the goods were ultimately resold at a loss. In an action for the loss sustained:—*Held:* the secret employment of the bidder by pltf. was evidence to go to the jury in support of a plea of fraud. —GREEN *v.* BAVERSTOCK (1863), 14 C. B. N. S. 204; 2 New Rep. 128; 32 L. J. C. P. 181; 8 L. T. 360; 10 Jur. N. S. 47; 143 E. R. 424.

Annotation:—**Consd.** Parfitt *v.* Jepson (1877), 46 L. J. Q. B. 529.

92. —— Sale under extent—Bidding reserved to Crown agent.]—The employment of a puffer at a sale by auction of property seized under an extent by an agent of the Crown, to whom a bidding is reserved by the conditions of sale, vitiates the sale. The misconduct of the purchaser does not preclude him from objecting to the employment of a puffer at a sale by auction.—R. *v.* MARSH (1829), 3 Y. & J. 331; 148 E. R. 1206.

93. —— At law—Different rule in equity.]—Where property is put up for sale by auction, with the usual condition that the highest bidder shall be the purchaser, & without any stipulation as to the reservation of a bidding by the vendor, the rule at law is that such condition prevents the vendor from interposing any reservation, & a bidding by the vendor or his agent in such circumstances will, in a ct. of law, be treated as no bidding. *Qu.:* whether a different rule exists in equity, & whether vendors are considered by cts. of equity to be at liberty, without express stipulation, to reserve a bidding to themselves, or, in other words, to employ a person to bid for them up to a reserved price.—MORTIMER *v.* BELL (1865), 1 Ch. App. 10; 35 L. J. Ch. 25; 13 L. T. 348; 29 J. P. 803; 11 Jur. N. S. 897; 14 W. R. 68, C. A.

Annotation:—**Consd.** Parfitt *v.* Jepson (1877), 46 L. J. Q. B. 529.

94. —— Not where there have been real bidders as well as puffers.]—*Semble:* where all the bidders at an auction, except a purchaser, are merely puffers, the sale is fraudulent against such purchaser, but where there are any real bidders who bid against each other, the biddings of the puffers will by no means render the sale invalid.—CHRISTIE *v.* A.-G. (1796), 6 Bro. P. C. 520; 2 E. R. 1239.

95. —— Not where puffer declared by auctioneer.]—Deft., purchaser of a meadow by auction, objected that the lot was raised to an extravagant price by puffing. The auctioneer had declared the person bidding for pltf. The lot was put up at £900, deft. bid £910, the person bidding for pltf. £920, & the lot was knocked down to deft. for £950. Specific performance was decreed with costs.—BOWLES *v.* ROUND (1800), 5 Ves. 508; 31 E. R. 701.

Annotation:—**Mentd.** Ashburner *v.* Sewell, [1891] 3 Ch. 405.

96. —— —— Declaration not heard by purchaser.]—Property, the subject of a suit, was put up to sale by auction under the decree of the ct., the decree giving leave to all the parties (including pltf., the mtgee. in possession, who had the conduct of the sale, & whose mtge. debt exceeded the value of the property) to bid at the sale. The particulars of sale stated nothing about this leave to bid, nor did they state whether the sale was with or without reserve. At the sale the mtgee. bid against the person who was ultimately declared purchaser, but ceased to bid when the price reached covered the amount of the mtge. debt. Purchaser afterwards petitioned the ct. that he might be discharged from his contract, alleging that he had discovered that the estate was of much less value than the price at which it was knocked down to him, & that the mtgee.'s biddings were puffing biddings, invalidating the sale. The evidence showed that the auctioneer stated in the auction room that the property was sold without reserve, & would be knocked down to the highest bidder, & that all the parties to the suit had leave to bid at the sale; but the purchaser swore that he heard only the statement that the sale was without reserve:—*Held:* the purchaser could not, on this ground, be discharged from his contract. *Semble:* if the auctioneer had merely stated that the sale was without reserve, the sale would have been void.—DIMMOCK *v.* HALLETT (1866), 2 Ch. App. 21; 36 L. J. Ch. 146; 15 L. T. 374; 31 J. P. 163; 12 Jur. N. S. 953; 15 W. R. 93, L.JJ.

Annotations:—**Mentd.** Whittemore *v.* Whittemore (1869), L. R. 8 Eq. 603; Phillips *v.* Miller (1874), 43 L. J. C. P. 74; Goddard *v.* Jeffreys (1881), 51 L. J. Ch. 57; *Re* Terry & White's Contract (1886), 32 Ch. D. 14, C. A.

97. —— Not where purchaser knows there are puffers.]—A., being requested to attend an auction to bid for the vendors, declined, saying he intended to bid for himself. The estate was put up in lots, & three in-bidders were appointed, without notice to the persons present. A. purchased two lots, but it did not appear whether or not his biddings were upon those of the respective in-bidders. Assuming that they were severally appointed to bid for respective lots, & that some one of them bid upon each of

Sect. 3.—Sales subject to reserve and vendor's right to bid: Sub-sect. 2. Sects. 4 & 5.]

the lots purchased by A. :—*Held :* (1) it could not be inferred that A.'s biddings were upon those of a puffer ; (2) he, at any rate, could not claim relief for want of notice, because he knew that biddings would be made for the vendors ; (3) specific performance should be decreed. *Semble :* there being one bidder for the vendors upon each lot, without public notice, is not in itself sufficient to vitiate the sale, at least if the final bidding is not upon that of a puffer.—BIRCH *v.* HANSON (1831), 1 L. J. Ch. 42.

98. —— Not where employed to bid up to reserve figure.]—At an auction one person only bid for the vendor to £75 an acre, upon a private notice to the auctioneer. Then after a contest with real bidders the estate was bought at £101 17*s.* an acre, & the purchaser some days afterwards paid the duty. He was decreed to perform the contract with costs.—BRAMLEY *v.* ALT (1798), 3 Ves. 620 ; 30 E. R. 1186.

Annotations :—**Refd.** Smith *v.* Clarke (1806), 12 Ves. 477 ; Mortimer *v.* Bell (1865), 1 Ch. App. 10, L.C. **Mentd.** Bell *v.* Balls (1897), 76 L. T. 254.

99. —— ——.]—The circumstance that a person bid at an auction under the private direction of the vendors, for the purpose of preventing a sale under a sum, specified as the value, is no objection to a specific performance, especially in a case where the vendors were assignees under a commission of bkpcy., & the purchaser was not present, but purchased by an agent. *Qu. :* whether bidding at an auction on the part of the vendor, for the purpose of enhancing the price, vitiates the sale, & prevents specific performance.—SMITH *v.* CLARKE (1806), 12 Ves. 477 ; 33 E. R. 180.

Annotations :—**Refd.** Flint *v.* Woodin (1852), 9 Hare, 618 ; Mortimer *v.* Bell (1865), 1 Ch. App. 10, L.C.

100. —— —— No averment that no real bidder.]—A bill was filed by exors. to compel deft., the best bidder at a sale by auction of testator's house, to complete his purchase. The answer stated that persons were employed to bid, & did bid, for pltfs., for the purpose of fraudulently advancing the price above its fair value, but it was not averred that there was no real bidder. In fact, one person only was employed, & bid, for the vendors. Specific performance was decreed, but upon a rehearing the bill was dismissed upon terms.—CONOLLY *v.* PARSONS (1797), 3 Ves. 625, n. ; 30 E. R. 1188.

101. —— ——.]—At the sale of an estate by public auction, one of the conditions being that the highest bidder should be the purchaser, a person attended who had no intention of being a purchaser but was employed by the vendor to bid in order to prevent the property from being sold at an under value, & this person made several biddings till he reached the sum of £650, when he ceased to bid. The property was afterwards purchased for £690, it being probable there were several intermediate bids. Upon the purchaser objecting to perform his contract, on the ground that puffers had been employed at the sale, the ct. decreed specific performance, the purchaser declining to have the validity of the contract tried in a ct. of law. *Qu. :* whether the declarations of an auctioneer at a sale to the effect that there are no puffers are receivable in evidence, unless the expressions used are put in issue by the pleadings.—WOODWARD *v.* MILLER (1845), 2 Coll. 279 ; 15 L. J. Ch. 6 ; 6 L. T. O. S. 167 ; 9 Jur. 1003 ; 63 E. R. 734.

Annotations :—**Consd.** Thornett *v.* Haines (1846), 15 M. & W. 367. **Refd.** Mortimer *v.* Bell (1865), 1 Ch. App. 10, L.C.

102. —— ——.]—Though a puffer ought not to be employed to screw up the price, or take advantage of the ignorance of other bidders, yet a progressive bidding to a fixed or reserved bidding by a person employed by the vendor, without the knowledge of the other bidders, will not necessarily be deemed to be taking an advantage of their ignorance.—FLINT *v.* WOODIN (1852), 9 Hare, 618 ; 22 L. J. Ch. 92 ; 19 L. T. O. S. 240 ; 16 Jur. 719 ; 68 E. R. 660.

Annotations :—**Refd.** Mortimer *v.* Bell (1865), 1 Ch. App. 10, L.C. **Mentd.** McMurray *v.* Spicer (1868), L. R. 5 Eq. 527.

103. Proof of puffing—Agreement to allow bidder discount.]—An agreement between the owner & a bidder at a sale by auction to allow the latter discount if he becomes the bidder is a gross fraud (LORD MANSFIELD, C.J.).—BEXWELL *v.* CHRISTIE (1776), 1 Cowp. 395 ; 98 E. R. 1150.

Annotations :—**Consd.** Howard *v.* Castle (1796), 6 Term Rep. 642 ; Smith *v.* Clarke (1806), 12 Ves. 477. **Refd.** Twining *v.* Morrice (1788), 2 Bro. C. C. 326 ; Green *v.* Baverstock (1863), 14 C. B. N. S. 204.

104. —— Indirect evidence admissible.]—In order to render a sale invalid, on the ground of puffing, it is not necessary to connect the puffer with the principal by direct proof ; indirect evidence is sufficient for this purpose.—THORNETT *v.* HAINES (1846), 7 L. T. O. S. 264.

105. Puffing must be specially pleaded.]—In an action of *assumpsit* for not completing the purchase of a house, deft. cannot, under the general issue, set up as a defence that the sale was a sale by auction, & void on the ground of puffing, as this must be specially pleaded.—ICELY *v.* GREW (1834), 6 C. & P. 671.

106. Fictitious bids by parties without knowledge of vendor—Sale not invalid.]—At an auction for the sale of some mtged. property sold by order of the ct., a person, acting in the interest of the mtgor., who had no intention of purchasing the property, & no means of so doing if it were sold to him, bid for it, & ran up the price considerably above the reserve, when it was knocked down to deft. Pltfs., the mtgees., who had the conduct of the sale, had no knowledge of this dishonest bidding, & were not party to it in any way —*Held :* pltfs. could enforce the contract.—UNION BANK OF LONDON *v.* MUNSTER (1887), 37 Ch. D. 51 ; 57 L. J. Ch. 124 ; 57 L. T. 877 ; 52 J. P. 453 ; 36 W. R. 72 ; 4 T. L. R. 29.

107. —— ——.]—A horse advertised for sale by auction as the property of D. was sold privately

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105 i. *Puffing must be specially pleaded.*]—One of several creditors, acting on his own behalf, bid & was preferred to a purchase at an auction under a bond & disposition in security. An unsuccessful bidder brought an action for reduction of the minute of enactment & preference, & for declarator that he was entitled to the property at his bid. He pleaded that, by bidding, the bondholder, being one of the sellers, had acted illegally ; but he did not aver that there was collusion between the purchaser & the other bondholders, or that the property had been bought on their behalf. The ct. dismissed the action, holding that pursuer, being a third party, could only succeed on the ground that the purchaser was not a *bonâ fide* bidder, & that had not been averred.—WRIGHT *v.* BUCHANAN, [1917] S. C. 73.—**SCOT.**

106 i. *Fictitious bids not puffing.*]—A sale of lands by auction being about to take place, an intending purchaser was told by a person who had previously purchased a portion of the same property that he intended buying additional portions thereof, & that he was prepared to go as high as £100 per acre for that portion which he intended to buy. By an arrangement between the owner of the estate & this person it was agreed that he should have the lots desired by him at the same price as he had paid for his first purchase, no matter at what price they might be knocked down to him ; they were accordingly bid off by him at a rate much higher than that formerly paid :—*Held :* this was not puffing, although it might have the effect of misleading the intending purchaser.—CROOKS *v.* DAVIS (1857), 6 Gr. 317.—**CAN.**

s. *No right to withdraw goods where sale without reserve.*]—*Semble :* where goods are sold by auction it will ordinarily be a reasonable precaution to fix reserve bid ; but unless the auction sale is expressly "without reserve" the seller can at any time before the goods are knocked down to a bidder by the auctioneer withdraw them from sale.—VANSTONE *v.* SCOTT (1908), 8 W. L. R. 919 ; 1 Alta. L. R. 462 ; 9 W. L. R. 257.—**CAN.**

before the sale to A., who instructed the auctioneer to put up the horse. The horse, which the auctioneer described as the property of D., was knocked down to pltf., A. having run up the bidding. D. was aware of the misdescription, but not of the fact that A. had run up the bidding :—*Held :* the sale was not vitiated on that ground.—WHURR *v.* DEVENISH (1904), 20 T. L. R. 385.

108. Bidding with intention to buy—Concealment—Sale set aside.]—One of the members of an insolvent firm was separately insolvent & *non compos ;* another was separately adjudicated bkpt. In order to procure a title to the separate interest of the *non compos* partner (whose separate creditors would not enter into an arrangement for releasing it) one of the creditors, who was also a separate creditor of the bkpt. partner, obtained an execution against the *non compos* partner, & sold by the sheriff at auction, expecting & intending to purchase himself, & sent a clerk to bid up to £150. Pltf. purchased at £151, the property being quite worthless :—*Held :* such concealment of circumstances as to justify the sale being set aside, with costs.—SMITH *v.* HARRISON (1857), 26 L. J. Ch. 412 ; 29 L. T. O. S. 11 ; 3 Jur. N. S. 287 ; 5 W. R. 408.

109. Effect of auctioneer disclosing reserve price—Contrary to instructions.]—An estate was put up for sale by auction & bought in, as the bidding did not reach the price fixed by the ct. The auctioneer, before he left the desk, made known the reserved price, & a person who had been present at the sale agreed to become the purchaser at that sum ; he, accordingly, signed the bidding paper & paid the deposit :—*Held :* the sale was good, & he could not dispute the sale or the contract, or repudiate the purchase.—ELSE *v.* BARNARD, *Ex p.* COURTAULD (1860), 28 Beav. 228 ; 29 L. J. Ch. 729 ; 2 L. T. 203 ; 6 Jur. N. S. 621 ; 54 E. R. 353.

110. Effect of bonâ fide mistake in instructing auctioneer—Regarding reserve price.]—Where a vendor made a *bonâ fide* mistake as to the authority which he had given to the auctioneer, & the property was knocked down to a purchaser for a less sum than the vendor considered that he had instructed the auctioneer to sell at, the ct. refused to decree specific performance of the contract at the instance of the purchaser.—DAY *v.* WELLS (1861), 30 Beav. 220 ; 25 J. P. 787 ; 7 Jur. N. S. 1004 ; 9 W. R. 857 ; 54 E. R. 872.

Annotation :—**Refd.** Bell *v.* Balls, [1897] 1 Ch. 663.

Mock auctions & crimes in regard to sales by auction.]—*See* CRIMINAL LAW & PROCEDURE.

SECT. 4.—ADVERTISEMENT OF THE AUCTION.

Rights of an intending purchaser when the property advertised is not put up for sale. *See* No. 335, *post.*

SECT. 5.—PARTICULARS AND CONDITIONS OF SALE.

See, also, Part III., Sect. 1, *ante.*

111. Authority to draw up.]—*Qu. :* as to the authority of an auctioneer to draw up conditions of sale.—PIKE *v.* WILSON (1854), 1 Jur. N. S. 59.

112. Duty in regard to particulars.]—By a public Act a co. were authorised to raise money (*inter alia*) by granting annuities for term of years, or for life. The Act did not contain any provision that the annuities should or should not be redeemable. The co., however, in the original grant, reserved to themselves a power of redemption :—*Held :* in these circumstances an auctioneer putting up to sale one of these annuities was bound, in his particulars of sale, to describe it as a redeemable annuity, & was liable to refund the purchaser his deposit for omitting to do so.

It is of great consequence to the public that auctioneers, who take upon themselves to describe in their particulars the property to be sold, should truly describe it, for the buyers act on the faith of those descriptions. We ought not, therefore, to be astute in curing the defects which are apparent on the face of these particulars (ABBOTT, C.J.).—COVERLEY *v.* BURRELL (1821), 5 B. & Ald. 257 ; 106 E. R. 1186.

Annotation :—**Refd.** Grosvenor *v.* Green (1858), 32 L. T. O. S. 252.

113. Communication of conditions—What is sufficient.]—Where the conditions of sale are printed & pasted up under the auctioneer's box, & the auctioneer declares that the conditions are as usual, there is sufficient notice to purchasers of the conditions.—MESNARD *v.* ALDRIDGE (1801), 3 Esp. 271.

114. —— As altered—Not heard by bidder.]—Premises were advertised to be sold according to certain printed particulars & conditions of sale. Before the sale took place, several of the printed copies were altered by the vendor's solr., who introduced in writing a reservation of a right-of-way to other premises belonging to the vendor. Several of

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PART IV. SECT. 4.

t. *Judicial sales — Form of advertisement.*]—Advertisements for sales should be as short as possible ; the short style of the cause & a short description of the property & improvements is sufficient, & no merely formal parts, such as convey no information to intending purchasers, should be inserted therein.—BAXTER *v.* FINLAY (1864), 1 Ch. Ch. 230.—**CAN.**

PART IV. SECT. 5.

113 i. *Communication of conditions—Necessity of proof.*]—At a sale by auction, the conditions of sale empowered the vendor to resell, if the purchaser made default within a specified period, & to charge the purchaser with his loss. In an action by the vendor :—*Held :* (1) the purchaser was bound by the conditions ; (2) it was not necessary to show that the conditions were read or exhibited at the sale.—LAING & SONS *v.* HAIN (1853), 15 Dunl. (Ct. of Sess.) 667 ; 25 Sc. Jur. 405.—**SCOT**

113 ii. —— *Exposed but not read by purchaser.*]—Printed conditions of sale, being up in conspicuous places in the auction room, are binding upon a purchaser who knows of their existence, although he has not read them.—WHITE & CO., LTD. *v.* DOUGHERTY (1891), 18 R. (Ct. of Sess.) 972 ; 28 Sc. L. R. 732.—**SCOT.**

113 iii. —— *Ledger heading not shown to purchaser.*]—A heading in an auctioneer's ledger not shown to a purchaser before the sale is not binding on him.—MEGAW *v.* MOLLOY (1878), 2 L. R. Ir. 530.—**IR.**

a. *Effect of conditions — Loss of articles—Short delivery.*]—C. exposed to public sale a quantity of stoneware, under the condition that purchasers were to satisfy themselves as to the quantity & quality of the articles before bidding, as no alteration could afterwards take place, & to carry them away, & settle for them immediately after the sale. G. purchased goods according to a list which was exhibited. On comparing the articles with the list G. found several wanting & sent back the set, which, after having been kept by C. for some time, was returned. In an action for the price :—*Held :* whether or not the alleged articles of roup might have been sufficient to relieve the seller from all questions as to the quality of the articles sold, they could not relieve him from the delivery of the articles sold according to the list delivered to the purchaser.—GALLETLY *v.* CHILD (1824), 3 Sh. (Ct. of Sess.) 142.—**SCOT.**

b. *Effect of prior agreement.*] — Conditions of sale imposed at time of sale at auction are binding notwithstanding an agreement made before sale.—MEAD *v.* HENDRY (1844), 1 U. C. R. 238.—**CAN.**

c. *Conditions read at auction — Different conditions inserted in memorandum—Purchaser not bound.*]—The conditions of sale annexed to the memorandum of purchase signed by deft.'s agent on his behalf after the sale differed materially from those annexed to the catalogue which were read out at the auction & on the terms of which his deposit was paid. In an action brought by the vendor to recover his loss on a resale in accordance with the conditions annexed to the memorandum :—*Held :* (1) deft. purchased on the conditions read out at the auction ; (2) pltf., having sued on a different contract, could not recover.—PAGE *v.* COWASJEE EDULJEE (1866), 3 Moo. P. C. C. N. S. 499 ; 16 E. R. 189.—**IND.**

Sect. 5.—Particulars and conditions of sale. Sect. 6.]

the altered copies of the particulars were laid on the table of the auction room, without any remark with regard to the alteration, & an altered copy was delivered to the auctioneer, who read same aloud before the biddings commenced, but the party who became the purchaser did not hear or notice the alteration. The contract was inadvertently signed by the auctioneer & by the purchaser on a copy of the particulars of sale not containing the reservation. After the purchase-money was paid & possession given, the purchaser filed his bill for specific performance of the contract by a conveyance from the vendor, without a reservation of the right-of-way, but the bill was dismissed without costs.—MANSER *v.* BACK (1848), 6 Hare, 443; 67 E. R. 1239.

Annotations :—**Consd. & Folld.** *Re* Hare & O'More's Contract, [1901] 1 Ch. 93. **Mentd.** Tamplin *v.* James (1880), 15 Ch. D. 215, C. A.; Rainbow *v.* Howkins, [1904] 2 K. B. 322; Douglas *v.* Baynes, [1908] A. C. 477, P. C.

115. —— —— ——.]—A clear & distinct statement by an auctioneer at the time of sale verbally correcting a material misdescription in the particulars disentitles the purchaser to specific performance with compensation for that misdescription, even if he does not hear the statement.—*Re* HARE & O'MORE'S CONTRACT, [1901] 1 Ch. 93; 70 L. J. Ch. 45; 83 L. T. 672; 49 W. R. 202; 17 T. L. R. 46; 45 Sol. Jo. 79.

See, also, Sect. 6, *post.*

116. —— **Containing misdescription.**]—Certain property described in the particulars as an immediate absolute reversion of a freehold estate was put up for sale by auction. By the conditions of sale, which were read in the auction room before the sale, but were not printed or circulated among those present, the property was stated to be subject to three mtges. The property was bought by pltf., who stated that he was deaf & did not understand that he was buying an equity of redemption. On a bill filed by pltf. to have the contract for sale rescinded :—*Held :* (1) the description of the property in the particulars of sale was misleading & the *onus* was on the vendor to show that the purchaser was not actually misled; (2) the reading of the conditions of sale in the auction room was not sufficient to convey to the purchaser a knowledge of the real facts; (3) pltf. was entitled to have the contract rescinded & his deposit returned.—TORRANCE *v.* BOLTON (1872), 8 Ch. App. 118; 42 L. J. Ch. 177; 27 L. T. 738; 37 J. P. 164; 21 W. R. 134, L.JJ.

Annotations :—**Consd.** Blaiberg *v.* Keeves (1906), 75 L. J. Ch. 464. **Mentd.** Carlish *v.* Salt, [1906] 1 Ch. 335; Nocton *v.* Ashburton, [1914] A. C. 932, H. L.

117. Sale in separate lots—Contracts cannot be consolidated.]—Where different lots are sold at an auction for different sums the contracts are separate, both in law & fact, & in a special action for refusing to adhere to the conditions of sale pltf. cannot consolidate the two contracts.—JAMES *v.* SHORE (1816), 1 Stark. 426.

Annotations :—**Mentd.** Casamajor *v.* Strode (1834), Coop. *temp.* Brough. 510; Franklin *v.* Lamond (1847), 11 Jur. 780.

—— **How far writing necessary.**]—*See* CONTRACT; SALE OF GOODS.

—— **Stamp duty.**]—*See* REVENUE.

SECT. 6.—VERBAL STATEMENTS BY AUCTIONEER.

See, also, Sect. 5, *ante.*

118. General scope of auctioneer's authority.]—As to a sale by an auctioneer, whatever is done by him must be held to be done by the principal.—BARDELL *v.* SPINKS (1846), 2 Car. & Kir. 646.

119. Binding on vendor—When within general scope of auctioneer's authority.]—Pltf., purchaser of the lease & goodwill of a public-house which was sold at an auction mart, sued deft., the former owner, for damage sustained by pltf. in consequence of a misstatement made by the auctioneer at the time of the sale as to the amount of business done at the house. The evidence was extremely contradictory as to the fact of the auctioneer having made any statement at all to the effect alleged. For deft. it was proposed to give evidence of a conversation between deft. & the auctioneer immediately before the sale began to show what authority was actually given by deft. to the auctioneer in respect of any warranty as to the amount of business :—*Held :* (1) this conversation was not evidence, as not having occurred in the presence of pltf.; (2) whether the statements made by the auctioneer were in conformity with his instructions or not, they were binding on deft., as made within general scope of his agent's authority, although he might have a remedy over against the auctioneer.—ETTY *v.* JACKSON (1837), 1 Jur. 83.

120. —— **When authorised by vendor's conduct.**]—The catalogue of a sale by auction described a horse as the property of D. Before the sale the horse was sold privately by D. to A., who instructed the auctioneer to put up the horse. The auctioneer did so, describing it as D.'s property. The horse was knocked down to pltf. D. was present throughout the sale. Pltf., discovering that the horse was not D.'s property at the time of the sale, claimed to rescind the contract of sale & to recover the price paid from D., on the ground that there was a material misrepresentation as to ownership, & that D. in lending his name as the ostensible seller became the agent of the real owner :—*Held :* (1) the representation as to ownership was material; (2) the auctioneer, in making it, was acting as D.'s agent & with his authority, inasmuch as D. assented to the auctioneer's conducting & authorised him to conduct the sale on the basis of the original representation; (3) D. was liable.—WHURR *v.* DEVENISH (1904), 20 T. L. R. 385.

121. Not binding on vendor—When made without authority.]—In Aug., 1878, deft. offered for sale by public auction a lease of a public-house. By the conditions of sale it was provided that "the lease to be granted shall contain the covenants, clauses, & provisions, & be in the form or to the effect set forth in the draft lease which will be produced on

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117 i. *Sale in separate lots.*]—The sale of each lot is a separate transaction.—COUSTON *v.* CHAPMAN (1872), L. R. 2 Sc. & Div. 250; 10 Macph. (Ct. of Sess.) 74; 44 Sc. Jur. 402, H. L.—**SCOT.**

d. *Sale by sample.*]—The exhibiting of a sample at an auction amounts to a representation that it was taken from the bulk about to be sold.—MEGAW *v.* MOLLOY (1878), 2 L. R. Ir. 530.—**IR.**

e. *Waiver of terms of credit & agreement to pay cash.*]—When goods are advertised for sale at auction, the terms stated "six months credit, three months without interest on approved note" or "on approved security," a buyer who declines to give the note required & says he will pay cash, & fails to do so after obtaining delivery, cannot avail himself of the six months' credit as a defence to an action for the purchase price. On the hearing of the appeal deft. sought to set up a subsequent verbal agreement on the part of pltf. to give further time :—*Held :* such defence, not having been pleaded, could not be raised on the hearing of the appeal.—CROSSMAN *v.* MOSELY (1915), 48 N. S. R. 227.—**CAN.**

PART IV. SECT. 6.

120 i. *Binding on vendor—When authorised by vendor's conduct.*]—By direction of deft., an engine was sold by auction in his presence. At this sale a claim to it was made by a third person, but the auctioneer stating that he had a guarantee from deft., pltf. bought it. The engine was afterwards recovered in an action by such third person :—*Held :* there was an express warranty of title by deft.—ROBBINS *v.* M'CULLOCH (1875), 1 V. L. R. 20.—**AUS.**

the sale & may be seen at the office of the auctioneers for seven days previous to the day of sale," & that "the property is presumed to be correctly described, but, as the premises may be viewed & the draft lease inspected at the office of the auctioneers, the purchaser shall be deemed to have bought with full knowledge of the contents thereof, & no error, misdescription, or omission in the particulars shall annul the sale, & no compensation shall be required for any such error, misdescription, or omission." There was no reference either in the conditions of sale or in the draft lease to the existence of any right of way from the garden of the public-house to Hampstead Heath, but, at the time of the sale, the auctioneer *bonâ fide*, but without any authority from deft. & acting entirely upon an inference drawn by himself from the appearance of the premises, & believing that there was a right of way through same & over the private road & so to Hampstead Heath, stated publicly that there was such a way, & spoke of it as enhancing the value of the premises :—*Held :* the evidence of what passed at the time of the sale was admissible as against the vendor, but no action could after the completion of the purchase be maintained against him to recover compensation for the innocent misrepresentation by the auctioneer.

There was no intention on the part of the lessor to authorise the auctioneer to warrant the existence of the way, or to undertake to convey it as an existing way (DENMAN, J.).—BRETT *v.* CLOWSER (1880), 5 C. P. D. 376.

Annotation :—**Mentd.** Angel *v.* Jay, [1911] 1 K. B. 666.

122. General rule as to auctioneer's statements at sale—Parol evidence.]—In the case of a general agent, as an auctioneer, he may at the auction state what limitations are imposed on his general power of agency, but that declaration must be of such a nature that the law will affect the person to be affected by it, as he would be affected under the general authority. Upon this principle loose declarations at a sale by public auction are not permitted to be proved by parol evidence (LORD ELDON, C.).—HOWARD *v.* BRAITHWAITE (1812), 1 Ves. & B. 202 ; 35 E. R. 79.

See, also, Nos. 16, 31, 96, *ante.*

123. Not admissible to discharge vendor.]—Where in the particulars of sale property was stated to be held under the C. estate upon three lives & it appeared, in an action to recover back the deposit, that one of the lives had dropped before the sale & that the property was not held directly under the C. estate :—*Held :* (1) the vendor could not call the auctioneer to prove that he stated before the sale that the life had dropped ; (2) the vendor might give evidence to show that before the sale the purchaser had read the original lease under which the property was held.—BRADSHAW *v.* BENNETT (1831), 5 C. & P. 48 ; 1 Mood. & R. 143.

124. Not admissible to vary printed conditions.]—The verbal declarations of an auctioneer at the time of the sale are not admissible evidence to contradict the printed conditions.—GUNNIS *v.* ERHART (1789), 1 Hy. Bl. 289 ; 126 E. R. 169.

Annotations :—**Refd.** Ogilvie *v.* Foljambe (1817), 3 Mer. 53 ; Shelton *v.* Livius (1832), 2 Cr. & J. 411. **Mentd.** Bartlett *v.* Pernell (1836), 2 Har. & W. 16 ; Eden *v.* Blake (1845), 13 M. & W. 614.

See, also, No. 115, *ante.*

125. ——.]—Printed conditions of sale of timber growing in a certain close did not state anything of the quantity :—*Held :* parol evidence, that the auctioneer at the time of sale warranted a certain quantity, was not admissible, as varying the written contract.—POWELL *v.* EDMUNDS (1810), 12 East, 6 ; 104 E. R. 3.

Annotations :—**Consd.** Bradshaw *v.* Bennett (1831), 5 C. & P. 48 ; Brett *v.* Clowser (1880), 5 C. P. D. 376. **Refd.** Shelton *v.* Livius (1832), 2 Cr. & J. 411. **Mentd.** Ogilvie *v.* Foljambe (1817), 3 Mer. 53 ; Bartlett *v.* Pernell (1836), 2 Har. & W. 16 ; Eden *v.* Blake (1845), 13 M. & W. 614.

126. ——.]—Verbal declarations of an auctioneer at the time of sale are not to be received in contradiction to the printed particulars. *Qu. :* as to the effect of personal information of a mistake in the particulars.—OGILVIE *v.* FOLJAMBE (1817), 3 Mer. 53 ; 36 E. R. 21.

Annotations :—**Refd.** Cowley *v.* Watts (1853), 22 L. J. Ch. 591 ; McMurray *v.* Spicer (1868), L. R. 5 Eq. 527. **Mentd.** Evans *v.* Jackson (1836), Donnelly, 147 ; A.-G. *v.* Dixon (1842), 1 Y. & C. Ch. Cas. 614 ; Clive *v.* Beaumont (1848), 1 De G. & Sm. 397 ; Cox *v.* Middleton (1854), 2 Eq. Rep. 631 ; Caton *v.* Caton (1867), L. R. 2 H. L. 127, H. L. ; Naylor *v.* Goodall (1877), 47 L. J. Ch. 53 ; Shardlow *v.* Cotterell (1881), 18 Ch. D. 280, C. A. ; Ellis *v.* Rogers (1885), 29 Ch. D. 661, C. A. ; Plant *v.* Bourne, [1897] 2 Ch. 281, C. A. ; Sheers *v.* Thimbleby (1897), 76 L. T. 709 ; Bank of New Zealand *v.* Simpson, [1900] A. C. 182, P. C. ; G. W. Ry. & Mid. Ry. *v.* Bristol Corpn. (1918), 87 L. J. Ch. 414, H. L. ; McGrory *v.* Alderdale Estate Co., [1918] A. C. 503, H. L.

127. ——.]—The printed particulars, under which a sale by auction proceeds, cannot be varied by parol evidence of the verbal statement of the auctioneer at the time of the sale, either as to the parcels or quality of the subject-matter of sale.—SHELTON *v.* LIVIUS (1832), 2 Cr. & J. 411 ; 2 Tyr. 420 ; 1 L. J. Ex. 139 ; 149 E. R. 175.

Annotations :—**Refd.** Bartlett *v.* Pernell (1836), 2 Har. & W. 16. **Mentd.** Eden *v.* Blake (1845), 13 M. & W. 614.

128. —— **Contract not in writing.**]—In the printed catalogue of articles intended to be sold by auction, a dressing case was described as having silver fittings, but previous to the sale of it the auctioneer stated publicly from his box, & in the hearing of deft., that the catalogue was incorrect in stating the fittings of the dressing case to be of

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124 i. *Not admissible to vary conditions.*]—Proof, that the auctioneer declared orally at the sale, that lots knocked down were to be held as delivered to the purchasers, is incompetent, where the articles of sale contain no such provision.—LANG *v.* BRUCE (1832), 10 Sh. (Ct. of Sess.) 777.—**SCOT.**

124 ii. ——.]—By the articles of a roup of a judicial sale, it was declared that Martinmas, 1843, should be the purchaser's term of entry, & that he should have right to the rents "falling due from & after the said term" :—*Held :* it was incompetent to control or modify the construction of the articles of roup by any declaration as to the meaning thereof.—STEVENSON *v.* MONCREIFF (1845), 7 Dunl. (Ct. of Sess.) 418 ; 17 Sc. Jur. 205.—**SCOT.**

f. *Public announcement at sale — Previous representation in catalogue.*]—In a printed catalogue of articles for sale a bull was stated to be "a sure stock-getter," but at the commencement of the sale the auctioneer publicly announced that the seller warranted nothing :—*Held :* pltf. (the purchaser) in an action as for a breach of warranty, was obliged to show that any warranty contained in the catalogue was imported into the auction sale.—CRAIG *v.* MILLER (1872), 22 C. P. 348.—**CAN.**

g. *Representations as to future happenings.*]—At a sale by auction, the conditions of sale, which were publicly read, stated that everything was sold "as it is." Pltf., before purchasing a cow, was informed by the auctioneer that she would calve in about three weeks' time. She did not calve until some months afterwards, & pltf. obtained judgment for a return of the price paid by him upon redelivery by him of the cow, & for his expenses in keeping her. On appeal :—*Held :* in the absence of any allegation & proof of fraud & in view of the fact that the statement had not been made with the object of varying the conditions of sale, but to express the auctioneer's own belief, erroneous though it was, the judgment ought to have been for the vendor.—DURR *v.* BAM (1890), 8 S. C. 22.—**S. AF.**

h. ——.]—At a sale by auction of certain kilns of bricks, the auctioneer stated that he sold them "as a lot" & not by number, & the seller, being asked by the auctioneer how many he estimated them to be, said "about eighty thousand." The purchaser on receiving delivery found there were only about fifty thousand, &, on being sued for the price, claimed a *pro ratâ* reduction :—*Held :* there was no warranty of quantity, & in the absence of bad faith on the part of the seller, he was entitled to claim the full price at which the kilns had been sold.—ELLIOTT *v.* MCKILLOP (1902), 19 S. C. 350 ; 12 C. T. R. 592.—**S. AF.**

silver, & that it would be sold as having plated fittings; but no alteration was made in the catalogue. Deft. afterwards bid for the dressing case, & became the purchaser. In an action by the auctioneer to recover the price of the dressing case, which was less than £10:—*Held:* parol evidence of that statement of the auctioneer at the time of the sale was admissible, the contract not being in writing.—EDEN *v.* BLAKE (1845), 13 M. & W. 614; 14 L. J. Ex. 194; 9 Jur. 213; 153 E. R. 257; *sub nom.* EADON *v.* BLAKE, 1 New Pract. Cas. 182; 4 L. T. O. S. 318.

129. Admissible to prove fraud.]—Parol evidence of declarations by the auctioneer at a sale warranting the quantity was received in opposition to specific performance, on the ground of fraud:—*Held:* performance should not be enforced.—WINCH *v.* WINCHESTER (1812), 1 Ves. & B. 375; 35 E. R. 146.

Annotations:—**Mentd.** Denny *v.* Hancock (1870), 18 W. R. 566; Huddersfield Corpn. *v.* Jacomb (1874), 30 L. T. 78; Joliffe *v.* Baker (1883), 11 Q. B. D. 255.

130. Whether admissible to explain ambiguities on face of particulars.]—Declarations of an auctioneer are not admissible in aid of specific performance upon the sale of an estate by auction to explain an ambiguity on the face of the particulars. *Semble:* it is otherwise where evidence is to resist specific performance.—HIGGINSON *v.* CLOWES (1808) 15 Ves. 516; 33 E. R. 850.

Annotations:—**Mentd.** Wall *v.* Stubbs (1815), 1 Madd. 80; Squire *v.* Campbell (1836), 1 My. & Cr. 459; Manser *v.* Back (1848), 6 Hare, 443; Eastes *v.* Russ (1913), 110 L. T. 296, C. A.

131. ——.]—In particulars of sale of annuities, the lots were described as "the life interest of S., etc.," & no mention was made of the time from which the purchaser was to receive the dividends, but at the time of the sale it was stated that the dividends to become due the following day would be the property of the purchaser:—*Held:* the purchaser was entitled to the dividends due the day after the sale.

With respect to the notice said to have been given at the sale, the ct. does not in general attend to that sort of notice, the babble of the auction room as it has been called, except in cases where we have to consider whether a purchaser is to take his bargain or not (LORD ELDON, C.).—ANSON *v.* TOWGOOD (1820), 1 Jac. & W. 637; 37 E. R. 511, L. C.

Annotation:—**Mentd.** Millican *v.* Vanderplank (1853), 11 Hare, 136.

132. ——.]—BRETT *v.* CLOWSER, No. 121, *ante.*

133. —— **Purchaser presumed to have knowledge.**]—Leasehold property was described in the particulars of sale as being occupied at an "annual rental," but it was not stated that the vendor as landlord paid the rates & taxes on the property, the tenancy being a monthly one. The purchasers, alleging that they were thereby led to infer that the tenancy was a yearly tenancy, & that the tenant paid the rates & taxes, claimed compensation pursuant to the conditions of sale. The vendor asserted that the purchasers had knowledge of the true facts of the case at the time of the sale, & evidence was adduced to prove that in the auction room a question was raised by a person present at the sale on the words "annual rental," & that in reply to an inquiry it was distinctly stated by the auctioneer that the landlord paid the rates & taxes & that the tenancy was a monthly tenancy:—*Held:* (1) the evidence was admissible; (2) the purchasers must be taken to have had knowledge of the facts, & to have known all the circumstances affecting the property for which they bid; (3) they were not entitled to compensation.—*Re* EDWARDS TO SYKES (DANIEL) & CO., LTD. (1890), 62 L. T. 445.

Annotation:—**Mentd.** *Re* Hare & O'More's Contract, [1901] 1 Ch. 93.

134. Admissible where particulars differ from conditions — Explanation insufficient.] — A dwelling-house was put up for sale by public auction, under a printed condition in a common form, that the lot was sold subject to any existing rights & easements of whatever nature, & the printed particulars made no mention of any easement, or of any claim to an easement. The house was subject to an easement belonging to the owner of a neighbouring tenement to use the kitchen for particular purposes, & the vendor's solr. knew of the rumoured existence of some such easement, but forbore to make inquiries. No grant of an easement appeared from the abstract, & its existence was, in fact, disputed on the pleadings. In the auction room the vendor's solr. said he had heard of some such claim, but had no definite information about it, & the auctioneer, in hearing of the vendor's solr., on being questioned, told the audience that they might dismiss the subject of the rumoured claims from their minds, as nobody would probably ever hear of them again:—*Held:* the conditions were misleading, & the statements in the auction room insufficient, & specific performance of the contract must be refused.—HEYWOOD *v.* MALLALIEU (1883), 25 Ch. D. 357; 53 L. J. Ch. 492; 49 L. T. 658; 32 W. R. 538.

Annotation:—**Mentd.** Nottingham Patent Brick and Tile Co. *v.* Butler (1885), 15 Q. B. D. 261.

135. Admissible when particulars differ from plan —Declaration that sale on particulars only ultra vires.]—A. purchased at an auction an estate described in the particulars as "Lot 3, being a certain freehold house, numbered," etc. With the particulars was folded up a plan, described as "the ground plan of the estate of the late W. L.," in which each lot was numbered to correspond with the particulars, & distinguished by lines & shadings as containing so many buildings & so much ground. The particulars did not refer to this plan. The title being settled, A. sent a surveyor over the property, & he then discovered that part of the land & buildings marked in the plan as belonging to Lot 3 had been conveyed to the purchaser of Lot 4, & that an upper room in an adjoining lot overhung & rested upon part of Lot 3. A. refused to complete his purchase. A motion was made by A. to be released from his purchase, or to have compensation, on the ground of misrepresentation. The auctioneer made an affidavit that he gave out to the persons present that he was selling by the particulars only, & not by the plan, which was merely for the general guidance of purchasers. The solr. of A. deposed that he was present during the time of the sale, & never heard any such intimation:—*Held:* (1) A. was entitled to be released from his purchase, on the ground of misrepresentation; (2) it was not competent to an auctioneer to say at the time of sale that he was not bound by the description generally, though he might be perhaps as to some specific point.—POPE *v.* GARLAND (1841), 4 Y. & C. Ex. 403; 10 L. J. Ex. Eq. 92.

Annotations:—**Mentd.** Strangways *v.* Bishop (1857), 29 L. T. O. S. 120; Grosvenor *v.* Green (1858), 28 L. J. Ch. 173; Evans *v.* Robins (1863), 11 L. T. 211, Ex. Ch.

136. Auctioneer's evidence admissible—Regarding what took place at auction.]—The evidence of an auctioneer is admissible to prove what took place at the auction.—SWAISLAND *v.* DEARSLEY (1861), 29 Beav. 430; 30 L. J. Ch. 652; 4 L. T. 432; 7 Jur. N. S. 984; 9 W. R. 526; 54 E. R. 694.

Annotation:—**Mentd.** Tamplin *v.* James (1880), 15 Ch. D 215, C. A.

SECT. 7.—BIDDING.

137. Right of public to bid—East India Company's sales—Compliance with conditions.]—The sales of the East India Co. were subject to a regulation that any buyer not making good the remainder of his purchase-money on or before the day limited for such payment should forfeit the deposit, " & should be rendered incapable of buying again at any future sale until he shall have given satisfaction to the Ct. of Directors " :—*Held :* (1) the term " satisfaction " meant pecuniary compensation for the non-performance of his agreement to pay on the appointed day ; (2) a buyer having made default on that day, but afterwards within a further time given to him by the co. paid the remainder of the purchase-money with interest, might maintain an action against the co. for refusing to permit him to become a bidder at their sales, such sales being by 9 Will. 3, c. 44, s. 69, declared to be public & open sales. *Qu. :* whether since 18 Geo. 2, c. 26, which regulated the deposits, forfeitures, & capacities of bidders at the tea sales of the co., the co. could make or enforce any other regulations affecting those sales than such as that Act had enacted.—EAGLETON *v.* EAST INDIA CO. (1802), 3 Bos. & P. 55 ; 127 E. R. 32.

Annotation :—**Mentd.** Kruse *v.* Johnson, [1893] 2 Q. B. 91, D. C.

138. Withdrawal of bid—Fall of hammer.]—A bidder at an auction, under the usual conditions that the highest bidder shall be the purchaser, may retract his bidding any time before the hammer is down.—PAYNE *v.* CAVE (1789), 3 Term Rep. 148 ; 100 E. R. 502.

Annotations :—**Consd.** Coles *v.* Trecothick (1804), 9 Ves. 234 ; Warlow *v.* Harrison (1858), 1 E. & E. 295. **Refd.** Routledge *v.* Grant (1828), 4 Bing. 653.

139. —— —— Sale by court.]—An estate sold under a decree was knocked down to the solr. of a mtgee., who was not a party to the suit, but consented to the sale. A motion by the solr. to be discharged from his purchase, on the ground that he retracted his bidding before the hammer fell, was refused with costs.—FREER *v.* RIMNER (1844), 14 Sim. 391 ; 60 E. R. 409.

140. Equal biddings—Duty of auctioneer.]—*Qu. :* whether, where there are two equal biddings, the auctioneer performs his mandate by selling to one of the bidders instead of going on & selling to the highest bidder.—CLARK *v.* RANDALL (1903), 19 T. L. R. 497, C. A.

141. Rights of bidder—Bidding 1 per cent. above offer of any other person.]—A., having bid 60 per cent. above the first offer (publicly made according to the directions of Land Tax Redemption Act, 1802 (c. 116)), & B. having subsequently bid 1 per cent. " above the offer of any other person," *semble :* B.'s offer was valid & binding as the highest offer within the Act, & B. could not be taken as a trustee for A.—WILLIAMS *v.* STEWARD (1817), 3 Mer. 472 ; 36 E. R. 182.

142. —— When highest bidder not declared purchaser.]—A bidder at a sale under the decree of the ct. who is not a party to the cause nor interested in the estate which is the subject of the sale has no right to apply to the ct. to set aside a sale to another bidder on the ground of irregularity in that the latter, although reported the purchaser, was not, in fact, the highest bidder. *Qu. :* whether he may apply to be declared purchaser in the place of the bidder reported to be the best purchaser.—HUGHES *v.* LIPSCOMBE (1846), 6 Hare, 142 ; 67 E. R. 1115.

143. —— When purchase of one lot conditional on sale of another.]—Two lots subject to a mtge. were offered for sale by auction under conditions providing that the sale of each lot was conditional on both being sold at the sale, & the purchaser of either lot was to be entitled to the return of the deposit & to any money paid by him into ct. in respect of the balance of the purchase, if the condition was not

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PART IV. SECT. 7.

137 i. *Right of public to bid—Refusal to accept bid.*]—An auctioneer is not bound to accept all bids from persons present at his auction. An action, therefore, will not lie for refusing to accept bids unless by reason of some special condition.—HOLDER *v.* JACKSON (1862), 11 C. P. 543.—**CAN.**

137 ii. —— —— *Sale without reserve.*]—Upon a sale without reserve, it is not open to the vendor to refuse a bid, however small.—O'CONNOR *v.* WOODWARD (1875), 6 P. R. 223.—**CAN.**

137 iii. —— —— *Conditions of sale.*]—The conditions of sale may empower the auctioneer to refuse bids from any member of a specified body.—SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY, LTD. *v.* GLASGOW FLESHERS' TRADE DEFENCE ASSOCN. (1898), 35 Sc. L. R. 645 ; 5 S. L. T. 263.—**SCOT.**

138 i. *Withdrawal of bid—Where there is mock bidding.*]—Mtgees. offered mtged. property for sale under power of sale. F. made mock bidding to swell price. Sale was adjourned for half an hour for F. to raise 20 per cent. as deposit. F. failed to return. Auctioneer proposed sale at next highest bid. R. withdrew his bid. Property was again put up & sold to next highest bidder, but at $3,500 less than his former bid :—*Held :* R. had a right to withdraw his bid when F. failed to put up the deposit.—KAISERHOF HOTEL CO. *v.* ZUBER (1912), 23 O. W. R. 305 ; 25 O. L. R. 194 ; 46 S. C. R. 651.—**CAN.**

138 ii. —— *Trade usage.*]—An agent of defts. made at an auction sale a bid for certain goods ; this bid was not at the time accepted by the auctioneers, but was referred to the owners of the goods for approval & sanction, the agent agreeing to such reference. The conditions of sale contained no clause stipulating for such procedure. Previous to any reply being received by the auctioneers from their principals, the principals of the agent bidding refused to acknowledge the bid of their agent. In a suit brought by the auctioneers to recover a loss on a resale of the goods, they set up a usage of trade, that the bidder was not at liberty to withdraw his bid until a reasonable time had been allowed for the auctioneers to refer the bid to the owner of the goods :—*Held :* the condition of sale containing no clause to the effect of the usage claimed, & there being no sufficient evidence that the usage was so universal as to become part of the contract by operation of law, there was no contract between the parties, & therefore no suit would lie.—MACKENZIE LYALL & CO. *v.* CHAMROO SINGH & CO. (1889), I. L. R. 16 Calc. 702.—**IND.**

141 i. *Rights of bidder—Highest bidder—Duty of auctioneer.*]—It is the duty of an auctioneer on the sale of goods to knock them down to the highest bidder, unless instructed to the contrary.—NELSON *v.* HICKS (1899), Q. R. 15 S. C. 465.—**CAN.**

141 ii. —— *When highest bidder not declared purchaser—Sale by court.*]—The " highest bidder " at an auction sale is the " purchaser " under the general orders of the ct., & the omission of the auctioneer to declare him the purchaser will not deprive him of his position.—MCALPINE *v.* YOUNG (1866), 2 Ch. Ch. 171.—**CAN.**

141 iii. —— *When highest bidder fails to fulfil contract.*]—Upon a bidding of £1,100, a person bid £1,150, & was declared the highest bidder ; but neglected paying in the deposit & could not be found ; the bidder of £1,100 being *bonâ fide,* & willing to abide by his offer, the ct. ordered that he should be declared the highest bidder, & be at liberty to proceed to confirm the sale.—WILLETT *v.* FLAHERTIE (1838), 6 Ir. L. Rec. N. S. 215.—**IR.**

141 iv. —— *When misled by mode of sale.*]—An auctioneer set up a property for sale, first in lots, then part of it in batches of some lots together, then the whole at once. He stated that he would receive biddings, & that the master would declare the purchaser. C. was the highest bidder for a batch of some lots, & afterwards for the whole :—*Held :* he was not entitled to be discharged from his bidding for the lots, though he was misled by the mode of selling, & meant to bid for the entire.—O'GRADY *v.* BRADY, 11 I. Eq. R. 400.—**IR.**

141 v. —— *Withdrawal of lot before acceptance of bid.*]—A bid is an offer, & is accepted by the fall of the hammer or any other agreed method. The auctioneer may, before he has accepted a bid, withdraw the property.—FENWICK *v.* MACDONALD, FRASER & CO. (1904), 6 F. (Ct. of Sess.) 850 ; 41 Sc. L. R. 638 ; 12 S. L. T. 227.—**SCOT.**

k. *Disputes as to bids—Duty of auctioneer.*]—The conditions of a sale by auction provided that in the event of any dispute as to the last or best bidder the land should be put up again for sale :—*Held :* it was within the province of the auctioneer to decide whether there was a *bonâ fide* dispute or not.—GREEN *v.* ROSE (1900), 21 N. S. W. Eq. 226.—**AUS.**

l. —— *Remedy of bidder.*]—Opinions expressed that where a prior bidder disputes the legality of the sale to a higher bidder at a public auction on grounds other than the fraud of the exposers, his remedy is reduction of the sale *in toto.*—SHIELL *v.* GUTHRIE'S TRUSTEES (1874), 1 R. (Ct. of Sess.) 1083 ; 11 Sc. L. R. 625.—**SCOT.**

fulfilled. O. became purchaser of one lot, the other lot not being sold. O. subsequently withdrew, & on the day after his withdrawal the other lot was sold by private contract:—*Held:* (1) the sale of the first lot was conditional on the second lot being sold at the sale by auction; (2) there was no contract binding on O.—*Re* PICKETT, EVANS *v.* PICKETT (1896), 40 Sol. Jo. 437.

144. —— When vendor instructs auctioneer not to take cheque for deposit.]—Defts. advertised a freehold public-house for sale by auction, under conditions providing that the highest bidder should be the purchaser, & that he should immediately after the sale pay to the auctioneer a deposit of 10 per cent. on the amount & in part payment of his purchase-money, & sign an agreement in the form annexed to the conditions, the form stating that the deposit had been paid. Pltf., a married woman with means at least sufficient to pay for the property, despatched her husband to bid for it. She did not entrust him with the cash necessary to pay the deposit. The property was knocked down to him at £4,900. He had a banking account of his own (which was not in credit to the amount of £490) & tendered his cheque for £490, the amount of the deposit. One of the vendors recognised him as one who had recently openly sworn that he had nothing in the world except the clothes he stood up in, &, on that vendor's instructions, the cheque was refused; the husband was not allowed to sign the contract, although he protested that his wife "would find the money to-morrow" & that he was buying for her, & the property was sold to some one else at an enhanced price. Pltf. thereupon sued the vendors for damages for breach of contract that the highest bidder should be the purchaser, & for refusing to allow the auctioneer to accept the cheque for the deposit, or to allow her husband to sign the contract. The ct. found that if the cheque had been accepted pltf. would have provided funds to meet it: —*Held:* (1) a vendor who offered property for sale by auction on the terms of printed conditions, could be made liable in damages to a person who accepted the offer & complied with the conditions if those conditions were violated by the vendor, & Stat. Frauds would be no defence; (2) no custom had been proved obliging a vendor to accept in payment of a deposit the cheque even of a person in credit, although such a course was usual, & no such custom could bind a vendor to accept a cheque from a pauper; (3) the conditions meant that the deposit was to be paid in cash, & the vendors were not bound to wait till the next day for it or to sign the contract until this condition precedent had been performed.—JOHNSTON *v.* BOYES, [1899] 2 Ch. 73; 68 L. J. Ch. 425; 80 L. T. 488; 47 W. R. 517; 43 Sol. Jo. 457.

145. —— When reserve price not reached.]—At a sale by auction subject to a reserve price on the article sold, where the fact that there is a reserve is known, the offer of the auctioneer to sell, the bidding, & the knocking down of the article to the highest bidder are all subject to the condition that the reserve price should be reached, & the fact that the auctioneer knocks down the article to a bidder who has bid a less price than the reserve gives the latter no right of action against the auctioneer, either for breach of duty in refusing to sign a memorandum of or otherwise complete the contract, or for breach of warranty of authority to accept the bid.—MCMANUS *v.* FORTESCUE, [1907] 2 K. B. 1; 76 L. J. K. B. 393; 96 L. T. 444; 23 T. L. R. 292; 51 Sol. Jo. 245, C. A.

Opening biddings.]—*See* SALE OF LAND.

Person bidding—Whether principal or agent.]—*See* AGENCY, Vol. I., pp. 626—628.

Who may bid—Trustee or cestui que trust.]—*See* TRUSTS & TRUSTEES.

——.]—*See* particular titles *passim.*

SECT. 8.—CONTRACT OF SALE.

146. Effect & application of Bills of Sale Acts, 1878 (c. 31), & 1882 (c. 43).]—At a sale of farm produce by auction, W. bought a stack of hay for £40 5*s*. The auctioneer's clerk signed the name of W. as purchaser in the auctioneer's book which, was also signed by the auctioneer, & contained a copy of the conditions of sale, & specified the lot & the price. No part of the purchase-money was paid, one of the conditions being that the purchaser was to have six months' credit, & the whole of the hay remained on the premises of the vendor & in his apparent possession. The entry in the auctioneer's book was not registered as a bill of sale under the above Act of 1878. The hay was seized in execution under a judgment obtained by creditors of the vendor:—*Held:* as the sale would have been void under Stat. Frauds, s. 17, but for the memorandum of the contract contained in the auctioneer's book, such memorandum was an assurance & a bill of sale within the above Act of 1878, & void as against the execution creditors for want of registration.—*Re* ROBERTS, EVANS *v.* ROBERTS (1887), 36 Ch. D. 196; 56 L. J. Ch. 952; 57 L. T. 79; 51 J. P. 757; 35 W. R. 684; 3 T. L. R. 678.

147. ——.]—The owner of goods seized under a writ of *fi. fa.* verbally agreed with an auctioneer that, in consideration of his paying out the sheriff, the auctioneer should hold possession of the goods, sell them by auction, & pay the balance (if any) to the owner. This agreement was reduced into writing & the sheriff was paid out, the man in possession remaining in possession for the auctioneer:—*Held:* the written agreement was not an assurance or licence to take possession, or in any other respect a bill of sale within the above Acts, as it did not constitute the auctioneer's title, & did not operate & was not intended to operate until the goods were actually transferred from sheriff to auctioneer.—CHARLESWORTH *v.* MILLS, [1892] A. C. 231; 61 L. J. Q. B. 830; 66 L. T. 690; 56 J. P. 628; 41 W. R. 129; 8 T. L. R. 484; 36 Sol. Jo. 411, H. L.; *revsg.* S. C. *sub nom.* MILLS *v.* CHARLESWORTH (1890), 25 Q. B. D. 421, C. A.

Annotations:—**Mentd.** Grigg *v.* National Guardian Assce., [1891] 3 Ch. 206; Morris *v.* Delobbel-Flipo, [1892] 2 Ch. 352; Ramsay *v.* Margrett, [1894] 2 Q. B. 18, C. A.; Withers *v.* Berry (1895), 39 Sol. Jo. 559; Clapham *v.* Ives (1904), 91 L. T. 69; G. E. Ry. Co. *v.* Lord's Trustee, [1909] A. C. 109, H. L.; Dublin City Distillery *v.* Doherty, [1914] A. C. 823, H. L.

Auctioneer's authority to sign memorandum of sale.]—*See* Nos. 57—76, *ante.*

Application of Statute of Frauds—Sufficiency of memorandum.]—*See* PART III., SECT. 2, *ante;* CONTRACT; SALE OF GOODS; SALE OF LAND.

SECT. 9.—DAMPING THE SALE, ETC.

Employment of puffers.]—*See* cases in SECT. 3, *ante.*

148. Agreement not to bid legal.]—An agreement between two persons, desirous of purchasing an

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PART IV. SECT. 9.

148 i. *Agreement not to bid legal.*]—An agreement to pay a sum of money in consideration of the other party not bidding at a sale is valid, especially where the other party is induced thereby to withdraw a claim to the property.—WADDEL *v.* MCCABE (1835), 4 O. S. 191. —CAN.

148 ii. ——.]—An agreement between two intending purchasers of Crown land

estate advertised for sale by auction, that one of them shall not bid against the other, is not illegal.

A. & B. agreed that, in consideration of A.'s withdrawing his opposition to B.'s purchase of an estate at a sale by auction, A. should have the right of pre-emption of that estate & of another estate belonging to B. during B.'s lifetime, & for twelve months after his decease :—*Held :* the agreement was founded upon valuable consideration, & could be enforced against the devisees in trust & *cestui que trust* under B.'s will.—GALTON *v.* EMUSS (1844), 1 Coll. 243 ; 13 L. J. Ch. 388 ; 3 L. T. O. S. 219 ; 8 Jur. 507 ; 63 E. R. 402.

Annotations :—**Refd.** Heffer *v.* Martyn (1867), 36 L. J. Ch. 372. **Mentd.** Emuss *v.* Smith (1848), 2 De G. & Sm. 722.

149. ——.]—On a sale under the ct. two persons agreed not to bid against each other, but that one should bid up to £1,500, & they should divide the lot between them. They bought it for £650 :—*Held :* this agreement furnished no ground for opening the biddings or annulling the sale.—*Re* CAREW'S ESTATE (1858), 26 Beav. 187 ; 28 L. J. Ch. 218 ; 32 L. T. O. S. 154 ; 4 Jur. N. S. 1290 ; 7 W. R. 81 ; 53 E. R. 869.

Annotation :—**Folld.** Heffer *v.* Martyn (1867), 36 L. J. Ch. 372.

150. —— **Specific performance.**]—Where a person bought property at an auction at a price far below what he would have been willing to give for it, having paid another person a sum of money not to bid against him :—*Held :* this did not amount to legal fraud, & was no ground for refusing specific performance.—HEFFER *v.* MARTYN (1867), 36 L. J. Ch. 372 ; 15 W. R. 390 ; 31 J. P. Jo. 375.

Annotations :—**Refd.** *Re* Alexandra Hall Co. (1867), 16 L. T. 7 ; Leopard *v.* Litoun (1897), 41 Sol. Jo. 545.

151. Knock-out sale—Enforcement of agreement between parties.]—An agreement for a "knock-out" is not illegal. Previous to a sale by auction of Govt. stores pltf. & deft. agreed that deft. was to buy a particular lot, which was subsequently to be disposed of to their mutual advantage. Pltf. after the lot had been purchased by deft. contracted to buy it from him, & arranged to resell the lot to a third person at an enhanced price. In the meantime deft. had sold the lot elsewhere :—*Held :* the agreement prior to the sale by auction was not illegal & did not vitiate the subsequent contract, for the breach of which pltf. was entitled to damages.—LEOPARD *v.* LITOUN (1897), 41 Sol. Jo. 545.

152. —— **Indictment for conspiracy.**]—It is an indictable conspiracy for brokers to agree together before a sale by auction that only one of them shall bid for each article sold, & that all articles thus bought by any of them shall be sold again among themselves at a fair price, & the difference between the auction price & the fair price divided among them.—LEVI *v.* LEVI (1833), 6 C. & P. 239.

Annotations :—**Dbtd.** Doolubdass Pettamberdass *v.* Ramloll Thackoorseydass (1850), 5 Moo. Ind. App. 109, P. C.; Leopard *v.* Litoun (1897), 41 Sol. Jo. 545. *Levi* v. *Levi* was wrongly decided ; there is nothing illegal in a knock-out (WRIGHT, J.).

153. Agreement to enhance or depress price—Wagering on price of opium.]—Wager contracts were entered into between pltfs. & defts. upon the price that Patna opium would fetch at the next Govt. sale at Calcutta, each party knowing that the other might use means to enhance or depress such price :—*Held :* (1) the bidding at the sale by one of pltfs., though done colourably, & only to enhance the price, was no fraud on defts., or on the public, as he had a right in common with all the world to bid at such sale, & he was not precluded from recovering the amount of such wager contracts by the fact that such bidding tended to bring about the event by which the wager was to be won ; (2) employing agents at such sale (all of whom were cognizant that the object was to enhance the price of the opium sold) to bid, there being no *crimen falsi* committed, did not constitute an illegal conspiracy, or such fraud as would vitiate the wager contracts.—DOOLUBDASS PETTAMBERDASS *v.* RAMLOLL THACKOORSEYDASS (1850), 5 Moo. Ind. App. 109 ; 7 Moo. P. C. C. 239 ; 15 Jur. 257 ; 18 E. R. 836, P. C.

Annotations :—**Mentd.** Chotayllol *v.* Uggerchund & Hurruckchund (1856), 10 Moo. P. C. C. 136, P. C. ; Juggomohun Ghose *v.* Kaisreechund (1862), 9 Moo. Ind. App. 260, P. C.

154. Purchaser pretending to be puffer.]—Where at a sale by auction pltf., after informing the vendor that he did not intend to bid, had the property knocked down to him below the reserve price, the auctioneer & every one present believing that pltf. was bidding for the vendor, & the person who had been employed by the vendor to bid the reserve price omitting to do so by mistake :—*Held :* the sale was void.—MASON *v.* ARMITAGE (1806), 13 Ves. 25 ; 33 E. R. 204.

Annotations :—**Apld.** Day *v.* Wells (1861), 30 Beav. 220. **Mentd.** Hughes *v.* Chester & Holyhead Ry. Co. (1861), 1 Drew. & Sm. 524.

155. —— **Employing vendor's agent to bid.**]—At a public auction the seller's agent bid for the purchaser ; specific performance was refused on that account.—TWINING *v.* MORRICE (1788), 2 Bro. C. C. 326 ; 29 E. R. 182.

Annotations :—**Consd.** Mortlock *v.* Buller (1804), 10 Ves. 292 ; White *v.* Cuddon (1842), 8 Cl. & Fin. 766, H. L. ; Cutts *v.* Salmon (1852), 21 L. J. Ch. 750, L. C. **Refd.** Townshend *v.* Stangroom (1801), 6 Ves. 328 ; *Ex p.* Lacey (1802), 6 Ves. 625 ; *Ex p.* Bennett (1805), 10 Ves. 381 ; Mason *v.* Armitage (1806), 13 Ves. 25 ; Smith *v.*

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lumber licences to two lots, neither wanting the whole of the lots, not to bid against each other at their public sale, but that one should bid them in for their joint benefit, is not illegal.—IRVING *v.* MCWILLIAMS (1895), 1 N. B. Eq. Rep. 217.—**CAN.**

148 iii. ——.]—There is nothing necessarily unlawful in two or more persons agreeing not to bid against one another at an auction sale.—HARI BALKRISHNA *v.* NARO MORESHVAR (1893), I. L. R. 18 Bom. 342.—**IND.**

148 iv. —— *Amounting to knock-out sale.*]—The fact that a combination amongst bidders at an auction sale has been formed to bid at the auction does not of itself give rise to an action at the suit of the vendor.

A combination among bidders at an auction not to bid against each other, even if the combination amounts to a "knock-out," does not give rise to an action at the suit of the vendor.—JYOTI PROKASH NANDI *v.* JHOWMULL JOHURRY (1908), I. L. R. 36 Calc. 134 ; 13 C. W. N. 87.—**IND.**

148 v. —— *Limitation to specified sale.*]—An agreement by which a person undertakes for a legal consideration not to bid at a judicial sale of immovables is lawful & valid. Such agreement made on the day before the sale, with the condition that the person to whom the undertaking is given shall become the purchaser, is to be regarded as made in view of this particular sale only, & the condition not being realised is extinguished. — DUHAMEL *v.* O'SULLIVAN (1905), Q. R. 15 K. B. 109.—**CAN.**

m. *Practices checking competition.*]—Where at the sale practices were indulged in by the audience which checked fair & free competition, & the lands were sacrificed, the ct., in the absence of any direct proof of combination, granted relief to the owner by setting aside the sale.—LOGIE *v.* YOUNG (1863) 10 Gr. 217.—**CAN.**

n. *Inducing persons not to bid.*]—Some persons attending an auction were induced to refrain from bidding because they were informed that a person who was at the sale intended to buy the property for the family of debtor :—*Held :* the sale to such person was valid, although he bought for the benefit of persons other than the family of debtor.—BROWN *v.* FISHER (1862), 9 Gr. 423.—**CAN.**

153 i. *Agreement to depress price.*]—By an arrangement between several parties bidding, it was agreed that each should be allowed to bid off a whole lot for taxes due upon it ; others, not parties to this agreement, were prevented from bidding, by reducing the quantity to such a trifle as to be quite useless to the purchaser. The land in question, said to be worth £500, was thus bid off for £2 12*s*. The ct. set aside the sale, but without costs, it being shown that the purchaser was not a party to the combination complained of.—HENRY *v.* BURNESS (1860), 8 Gr. 345.—**CAN.**

Clarke (1806), 12 Ves. 477; Downes *v.* Grazebrook (1817), 3 Mer. 200.

156. Sale by mortgagee—Clerk of vendor's solicitor bidding.]—A sale by a mtgee., at which the purchaser employed a clerk of the mtgee.'s solr. to bid, was set aside.—PARNELL *v.* TYLER (1833), 2 L. J. Ch. 195.

157. Disparaging statement at sale.]—Pltf., on the sale of a barge by auction under an execution, addressed the persons present, stating that he had built it for the person against whom the execution was issued, who had not paid him for it, on which no person bid against him, but the auctioneer refused to knock it down to him at his first bidding. Thereupon a friend of his made another bidding, & pltf. advanced 1*s.* more, & paid a deposit in part of the purchase-money:—*Held:* pltf. did not acquire any property in the barge under such sale.—FULLER *v.* ABRAHAMS (1821), 3 Brod. & Bing. 116; 6 Moore, C. P. 316; 129 E. R. 1226.

158. —— Action for.]—A declaration for words imputing that tulips of pltf., about to be sold by auction, were stolen property, whereby purchasers were deterred from bidding, & the sale was defeated:—*Held:* bad in arrest of judgment for not setting out the words *verbatim.*

The declaration, having stated that the tulips were about to be sold by auction, alleged that deft. asserted & represented that the tulips were stolen property:—*Held:* this was sufficient, without stating that he spoke the words of & concerning the tulips, the property of pltf.—GUTSOLE *v.* MATHERS (1836), 1 M. & W. 495; 5 Dowl. 69; 2 Gale, 64; Tyr. & Gr. 694; 5 L. J. Ex. 274; 150 E. R. 530.

Annotation:—**Mentd.** Solomon *v.* Lawson (1846), 8 Q. B. 823.

159. Persons interested bidding.]—Trustees to sell a bkpt. estate may not bid at the auction thereof.

If persons, who are trustees to sell an estate, are there professedly as buyers to bid, that is a discouragement to others to bid. The persons present, seeing the seller there to bid for the estate to or above its value, do not like to enter into that competition (LORD ELDON, C.).—*Ex p.* LACEY (1802), 6 Ves. 625; 31 E. R. 1228.

Annotations:—**Mentd.** *Ex p.* James (1803), 8 Ves. 337; Morse *v.* Royal (1806), 12 Ves. 355; A.-G. *v.* Dudley (1815), Coop. G. 146; Greenlaw *v.* King (1841), 10 L. J. Ch. 129, L. C.; Hamilton *v.* Wright (1842), 9 Cl. & Fin. 111, H. L.; Benson *v.* Heathorn (1842), 1 Y. & C. Ch. Cas. 326; Aberdeen Ry. Co. *v.* Blaikie (1854), 1 Macq. 461, H. L.; Baker *v.* Peck (1860), 3 L. T. 656; De Cordova *v.* De Cordova (1879), 4 App. Cas. 692, P. C.; *Re* Worssam, Hemery *v.* Worssam (1882), 46 L. T. 584; Plowright *v.* Lambert (1885), 52 L. T. 646; *Re* Postlethwaite, Postlethwaite *v.* Rickman (1888), 59 L. T. 58; Farrar *v.* Farrars (1888), 40 Ch. D. 395, C. A.; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, C. A.; *Re* Boles & British Land Co.'s Contract (1901), 71 L. J. Ch. 130; Rowland *v.* Chapman, Rowland *v.* Corrie, Rowland *v.* Corrie, Rowland *v.* Brandreth (1901), 17 T. L. R. 669.

160. —— Purchase through agent.]—An estate was conveyed to D. by way of security for the re-investment of a specific sum of stock, & for payment of the dividends in the meantime, with a power of sale in case of default. The estate was put up to sale by auction, at which C., as agent for D., was the only bidder, & it was knocked down to him accordingly:—*Held:* (1) D. being under the deed trustee for the party making the conveyance, &, as such, disabled from purchasing for himself so long as he continued to be a trustee without the consent of his *cestui que trust*, the sale could not stand, although there was no evidence of fraud or under-value; (2) it could not be supported by evidence of pltf.'s having known & approved of the sale taking place, & afterwards attempting to damp it, nor of a previous conversation with her attorney in which the latter exhorted the purchaser to bid a good price for the estate to keep up the sale. *Qu.:* whether, if C. had purchased for himself, & not for D., the sale could have been supported, he being present in the character of solr. for D. the vendor.—DOWNES *v.* GRAZEBROOK (1817), 3 Mer. 200; 36 E. R. 77.

Annotations:—**Refd.** Orme *v.* Wright (1839), 3 Jur. 972, C. A.; *Re* Bloye's Trust (1849), 2 H. & Tw. 140. **Mentd.** Robertson *v.* Norris (1858), 1 Giff. 421; Warner *v.* Jacob (1882), 20 Ch. D. 220; Farrar *v.* Farrars (1888), 40 Ch. D. 395, C. A.; Nutt *v.* Easton (1899), 47 W. R. 430; Hodson *v.* Deans, [1903] 2 Ch. 647.

161. —— Solicitor of vendor—Necessity for declaration.]—Where the solr. for the vendor known to be such bids in person at the sale on his own behalf, he is bound to state that fact publicly, in order to exclude the inference that he is bidding on behalf of the estate; otherwise, the sale is damaged, as he prevents the public from bidding & is enabled to buy the property at an under-value.—CUTTS *v.* SALMON (1852), 21 L. J. Ch. 750; 19 L. T. O. S. 53; 16 Jur. 623, L. C.

—— At sales under order of court.]—*See* SALE OF LAND.

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157 i. *Disparaging statements at sale—Action for—Practice.*]—In an action for slander of title to goods the statement of special damage was that by reason of the utterances of deft. to persons assembled at an auction sale a large number of them withdrew from it, & the goods sold brought less money than they would otherwise have done:—*Held:* pltf. should not be required to give particulars of the names of the persons who would have given for each article a larger price than was realised at the sale; all that he could reasonably be required to particularise was the amount by which his sale had been damped.—CATTON *v.* GLEASON (1891), 14 P. R. 222.—**CAN.**

157 ii. ——.]—An action of damages founded on certain statements made at a sale by auction, which were said to be false & to have deterred parties from bidding, & so injured the sale, dismissed as irrelevant, in respect (1) the statements alleged had reference to the legal right of pursuer to sell the articles; & (2) there was no averment of malice.—YEO *v.* WALLACE, ETC. (1868), 5 Sc. L. R. 253.—**SCOT.**

p. *Advertisement of sale—Description of land as "unpatented."*]—*Semble:* a sale was not "fairly conducted," as the advertisement describing the lands as unpatented, was of such a character as to damp the sale.—SCOTT *v.* STUART (1889), 18 O. R. 211.—**CAN.**

159 i. *Persons interested bidding.*]—Parties to the suit will not be allowed to bid at the auction, but will be permitted to have a reserved bidding.—PHILLIPS *v.* CONGER, 1 O. S. 231.—**CAN.**

159 ii. —— *Execution sale.*]—Goods of a tenant were seized for rent & offered for sale by a bailiff. The tenant bid them in & they were immediately seized under an execution against him. They were then claimed by a third person, who alleged that the tenant was in reality bidding for him, & this claimant paid the purchase-money:—*Held:* if the goods were sold at an under-value owing to the bids being made by the tenant ostensibly for himself as part of a scheme between the tenant & claimant to defeat creditors by keeping down the price, the sale would be fraudulent & void as against the creditors of the tenant, though it would be good as far as the purchase-money was concerned, which could not in any event be recovered back by claimant.—SULLIVAN *v.* FRANCIS (1890), 18 A. R. 121.—**CAN.**

160 i. —— *Purchase through agent.*]—A person attended on a sale of land, & stated that he was buying on behalf of his brother's family, the effect of which was to prevent competition at such sale, & he became the purchaser, but he subsequently refused to admit the right of pltfs., his brother's family, to redeem the property in his hands. The ct. declared pltfs. entitled to redeem, & ordered deft. to pay all the costs of the suit.—WATSON *v.* JAMES (1872), 19 Gr. 355.—**CAN.**

160 ii. —— ——.]—R. & W. were auctioneers & also mtgees. of a station belonging to H. B. & R. B. On a sale of the station by R. & W. they nominated an agent to bid for M., one of their constituents, who became the purchaser:—*Held:* the purchase by M. through the agent so appointed was void as against H. B. & R. B.—BROOKS *v.* RICHARDSON (1866), 5 N. S. W. S. C. R. 3.—**AUS.**

q. *Agent's pledge to pay person abstaining from bidding.*]—When a principal merely authorises an agent to bid at an auction, he is not liable for an agreement entered into by the agent with a third party pledging him to pay to such party a certain sum in consideration that he should abstain from bidding.—ESHENCHUNDER SINGH *v.* SHAMACHURN BHUTTO (1866), 11 Moo. Ind. App. 7; 2 Ind. Jur. N. S. 87; 16 W. R. 57, P. C.—**IND.**

Part V.—Deposit.

Purchaser's right to return of deposit & vendor's right to same when forfeited.]—*See* MISREPRESENTATION & FRAUD; SALE OF LAND; SPECIFIC PERFORMANCE.

162. Auctioneer stakeholder.]—An auctioneer is a mere stakeholder, & the ct. will secure the stake pending the litigation.

A bill against a vendee & an auctioneer, prayed specific performance, & that the deposit might be paid into ct. The auctioneer admitted the deposit to be in his hands & stated his claim upon it. On motion, he was ordered to pay in the deposit, after retaining the amount of his claims, & without prejudice to any question as to the money retained. —YATES *v.* FAREBROTHER (1819), 4 Madd. 239; 56 E. R. 694.

163. —— Premature payment to wrong party.]—A deposit is peculiarly circumstanced; if the auctioneer pays it to the vendor, he does it at his peril, & if the purchase is not completed the purchaser may recover it from the auctioneer. It is reasonable that the vendor should be chargeable with any loss of the deposit received by the auctioneer because he might, by agreement with the auctioneer, have had the money laid out at interest or by making the auctioneer a party to a bill for specific performance against the vendee, obtain an order for payment of the deposit into ct., & have it laid out at interest which the vendee could not oblige the auctioneer to do, unless with the consent of the vendor. If, therefore, the vendor takes no such steps, & the deposit is lost, the loss falls upon the vendor (PLUMER, V.-C.).—SMITH *v.* JACKSON (1816), 1 Madd. 618; 56 E. R. 227.

164. —— ——.]—Where an auctioneer sells an estate by public auction & receives a deposit, it is his duty, as the agent of both vendor & purchaser, to retain the deposit until the sale is complete, & it is ascertained to whom the money belongs.

Where an auctioneer sold an estate by public auction, & received the deposit, & signed an agreement stating that he acknowledged having sold the estate, & that he agreed to complete the sale; & the sale was not completed on account of a defect of title:—*Held:* the purchaser might recover the deposit in an action for money had & received against the auctioneer, though the latter had paid it over to the vendor, without any notice from the purchaser not to do so, & before the defect of title was ascertained.—GRAY *v.* GUTTERIDGE (1828), 1 Man. & Ry. K. B. 614; 6 L. J. O. S. K. B. 154.

Annotation:—**Expld. & Distd.** Holland *v.* Russell (1861), 1 B. & S. 424.

165. —— ——.]—The purchaser at a sale, which turns out abortive from the vendor's inability to make a good title, cannot recover the deposit from the vendor as money had & received, though paid over to him, but must sue the auctioneer, he being the agent of both parties to appropriate the deposit to the party entitled to it.—JOHNSON *v.* ROBERTS (1855), 24 L. T. O. S. 254.

166. —— ——.]—Pltf. became the purchaser of a house which was put up to auction by deft., an auctioneer. The price was £3,610, & a deposit was paid to deft. of £310. Under the conditions of sale, which were signed by pltf. & by deft. as the vendor's agent, if the vendor could not make a good title, he was to repay the deposit. Shortly afterwards deft. paid a sum of £150, part of the deposit, to the vendor. The latter failed to make a good title, & proceedings were taken against him in the Ch. Div., when an order was made upon him to pay, amongst other items, the £150. Pltf. then put in an execution against the vendor, but that only realised £7. The vendor then gave pltf. a charge upon the house, but this turned out to be useless by reason of prior charges:—*Held:* pltf. was entitled to recover the sum of £150, less the sum of £7 raised by the execution, from deft. as a stakeholder.—FURTADO *v.* LUMLEY (1890), 54 J. P. 407; 6 T. L. R. 168.

167. Liability to bidder—Deposit not paid over.]—An auctioneer, who has not paid a deposit over to his principal, is liable for same to the bidder.—BURROUGH *v.* SKINNER (1770), 5 Burr. 2639; 98 E. R. 387.

Annotations:—**Consd.** Edwards *v.* Hodding (1814), 1 Marsh. 377; Gray *v.* Gutteridge (1828), 1 Man. & Ry. K. B. 614. **Refd.** Smith *v.* Jackson (1816), 1 Madd. 618.

PART V.

162 i. *Auctioneer stakeholder—Fraudulent conversion of deposit.*]—An auctioneer is a stakeholder when he receives from the purchaser a deposit on sale; if he fraudulently converts same to his own use he is guilty of larceny.—R. *v.* BRODIE (1894), 15 N. S. W. L. R. 436.—**AUS.**

167 i. *Liability to bidder—Receipt of deposit quâ agent of vendor.*]—Where an auctioneer sells land under conditions providing for payment of a deposit to him "as agent for the vendor" he is not liable in an action by the purchaser to recover the deposit; & if he suffer judgment therein, he cannot recover against his principal the costs of such action.—MCMILLAN *v.* READ (1877), 3 V. L. R. 284.—**AUS.**

167 ii. —— *Objection to title.*]—W. bought property at auction, signing an agreement to pay 10 per cent. of price down & balance on delivery of deed. The auctioneer's receipt for the 10 per cent. so paid stated that the sale was on the understanding that a good title in fee simple clear of all incumbrances was to be given to W., otherwise his deposit to be returned. W., not having been tendered a deed which he would accept, caused the vendor to be notified that he considered the sale off & demanded repayment of his deposit. In reply the vendor wrote that all the auctioneer had been instructed to sell was an equity of redemption in the property; that a deed of the equity of redemption had been tendered to W., & he was required to complete his purchase. In an action to recover the deposit:—*Held:* W. could treat the contract as rescinded & sue to recover his deposit.—WRAYTON *v.* NAYLOR (1894), 24 S. C. R. 295.—**CAN.**

167 iii. —— *Refusal of purchaser to perform contract.*]—Pltf. gave his note for the deposit required on a purchase at auction, but refused to carry out the contract, & sought to recover the amount of his note:—*Held:* he could not recover.—LINDSAY *v.* ZWICKER (1870), 2 N. S. D. 100; 8 N. S. R. 100.—**CAN.**

167 iv. —— *Refusal of vendor to complete.*]—Pltf. purchased property at auction & deposited with the auctioneer on account of the purchase-money. The vendor refused to convey the property to pltf.:—*Held:* the money having been deposited with the auctioneer as a stakeholder & being in his hands, action to recover it lay against the auctioneer, & not against the vendor.—ESSAJI ADAMJI *v.* BHIMJI PURSHOTAM (1867), 4 Bom. O. C. 125.—**IND.**

167 v. —— *Misrepresentation — Part deposit paid over.*]—On sale by auction, the purchaser paid a deposit of £400 to the auctioneer. One of the conditions of sale was that the deposit must be paid to the vendor's solr., & the auctioneer sent a cheque for the amount to him. The solr. returned a cheque for £200 to the auctioneer in part payment of a claim of the auctioneer. The purchaser, on the ground of misrepresentation, rescinded his bargain:—*Held:* the £200 paid to the auctioneer by the vendor's solr. was part of the deposit, & must be repaid by the auctioneer to the purchaser.—DICKIE *v.* WHITE (1901), 35 I. L. T. 52.—**IR.**

167 vi. —— *Misdescription.*]—Action to recover deposit paid at auction on the purchase of property not of the description given at time of the sale. Upon evidence of such difference, there was a verdict for pltf. for the full amount of the deposit.—LEACH *v.* MULLET (1827), 1 Ir. L. Rec. 1st Ser. 64.—**IR.**

167 vii. —— ——.]—Conditions of sale at auction referred to public advertisements, which professed to contain a description of the property to be sold. In an action by the vendee to recover back the deposit on the purchase-money:—*Held:* those advertisements were admissible evidence to show that the conditions of sale misdescribed the premises.—THOMPSON *v.* GUY (1844), 7 I. L. R. 6.—**IR.**

167 viii. —— *Defence available to auctioneer.*]—In an action by the purchaser to recover the deposit, the auctioneer

168. Vendor's solicitor acting as auctioneer—Receipt of deposit as auctioneer.]—A solr., who was also an auctioneer, received a deposit on property which he had sold by auction &, after queries were raised as to the title, & before they were cleared, paid over the deposit to his principal. On a demand of the deposit by the buyer, he answered that his principal would not consent to return it, & would enforce the contract:—*Held:* the buyer might recover the deposit from the auctioneer as money had & received to pltf.'s use, because (1) deft., as solr., had notice that the title had not been completed before he paid over the money; (2) he misled pltf. to sue himself by not saying he had paid it over.—EDWARDS *v.* HODDING (1814), 5 Taunt. 815; 1 Marsh. 377; 128 E. R. 913.

Annotations:—**Expld.** Lee *v.* Munn (1817), 8 Taunt. 45; Horsfall *v.* Handley (1818), 8 Taunt. 136. **Consd.** Gray *v.* Gutteridge (1827), 3 C. & P. 40. **Distd.** Holland *v.* Russell (1861), 1 B. & S. 424. **Refd.** Edgell *v.* Day (1865), L. R. 1 C. P. 80.

169. Vendor's solicitor receiving deposit—Receipt quâ agent of vendor.]—Where a solr. acting for a vendor receives the deposit on the sale of an estate, the law will not imply, as in the case of an auctioneer, that he receives it as stakeholder. If he professes to receive it as agent for the vendor he is bound to pay it over to him on demand.—EDGELL *v.* DAY (1865), L. R. 1 C. P. 80; Har. & Ruth. 8; 35 L. J. C. P. 7; 13 L. T. 328; 12 Jur. N. S. 27; 14 W. R. 87.

Annotation:—**Mentd.** Ellis *v.* Goulton, [1893] 1 Q. B. 350, C. A.

See, further, SALE OF LAND; SOLICITORS.

170. Cheque for deposit—Misrepresentation—Sale voidable—Defence.]—Deft. bought premises at an auction, & gave pltf., an auctioneer, a draft on his banker, instead of money, in payment of the deposit. Having afterwards refused to pay the draft on account of misdescription of the property by pltf., he pleaded to an action on the draft that "there was not, at any time, any consideration or value for his making the draft, or for paying its amount." Issue having been taken, the jury found pltf. guilty of a wilful misrepresentation in the description of the premises:—*Held:* the draft having been in point of law given without consideration, deft. could have rescinded the contract, & might resist payment of his draft, on the ground that the contract, which was the consideration, having been done away *ab initio*, no consideration remained at all.—MILLS *v.* ODDY (1835), 2 Cr. M. & R. 103; 3 Dowl. 722; 1 Gale, 92; 5 Tyr. 571; 4 L. J. Ex. 168; 150 E. R. 43.

Annotations:—**Mentd.** Easton *v.* Pratchett (1835), 1 Gale, 250, Ex. Ch.; Doe d. Bowdler *v.* Owen (1837), 8 C. & P. 110; Keene *v.* Beard (1860), 8 C. B. N. S. 372.

171. Auctioneer agent of vendor in resale.]—Pltf. sought to recover as money had & received £18, being the deposit & auction duty paid on a sale of property by auction, at which deft. had become the purchaser, & had afterwards re-sold to pltf., who agreed to give deft. £10 for his bargain. The sale never having been completed, pltf. sought to recover back the deposit, etc.:—*Held:* (1) the auctioneer, into whose hands the money had been paid, had received it as agent for deft.; (2) a verdict for the amount should be entered for pltf.—CONSTABLE *v.* MARTIN (1847), 9 L. T. O. S. 314.

172. Loss of deposit—Falls on vendor—Vendor's refusal to have funds paid into court.]—Upon a sale by auction the vendor determines who is to receive the deposit. The auctioneer is not a stakeholder of the purchaser, at least not of his choice. If he were a stakeholder for both parties, either would have a right to propose to change the stakeholder, & the party refusing takes upon himself the risk.

Where a motion by the purchaser that the deposit should be paid into ct. was resisted by the vendor on the ground that the deposit was secure in the hands of the agent:—*Held:* the refusal to concur in the purchaser's proposition threw the risk of the agent's credit on the party refusing, & it would be too hard to throw the loss by the agent's failure on the purchaser.—FENTON *v.* BROWNE, BROWNE *v.* FENTON (1807), 14 Ves. 144; 33 E. R. 476.

Annotations:—**Consd.** Smith *v.* Jackson (1816), 1 Madd. 618. **Mentd.** Brooke *v.* Rounthwaite (1846), 5 Hare, 298.

173. —— —— Vendor not insisting on having funds paid into court.]—SMITH *v.* JACKSON, No. 163, *ante.*

174. —— —— Vendor's right to set off loss against sums due to auctioneer.]—A., being about to convey his estate to trustees for sale, to pay off incumbrances & to pay him over the residue, obtained advances of the auctioneer intended to be employed, to be repaid out of the deposits. The estate was accordingly conveyed to the trustees; the sale took place, & the auctioneer received deposits to a greater amount than his advances, & became bkpt.:—*Held:* A. was entitled to an equitable set-off of deposits against his debt to the bkpt.'s estate, according to the amount in which, on taking the account, A. should appear to be in reality interested beneficially in the surplus of the proceeds of the sales. If he was not so interested, then the deposits were the moneys of the trustees.—ALVANLEY *v.* LEWIS (1831), 1 L. J. Ch. 55.

175. —— —— As between purchaser & mortgagee consenting to sale.]—A mtgor. contracted to sell the estate, & one of the conditions was that the purchaser should pay a deposit to the auctioneer. The mtgee. afterwards concurred in & adopted the contract. A loss having occurred by the insolvency of the auctioneer:—*Held:* as between the purchaser & mtgee., the latter stood in the shoes of the vendor & must bear the loss.—ROWE *v.* MAY (1854), 18 Beav. 613; 52 E. R. 241.

Annotation:—**Mentd.** Barrow *v.* White (1862), 2 John. & H. 580.

—— —— As between mortgagor & mortgagee.]—*See* MORTGAGE.

176. Vendor's risk — Payment into court less auctioneer's charges.]—An auctioneer, on motion of the vendor, was ordered to pay the deposit into ct., *minus* his charges & expenses, & the vendee was restrained by injunction from proceeding in his action against the auctioneer for the deposit, in which action he had obtained a judgment for the whole amount of the deposit.

Pending the dispute as to the title, all the risk respecting the deposit rests with the vendor; for though the auctioneer is, to a certain degree, a stakeholder for vendor & vendee, yet so far as respects any risk as to the deposit, the auctioneer is considered as the agent only of the vendor. The deposit is the vendor's money, & the risk belonging to it is his; & if the vendor moves to have the deposit paid into ct. (which on large purchases it is always prudent to do for the sake of security, & to obtain interest on the deposit), there is good ground for the auctioneer insisting to have his costs & ex-

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must, in the absence of an express condition of sale, set out such facts as would be sufficient to justify him in paying the entire purchase-money, if still in his hands, to the vendor.

In an action against an auctioneer to recover a deposit, deft. pleaded, as to part of the sum claimed, that, being an auctioneer, he was employed to sell a farm, for which pltf. bid the highest price, & was declared the purchaser, & that the sum was lodged with him as a deposit, pursuant to the conditions of sale, & this he was entitled to retain, & had retained as auctioneer's fees:—*Held:* the plea was embarrassing, & should be set aside.—EARLY *v.* SMITH (1857), 7 I. C. L. R. 397.—IR.

penses first deducted (PLUMER, V.-C.).—ANNESLEY *v.* MUGGRIDGE (1816), 1 Madd. 593; 56 E. R. 218.

177. Vendor's right to insist on auctioneer getting cash for deposit.]—JOHNSTON *v.* BOYES, No. 144, *ante*.

178. Auctioneer not liable for interest.]—A purchaser of an estate by public auction deposited a sum with the auctioneer as part of the purchase-money, until the vendor made out a good title, according to the conditions of sale. No good title was made out, but the treaty was kept open with the auctioneer for four years from the time of the sale, & no demand had been made on him for the repayment of the deposit:—*Held:* in such case, the auctioneer was not liable to the purchaser for interest on the deposit money.—LEE *v.* MUNN (1817), 8 Taunt. 45; 1 Moore, C. P. 481; 129 E. R. 299.

Annotations:—**Refd.** Arnott *v.* Redfern (1826), 3 Bing. 353; Curling *v.* Shuttleworth (1829), 6 Bing. 121.

179. ——.]—If a purchaser pay a deposit to auctioneers at the time of sale & bring an action against them to recover it back, in consequence of the vendor not being able to make a good title, & such deposit be recovered from them, the purchaser is entitled to interest on the deposit from the time the purchase should have been completed, & may recover it from the vendor on alleging the special damage in his declaration.—FARQUHAR *v.* FARLEY (1817), 7 Taunt. 592; 1 Moore, C. P. 322; 129 E. R. 236.

Annotations:—**Refd.** Lee *v.* Munn (1817), 8 Taunt. 45; Petre *v.* Duncombe (1851), 2 L. M. & P. 107; L. C. & D. Ry. Co. *v.* S. E. Ry. Co., [1892] 1 Ch. 120, C. A. **Mentd.** Curling *v.* Shuttleworth (1829), 6 Bing. 121; *Re* Maria Anna & Steinbank Coal & Coke Co., McKewan's Case (1877), 36 L. T. 609.

180. ——.]—An auctioneer, who, as agent for the vendor, agrees to sell an estate upon the terms contained in conditions of sale, by which the purchaser is to pay down immediately a deposit & the auction duty & the residue of the purchase-money upon a day certain, on having a good title, & the vendor is to prepare & deliver to the purchaser an abstract of title, is not, upon a failure of the contract in consequence of a defective title, personally responsible for interest upon the deposit & auction duty, unless the money be demanded, or notice be given to him that the contract has been rescinded.—GABY *v.* DRIVER (1828), 2 Y. & J. 549; 148 E. R. 1036.

181. ——.]—Deft., an auctioneer, offered two policies of assurance for sale by auction, & it was stated in the particulars that the policies would be sold by order of the exors. of the mtgee., & under a power of sale. Pltf. purchased one of the policies, & deposited part of the purchase-money with deft. at the time of the sale. The mtgor. having assigned the policy by deed to the mtgee., a subsequent deed between the same parties, on a further advance by the mtgee., contained a power of sale, if the principal sum were not paid on a given day, and on a further advance by the mtgee., a third deed was entered into, by which the interest remaining unpaid was to be converted into principal, but the power of sale was omitted; & the vendors declined to procure the concurrence of the mtgor. to the assignment of the policy to pltf.:—*Held:* He was entitled to recover back his deposit, but without interest.—CURLING *v.* SHUTTLEWORTH (1829), 6 Bing. 121; 3 Moo. & P. 368; 8 L. J. O. S. C. P. 113; 130 E. R. 1226.

Annotations:—**Dbtd.** Boyman *v.* Gutch (1831), 7 Bing. 379. **Mentd.** Young *v.* Roberts (1852), 15 Beav. 558.

182. ——.]—In general an auctioneer is not liable for interest on a deposit.

A deposit upon the contract for sale of an estate was paid to the auctioneer. There being difficulties in the title, the sale was not completed until several years had elapsed. The vendor, in the interim, gave notice to the auctioneer to invest the money in Govt. securities, & offered to indemnify him for so doing; but he did not obtain the consent of the purchaser to this arrangement. The auctioneer was in the habit of keeping a considerable sum at his bankers', to answer the demands which might be made upon him for deposits. Of the remainder of these deposits he made a profit, but it did not appear whether he made a profit of this particular sum, all trace of which was lost in its mixture with the bulk. In an action by the vendor against the auctioneer, after the sale had been completed:—*Held:* the latter was not chargeable with interest.—HARINGTON *v.* HOGGART (1830), 1 B. & Ad. 577; 9 L. J. O. S. K. B. 14; 109 E. R. 902.

Annotation:—**Distd.** Edgell *v.* Day (1865), 35 L. J. C. P. 7. Where the attorney acts as auctioneer, he does not lose his rights as auctioneer because he is also agent, as was the case in *Harrington* v. *Hoggart* (ERLE, C.J.).

183. ——.]—A party recovering back a deposit paid on the purchase of real property is not entitled to interest.—BRADSHAW *v.* BENNETT (1831), 5 C. & P. 48; 1 Mood. & R. 143.

184. ——.]—Upon the abandonment of an unwritten contract for the sale of land, on defect of title, the deposit money & money paid by the purchaser to the auctioneer for purchaser's moiety of the auction duty may be recovered, but interest upon the deposit cannot be recovered.—GOSBELL *v.* ARCHER (1835), 2 Ad. & El. 500; 1 Har. & W. 31; 4 Nev. & M. K. B. 485; 4 L. J. K. B. 78; 111 E. R. 193.

Annotations:—**Refd.** Casson *v.* Roberts (1862), 31 Beav. 613. **Mentd.** Scott *v.* Alvarez (1895), 43 W. R. 694, C. A.

185. Purchaser's action to recover—Vendor no title.]—Where on the sale by auction of an annuity the seller fails to produce his title deeds for inspection by the day named in the conditions of sale, an action for money had & received lies against the customer to recover the deposit.—BERRY *v.* YOUNG (1788), 2 Esp. 640, n.

186. —— ——.]—Where the seller is unable to make a good title to land sold, an action for money had & received lies against the auctioneer to recover the amount of the deposit.—WARD *v.* SCOTT (1812), 3 Camp. 284.

187. —— ——.]—An agreement of reference was entered into between G. & H., in which H. was described as the administrator of A., to whom certain leasehold premises, the right of which was in dispute, had belonged. The arbitrator directed the premises to be sold by an auctioneer, whose appointment was assented to by both parties. G.'s solr., who, at the time of the sale, was aware that H. had not taken out administration, became the purchaser & paid a deposit to the auctioneer, it being understood at the time of the sale that H. would take out administration. H., however, afterwards refused to do so, & a good title was not made out:—*Held:* the purchaser was entitled to recover his deposit from the auctioneer, without notice of the contract having been rescinded.—DUNCAN *v.* CAFE (1837), 2 M. & W. 244; Murph. & H. 1; 6 L. J. Ex. 81; 1 Jur. 23; 150 E. R. 747.

188. —— —— **Objections—Rescission.**]—Pltf. had purchased property at a sale by auction, subject to a condition of sale, whereby the vendor was required to furnish the abstract of his title to the property sold within four days of the sale, for the perusal of the purchaser, who was to be allowed fourteen days for sending in objections to the title, or requisitions connected therewith; the conditions of sale contained likewise a proviso that the purchaser should be considered to have waived all objections to the title, if no objection or requisition

was sent in within the fourteen days above mentioned. The purchaser had, subsequent to the sale, received the abstract of title, which was submitted by him to counsel, & he had, prior to the expiration of the fourteen days, returned the abstract to the solr. acting on behalf of the vendor, with the queries & opinion of counsel, who advised that the title was essentially defective. Pltf. having been unable to ascertain the vendors' names, gave notice to deft. (the auctioneer) that the contract of sale was at an end, & brought an action against him for recovery of the deposit paid at the time of the sale :—*Held :* (1) pltf. must be taken to have delivered his objections to the title as stipulated by the fourth condition, as the mode adopted by pltf. was a very usual mode of stating objections to title ; (2) demanding the deposit from the auctioneer was in fact a rescinding of the contract ; (3) pltf. was entitled to recover.—KERRIDGE *v.* SIMPSON (1846), 7 L. T. O. S. 92.

189. —— Objection to title.]—In an action against an auctioneer to recover the amount of a deposit on the sale of an estate, deft., after an abstract has been delivered, is entitled, as a matter of course, to a statement in writing from pltf. of the objections of fact to the title on which he relies ; but he is not entitled to a statement of objections of law.—ROBERTS *v.* ROWLANDS (1838), 3 M. & W. 543 ; 7 L. J. Ex. 182 ; 2 Jur. 875 ; 150 E. R. 1261 ; *sub nom.* ROBSON *v.* ROWLAND, 6 Dowl. 553 ; 1 Horn & H. 105.

190. —— Misdescription.]—In the conditions of sale of the lease of a public house it was described as " a free public house " but the lease contained a covenant that the lessee & his assigns should take their beer from a particular brewer. This lease was read over by the auctioneer at the time of the sale, who said mistakenly that it was a free public house, & that the covenant about the beer had been decided to be bad :—*Held :* a purchaser who heard the lease read over was not bound in these circumstances to complete the purchase, but was entitled to recover back the deposit.—JONES *v.* EDNEY (1812), 3 Camp. 285.

Annotations :—**Consd.** Brumfit *v.* Morton (1857), 30 L. T. O. S. 98. **Refd.** Grosvenor *v.* Green (1858), 28 L. J. Ch. 173. **Mentd.** Flight *v.* Booth (1834), 1 Bing. N. C. 370 ; *Re* Davis & Cavey (1888), 40 Ch. D. 601 ; *Re* Fawcett & Holmes' Contract (1889), 42 Ch. D. 150, C. A.

191. —— ——.]—If property be sold at auction under a description which is untrue, & calculated to entrap persons coming into the auction-room, the sale is void, & the purchaser may recover back his deposit in an action for money had & received. —ROBINSON *v.* MUSGROVE (1838), 8 C. & P. 469 ; 2 Mood. & R. 92.

Annotation :—**Mentd.** Evans *v.* Robins (1862), 1 H. & C. 302.

192. —— Concealment.]—A landlord having given notice to his lessee, under a covenant in the lease, that he would re-enter, if the premises were not put into repair within three months, if an auctioneer sell the lease without communicating the notice to the vendee, the latter may recover his deposit from the auctioneer, although he knew the dilapidated state of the premises at the time of sale. —STEVENS *v.* ADAMSON (1818), 2 Stark. 422.

Annotations :—**Folld.** Carlish *v.* Salt, [1906] 1 Ch. 335. **Mentd.** *Re* Leyland & Taylor (1900), 69 L. J. Ch. 764, C. A.

193. —— Vendor's delay—Abandonment.]—A motion for an injunction to restrain an action against an auctioneer for a deposit was refused, where there had been great delay on the part of the vendor.—LLOYD *v.* COLLETT (1793), 4 Bro. C. C. 469 ; 29 E. R. 992.

Annotations :—**Expld.** Omerod *v.* Hardman (1801), 5 Ves. 722. **Distd.** Seton *v.* Slade (1802), 7 Ves. 265. **Consd.** Alley *v.* Deschamps (1806), 13 Ves. 225 ; Venn *v.* Cattell (1872), 27 L. T. 469 Stickney *v.* Keeble, [1915] A. C. 386, H. L. **Refd.** Walker *v.* Jeffreys (1842), 1 Hare, 341 ; Firth *v.* Greenwood (1855), 1 Jur. N. S. 866. **Mentd.** Fordyce *v.* Ford (1794), 4 Bro. C. C. 494.

194. —— Sale not completed promptly.]—Defts., on July 6, 1876, sold to pltf. by auction a contingent reversion in railway stock. The sale was subject to conditions, whereby it was provided that the purchaser should pay a deposit & the purchase be completed on or before Aug. 17 then next, " but should the completion of the purchase be delayed from any cause whatever beyond that period, the purchaser is (but without prejudice nevertheless to the vendor's rights under the seventh or any other condition of sale) to pay interest on the balance of the purchase-money from that day until the completion of the purchase." By the seventh condition, should the purchaser neglect or fail to comply with any condition, " the deposit-money shall be forfeited & the vendor . . . shall be at full liberty to resell the property . . . & the deficiency (if any) arising by such second sale, together with all charges attending same, shall be made good by the defaulter." There was no express stipulation that time should be of the essence of the contract. Pltf. at the time of sale paid a deposit of £30. Defts. were not able to complete the sale on or before Aug. 17, & pltf. two days afterwards brought an action to recover the deposit. Defts. were able & willing to complete the sale at the end of Nov., 1876 :—*Held :* under the conditions time was not of the essence of the contract, & pltf. was not entitled to recover.—PATRICK *v.* MILNER (1877), 2 C. P. D. 342 ; 46 L. J. Q. B. 537 ; 36 L. T. 738 ; 41 J. P. 568 ; 25 W. R. 790.

195. —— Making auctioneer party.]—Although it is the law that an auctioneer holding the deposit on a purchase may be made a deft. in an action for specific performance, yet, as a general rule, the proper practice is not to make him a deft. when the deposit is of small amount, unless he refuses to pay it into ct. when required, but where the deposit is of large amount he may be properly made a deft., unless he has paid it into ct. before action brought. —EGMONT (EARL) *v.* SMITH, SMITH *v.* EGMONT (EARL) (1877), 6 Ch. D. 469 ; 46 L. J. Ch. 356.

Annotations :—**Mentd.** Royal Bristol Permanent Bldg. Soc. *v.* Bomash (1887), 35 Ch. D. 390 ; Bolton Partners *v.* Lambert (1889), 41 Ch. D. 295, C. A. ; Clarke *v.* Ramuz [1891] 2 Q. B. 456, C. A. ; Leppington *v.* Freeman (1891), 65 L. T. 145 ; *Re* Read, [1894] 3 Ch. 238 ; *Re* London School Board & Foster (1903), 87 L. T. 700, C. A.

196. —— Claim by vendor — Vendor made defendant.]—An auctioneer was employed to sell land by auction ; the purchaser of a lot paid a deposit, but, not being satisfied with the title, refused to complete the purchase, & sued the auctioneer for the deposit. The vendor gave deft. notice to hold the money for her, as forfeited. Deft. applied to have the vendor made deft. The solvency of the vendor appearing doubtful, the ct. made the rule absolute, on the money being brought into ct. & security for costs being given to pltf., but refused to order that the costs of original deft. should be paid out of the money.—DELLER *v.* PRICKETT (1850), 15 Q. B. 1081 ; 20 L. J. Q. B. 151 ; 16 L. T. O. S. 212 ; 15 Jur. 168 ; 117 E. R. 769.

Annotation :—**Expld.** Ridgway *v.* Jones (1860), 1 L. T. 368.

197. —— Evidence.] — Upon a sale of houses by auction according to certain particulars & conditions of sale, requiring (*inter alia*) the delivery of an abstract of title within ten days, & payment of a deposit to the auctioneer, the purchaser of two houses paid a deposit, signed an agreement as purchaser, & obtained a receipt from the auctioneer for the money paid as for a deposit on a sale by auction of the premises described in the particulars & conditions of sale. The abstract of title not being delivered, the purchaser brought an action against the auctioneer for the recovery of the deposit :—*Held :* production of the receipt & of

the conditions of sale, without production of the written contract signed by the purchaser, was insufficient.—CURTIS *v.* GREATED (1834), 1 Ad. & El. 167; 3 Nev. & M. K. B. 449; 3 L. J. K. B. 126; 110 E. R. 1170.

198. Interpleader.]—An auctioneer is the agent as well of the purchaser as of the vendor, & if the vendor commence an action against him for the recovery of the deposit, he may file a bill of interpleader, for the purpose of ascertaining to whom it belongs.—FAIRBROTHER *v.* PRATTENT (1818), Dan. 64.

199. *S. P.* FAIRBROTHER *v.* NEROT & HARRIS (1818), Dan. 68, n.

200. ——.]—An auctioneer against whom an action is brought for recovery of a deposit is not entitled to interplead if he insists on retaining either his commission or the duty.—MITCHELL *v.* HAYNE (1824), 2 Sim. & St. 63; 57 E. R. 268.

Annotations:—**Distd.** Suart *v.* Welch (1839), 4 My. & Cr. 305, L. C. **Apprvd.** Bignold *v.* Audland (1840), 11 Sim. 23.

201. ——.]—H., an auctioneer, employed by T. to sell an estate belonging to him, sold the estate in 1835, by auction, to C., who paid H. a sum of £134 by way of deposit. Disputes having arisen as to the estate T. gave notice to C. of his intention to put up the estate to auction again on the ground that he had failed to perform his contract, & employed H. for that purpose. C., on receiving the notice, warned H. not to resell the estate, requiring him to hold the deposit money till the title was completed. H., by the direction of T. in 1837, resold the estate by auction to V., who paid £128 as a deposit. Some difficulties respecting the title & the claim of C. arose between T. & V., & T., representing that V. had failed to perform his contract, & thereby forfeited his deposit, called on H. to pay him the two deposits, & H. having refused, T. brought an action against H. to recover the amount of both deposits. C. shortly afterwards filed a bill against T., V. & H. for specific performance of his agreement for purchase, & for some time the proceedings in T.'s action were stayed, but in May, 1838, the plea being called for, H.'s solr. gave notice of that proceeding to the solr. of C. & V. T. required payment of the deposits, & offered H. an indemnity, stating that if payment were not made, he should proceed with his action. C. declined to move for an injunction in his suit, telling H. that if he paid his (C.'s) deposit to T. he would do so at his own peril, & V. required a good title or repayment of his deposit, with interest. H. filed his bill in June, 1838, against T., C. & V., treating the case as an ordinary case of interpleader, & in the same month obtained an injunction against T. from further proceeding in his action, on payment of the amount of the deposits into ct., & an injunction also against the other defts. from taking any proceedings at law, in respect of such deposits. The bill was dismissed with costs as against V., & the deposit paid by him ordered to be returned to H., & the injunction was dissolved as to T. & V. in respect of V.'s deposit, but continued in other respects as to T. & C.—HOGGART *v.* CUTTS (1841), 1 Cr. & Ph. 197; 10 L. J. Ch. 314; 41 E. R. 465.

Annotations:—**Mentd.** Suisse *v.* Lowther (1843), 7 Jur. 808; Gloucester Corpn. *v.* Wood (1843), 7 Jur. 1151.

See, also, Nos. 228, 271, 272, *post,* and INTERPLEADER.

Part VI.—Interpleader and Payment into Court.

See Nos. 162, 163, 172, 176, 195, 196, 198—201, *ante,* 228, 271, 272, *post,* and INTERPLEADER.

Part VII.—Rights and Duties in relation to Vendor.

SECT. 1.—DUTY GENERALLY.

202. Liability for negligence—Preparation of catalogue—Costs of action.]—In an action claiming damages for the negligent preparation of a catalogue, the jury found that defts. had been negligent, but that pltfs. had suffered no damage in consequence thereof:—*Held:* pltfs. were not, & defts. were, entitled to the costs of the action.—COLE *v.* CHRISTIE, MANSON & WOODS (1910), 26 T. L. R. 469.

PART VII. SECT. 1.

r. *Duty to use due care.*]—From the employment of an auctioneer for reward, there is implied a contract upon his part to use due care & skill in conducting the sale.—KAVANAGH *v.* CUTHBERT, 9 I. R. C. L. 136.—**IR.**

s. —— *Perishable goods.*] — Persons holding themselves out as auctioneers, & as such receiving perishable goods for sale, are bound to exercise reasonable diligence in seeking to effect a sale, & if unable to sell must forthwith inform the vendor. In such cases the measure of damages is the value of the goods at the time they were received by the auctioneer.—ROSE *v.* LOWE (1900), 2 W. A. L. R. 24.—**AUS.**

202 i. *Liability for negligence—How affected by illegal action of vendor.*]—A vendor who, contrary to law, has bid for his own goods, cannot afterwards sue the auctioneer for negligence in failing to procure the signature of the person to whom the goods are actually knocked down.—CHRISTIE *v.* QUAIFE (1906), 26 N. Z. L. R. 495.—**N.Z.**

202 ii. —— *Failure to advertise sale—Sacrifice of property.*]—Pltf. claimed damages for the sale of his farm by defts. at auction. The property was in the centre of a district of good farming land & worth at least $3,500, & would have brought that amount at an auction sale if properly advertised. Defts. sold it for $2,800, subject to unpaid taxes:—*Held:* defts. were liable for the difference between the two amounts, because they had so negligently & carelessly conducted the sale proceedings that the property was sacrificed.—CARRUTHERS *v.* HAMILTON PROVIDENT & LOAN SOCIETY (1898), 12 Man. L. R. 60.—**CAN.**

202 iii. —— *Failure to procure full deposit.*]—Deft., an auctioneer, was instructed by pltf., the tenant of a judicial tenancy, to sell the farm. The farm was put up for sale, subject, amongst others, to a condition that the landlord's assent should be obtained. Deft. informed pltf. that a certain purchaser would buy, & took upon himself to accept as a deposit £5 instead of £25, the percentage mentioned in the conditions of sale. The landlord refused to consent; the sale was abandoned; & the £5 was returned by deft. to the purchaser. At the trial the jury found negligence on deft.'s part; found that the landlord's refusal was the cause of the sale not being completed; found that pltf. suffered loss by reason of deft. not receiving the full deposit; & contingently assessed damages at £65. On new trial motion:—*Held:* pltf. was entitled to recover only nominal damages.—FARMER *v.* CASEY (1899), 33 I. L. T. 144.—**IR.**

202 iv. —— *Failure to accept bid—Measure of damages.*]—A settlor, with the concurrence of the trustee of the settlement, employed auctioneers to sell the settled property, fixing a reserve. At the sale the reserve was bid, but by mistake on the part of the auctioneers was not accepted. The market was a falling one, &, after several abortive attempts to sell with a reserve, the property, two years & a half after, was sold for much less than was first bid for it:—*Held:* (1) the auctioneers were liable to the settlor, as her agents, for negligence; (2) the measure of damages was the difference between the amount bid at the first attempted sale & the actual market value of the property.—LOGIE *v.* GILLIES & HISLOP (1885), 4 N. Z. L. R. 65.—**N.Z.**

202 v. —— *Selling below reserve.*]—A vendor who employs an auctioneer to sell his goods & fixes a reserve price can maintain an action for damages against

Sect. 1.—Duty generally. Sects. 2, 3, 4 & 5.]

203. —— Particulars of sale — Measure of damages.]—In an action against an auctioneer, employed by pltf. to conduct the sale of houses, for negligence in preparing the particulars of sale, in which the houses were improperly described, whereby pltf. was obliged to make the purchaser compensation, the jury found for pltf. with £47 10*s.* damages (being the amount paid for compensation): —*Held:* as it was impossible to say that the houses would not have sold for the same price, if they had been properly described, deft. was not entitled to have the damages reduced either in part or to nominal damages.—PARKER *v.* FAREBROTHER (1853), 21 L. T. O. S. 128; 1 W. R. 370; 1 C. L. R. 323.

204. —— Delivery without payment.]—An auctioneer, who delivered goods without receiving the price from the purchaser:—*Held:* liable in an action for not duly accounting for the proceeds of the sale.—BROWN *v.* STATON (1816), 2 Chit. 353.

205. Injunction restraining sale—Notice by telegram—Duty to communicate.]—An auctioneer, receiving a telegram purporting to come from solrs., stating that an injunction restraining an execution sale has been issued by the Bkpcy. Ct., is not under a duty to communicate with the Bkpcy. Ct. or the sheriff's London agents, but he is under a duty to communicate with the person on whose instructions he is selling.—*Re* BISHOP, *Ex p.* LANGLEY, *Ex p.* SMITH (1879), 13 Ch. D. 110; 49 L. J. Bcy. 1; 41 L. T. 388; 28 W. R. 174, C. A.

206. Licence to sell on vendor's premises—Revocation.]—Where the owner of premises, who has employed an auctioneer to sell his goods thereon, revokes his consent to the auctioneer remaining on the premises, the latter has no right to continue there, though he has incurred expenses in allotting the goods & though he remains only to complete the sale by delivering the goods to the purchasers.—TAPLIN *v.* FLORENCE (1851), 10 C. B. 744; 20 L. J. C. P. 137; 17 L. T. O. S. 63; 15 Jur. 402; 138 E. R. 294.

Annotations:—**Refd.** Campanari *v.* Woodburn (1854), 15 C. B. 400; Hurst *v.* Picture Theatres, [1915] 1 K. B. 1, C. A.

207. Proceeds of sale—Fiduciary capacity—Right to follow.]—An auctioneer received moneys from a sale of live stock & paid them into his private account at defts.' bank. His account was overdrawn to an amount not exceeding £2,500, but, under an arrangement which was then subsisting, he was permitted to overdraw up to £2,500, & he had no suspicion at the time when he paid in such moneys of any intention on the part of the bank to close his account. The bank shortly afterwards closed the account, & applied the proceeds of the sale in reduction of the overdraft. The bank had notice that the moneys so paid in were substantially the produce of the sale of stock. An action was brought by pltf., on behalf of all the vendors at the sale, against the bank, to recover their respective purchase-moneys, less the auctioneer's commission: —*Held:* the auctioneer paid the proceeds of the sale to his private account in the ordinary course of business, & was not guilty of a breach of trust in so doing, & pltf. had no remedy against the bank.—MARTEN *v.* ROCKE, EYTON & CO. (1885), 53 L. T. 946; 34 W. R. 253; 2 T. L. R. 140.

208. —— —— ——.]—Deceased was an auctioneer holding cattle sales in B. It was alleged that his course of business was to sell stock in his own name, giving varying credit to the buyers, but paying the vendors at the conclusion of the sale if they so wished, or otherwise within two days, irrespective of the time of payment of the purchase price by the buyers. His conditions of sale provided that he sold as commission agent & would in no way be liable as principal, & that vendor's remedy should be against purchaser only. On Apr. 23, 1912, deceased held a sale at B. at which, among other lots, he disposed of cattle belonging to C. On Apr. 24 deceased left his office, & on Apr. 25 committed suicide. Earlier on the same day his son had paid into a special account at the bank the proceeds of this sale, amounting to £794, including a cheque from the purchaser of C.'s cattle for the amount due. On May 24 an order was made for the administration of deceased's estate in bkpcy., & G. was appointed trustee. C. applied for an order that the trustee should pay over to him the purchase price of the cattle, less the auctioneer's commission:—*Held:* (1) there was no evidence of an agreement by which vendor became the creditor of the auctioneer & looked to him alone, & not to purchaser for payment; (2) the auctioneer received the money in a fiduciary capacity; (3) as it could be traced, it must be paid over to the vendor.—*Re* COTTON, *Ex p.* COOKE (1913), 108 L. T. 310; 57 Sol. Jo. 343, C. A.

209. —— —— ——.]—An auctioneer is, as regards the proceeds of sale of goods which he has been instructed to sell, "a person in a fiduciary position" within the Debtors Act, 1869 (c. 62), s. 4 (3), & may be sent to prison for default in paying such proceeds of sale as directed by the ct., notwithstanding that he is bkpt.—CROWTHER *v.* ELGOOD (1887), 34 Ch. D. 691; 56 L. J. Ch. 416; 56 L. T. 415; 35 W. R. 369; 3 T. L. R. 355, C. A.

Annotations:—**Folld.** Preston *v.* Etherington (1887), 57 L. J. Ch. 176, C. A. **Refd.** *Re* Gent, Gent-Davis *v.* Harris (1888), 40 Ch. D. 190; *Re* Smith, Hands *v.* Andrews; [1893] 2 Ch. 1, C. A.; Piddocke *v.* Burt, [1894] 1 Ch. 343; *Re* Cotton, *Ex p.* Cooke (1913), 108 L. T. 310, C. A.

Vendor's right to follow proceeds of sale into hands of third parties.]—*See* AGENCY, Vol. I., pp. 562—566; BANKRUPTCY & INSOLVENCY; EQUITY; TRUSTS AND TRUSTEES.

SECT. 2.—AS TO GOODS.

210. Duty of auctioneer as bailee.]—An auctioneer is bound only to take due care of the goods entrusted to him for sale, such as he would do of his own goods, so that for a loss arising from misfortune or unavoidable accident he is not liable (LORD KENYON, C.J.). —MALTBY *v.* CHRISTIE (1795), 1 Esp. 340.

Annotation:—**Expld.** Rankin *v.* Horner (1812), 16 East, 191.

But *see Coggs* v. *Bernard* (1704), 2 Ld. Raym.

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the auctioneer if the latter sells the goods at a lower price; & he is not limited to his remedy against the purchaser.—HAWKE'S BAY FARMERS' CO-OPERATIVE ASSOCN., LTD. *v.* FARQUHARSON (1916), 35 N. Z. L. R. 917. —**N.Z.**

202 vi. —— ——.]—An auctioneer receiving an article with instructions not to sell under a certain price will be liable to make good the loss if he sell it for a less sum.—MASON *v.* CHAMBERLAIN (1834), 1 Thom. (2nd ed.) 7.—**CAN.**

t. —— *Direction to jury.*]—An action will lie against an auctioneer for selling goods at a ruinous sacrifice, if he has acted negligently & disregarded his duty; & it is no misdirection to tell the jury that the low price obtained is evidence to go to them of negligence.—CULL *v.* WAKEFIELD (1842), 6 O. S. 178. —**CAN.**

u. *Injunction restraining sale — Notice by telegram—Received after sale.*] —An auctioneer acting under an order for sale, or master or other officer conducting such proceedings, is not bound by an order staying the sale, of which he has not notice.

Where an order staying a sale for three weeks was granted on the day the sale was to take place, & the registrar telegraphed to the master conducting the sale that such order was granted, & the message reached him after the sale, but before payment of the purchase-money; an order made by a judge in chambers, refusing an application to set aside the sale, was sustained by the full ct. on rehearing.—FREEHOLD PERMANENT BUILDING SOCIETY *v.* CHOATE (1871), 3 Ch. Ch. 440.—**CAN.**

909, *per* HOLT, C.J., at p. 917, &, generally, BAILMENT, Part III., sect. 1, *post*.

211. Sale without authority—Conversion.]—Pltf. sent three horses to deft., an auctioneer, to be sold next day. Being told by deft.'s clerk that the next day would not be so good a time to sell them as the following sale day, pltf. said he would send for them back again, but when he did so on the next evening, he found that they had been sold. In a conversation deft. said that it was a mistake of his clerk, for which he was not answerable :—*Held :* (1) the horses were entrusted to deft. for a qualified purpose which admittedly was not conformed to ; (2) deft. was guilty of conversion.—POWELL *v.* SADLER (1806), Paley, Principal & Agent, 3rd ed., 80.

212. Delivery to third party—Mistake of servant—Conversion.]—Trover to recover a wardrobe. The wardrobe had been sent by pltf. to deft.'s sale room, to be sold by auction, but at the sale it was bought in for pltf. A witness stated that after the sale he went & paid the expenses for pltf. & received a ticket for the delivery of the wardrobe, which he took to deft.'s porter, who informed him that it had been given to another purchaser of a different lot at the sale, & that it would be returned to pltf. as soon as it was found. The wardrobe had been delivered by the porter in mistake to purchaser of the other lot :—*Held :* (1) there was sufficient evidence of a conversion ; (2) although a master was not responsible for every wrongful act of his servant, yet deft. must be liable for the misdelivery of his porter as it was the porter's duty to take the delivery tickets, & to give to each purchaser the proper article.—HARRIS *v.* RICHARDS (1847), 8 L. T. O. S. 451.

SECT. 3.—DUTY TO MAKE BINDING CONTRACT.

213. Sale at price exceeding £10—No memorandum signed—Negligence.]—An auctioneer who sells goods by auction at a price exceeding £10 is liable to the vendor for negligence in failing to procure a sufficient memorandum of the contract signed by or on behalf of the purchaser, whereby the contract is not binding upon the purchaser (BLACKBURN, J.).—PEIRCE *v.* CORF (1874), L. R. 9 Q. B. 210 ; 43 L. J. Q. B. 52 ; *sub nom.* PIERCE *v.* CORF, 29 L. T. 919 ; 38 J. P. 214 ; 22 W. R. 299.

Annotations :—**Apld.** McCaul *v.* Strauss (1883), Cab. & El. 106. **Expld.** Wylson *v.* Dunn (1887), 34 Ch. D. 569 ; Dewar *v.* Mintoft, [1912] 2 K. B. 373. **Refd.** Rishton *v.* Whatmore (1878), 8 Ch. D. 467 ; Potter *v.* Peters (1895), 64 L. J. Ch. 357 ; Bell *v.* Balls, [1897] 1 Ch. 663.

214. Failure to get purchaser's signature & deposit—Resale at reduced price—Damages.]—Defts., auctioneers, having put up a ship for sale, under the usual conditions (*inter alia*) that the highest bidder should immediately sign the contract & pay a deposit, or that the ship should be put up again, allowed the highest bidder, who was unknown to them, to go away without signing or paying a deposit. He could not be found, & the ship was sold by pltf. for less than the pretended purchaser had bid, but also for less than defts. could have obtained by private contract :—*Held :* if the jury thought there had been a neglect of duty, but no real injury, they should find for pltf. the owner of the ship, for nominal damage.—HIBBERT *v.* BAYLEY (1860), 2 F. & F. 48.

SECT. 4.—PURCHASE BY AUCTIONEER.

215. Abortive sale—Purchase by private contract—Setting aside sale—Lapse of years.]—An auctioneer employed to sell cannot be permitted on equitable principles to purchase the property himself.

Where an auctioneer, who had been employed to value & subsequently to sell an estate by auction, purchased the estate himself by private contract on the day after the auction, which proved abortive in consequence of no bidding having been made, & failed to give a satisfactory account of the proceedings at the auction, the purchase was set aside after a lapse of thirteen years.—OLIVER *v.* COURT (1820), 8 Price, 127 ; Dan. 301 ; 146 E. R. 1152.

See, generally, AGENCY, Vol. I., pp. 470—474.

SECT. 5.—LIABILITY FOR PROCEEDS OF SALE AND TO ACCOUNT.

216. Must account to employer—Adverse claim—Agreement as to proceeds—Repudiation.]—Action against an auctioneer by a person, who had employed him to sell goods, to recover the proceeds of the sale. Before the sale had been completed, a judgment creditor of another party had interfered, & seized the goods as belonging to him. Pltf. had then agreed in writing that deft. should pay the proceeds of the sale into a bank to abide the event of the dispute between pltf. & the judgment creditor. Pltf. subsequently repudiated the agreement by notice in writing, before the money was paid over, which it was contended he could not do :—*Held :* there was nothing to relieve deft. from his liability to pltf.—LOWE *v.* GALLIMORE (1852), 18 L. T. O. S. 63, 241.

217. Jus tertii—Goods fraudulently removed—Insolvent's assignees.]—Pltf., acting in collusion with an insolvent, fraudulently removed the insolvent's goods & employed deft., an auctioneer, to sell them. Notice of the fraudulent removal was given by the insolvent's assignees to deft., who, nevertheless, sold the goods & rendered an account of the sale to pltf. Afterwards, on receiving an indemnity from the assignees, he refused to pay over the proceeds of the sale to pltf. In an action for money had & received :—*Held :* (1) pltf. had no better title than the insolvent ; (2) deft. could set up the title of the insolvent's assignees.

If the insolvent had put the goods into the hands of deft. for sale, his assignees would have stepped in & claimed the produce from deft. & the insolvent could not have maintained his action after such

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PART VII. SECT. 3.

w. *Limits of duty.*]—From the auctioneer's acceptance of an engagement to conduct an auction there is no implication of an absolute contract on his part to bind the person to whom a lot may be knocked down to complete the purchase.—KAVANAGH *v.* CUTHBERT, 9 I. R. C. L. 136.—**IR.**

PART VII. SECT. 4.

215 i. *Abortive sale—Purchase by private contract—Where not breach of duty.*]—An auctioneer employed to sell a property by public auction is an agent *pro hac vice* only, & whether he succeeds in effecting a sale or not his agency is determined after the auction. Therefore where mtgees. have put up the mtged. property for sale by public auction without result, & fourteen days afterwards agree to sell the same property by private contract to the auctioneers who conducted the attempted auction sale, the transaction cannot be impeached by the mtgor. as a purchase by a mtgor.'s agent from the mtgee.—YOUNG *v.* HILL (1883), 2 N. Z. L. R. 62.—**N.Z.**

PART VII. SECT. 5.

217 i. *Jus tertii.*]—An auctioneer having sold certain goods on the instructions of A., received, while the proceeds were in his hands, notice from B., an exor., that the goods sold formed part of the assets of his testator, & that he claimed the proceeds. In an action against the auctioneer by C., as administrator of A., to recover the proceeds of the sale :—*Held :* as deft. would otherwise render himself liable to an action at the suit of B., he was entitled to rely as a defence on B.'s right.—HARTE *v.* GRAHAM (1899), 33 I. L. T. 72.—**IR.**

Sect. 5.—Liability for proceeds of sale and to account. Sect. 6: Sub-sect. 1.]

claim (ALDERSON, J.).—HARDMAN *v.* WILLCOCK (1831), 9 Bing. 382, n.; 131 E. R. 659.

Annotations:—**Expld. & Distd.** Tassell *v.* Cooper (1850), 9 C. B. 509; Newnham *v.* Stevenson (1851), 10 C. B. 713. **Expld.** Biddle *v.* Bond (1865), 6 B. & S. 225.

218. —— Adverse claim—No title shown by claimants.]—Pltf., the elder brother & creditor of an intestate, being in possession of the goods of the intestate under a bill of sale, said that he should not insist on his bill of sale, but that he should divide the goods with the other creditors, & he employed deft., an auctioneer, to sell the goods. After the sale the widow of deceased gave deft. notice, through her solr., not to pay pltf., but to retain the money until all the creditors should come in, that it might be divided rateably amongst them. No letters of administration were taken out:—*Held:* (1) deft. was *primâ facie* bound to account to pltf., from whom he had received the goods; (2) even if he would have been at liberty to set up the *jus tertii*, & show as a defence against pltf. that he was bound to account to a third person, still he was liable, no title being shown by him in any third person.—CROSSKEY *v.* MILLS (1834), 1 Cr. M. & R. 298; 3 L. J. Ex. 297; 149 E. R. 1093.

219. —— Evidence of title—No estoppel.]—Pltf. seized goods belonging to R., under a distress for rent of a house alleged to have been demised by pltf. to R., & having seized them he delivered them to deft., an auctioneer, for the purpose of selling them. When the sale was about to begin R. gave notice to deft. that he must not sell the goods, or if he did sell them that he must retain the proceeds for him (R.), as the distress was void, & as the relation of landlord & tenant did not exist between himself & pltf. This was true, & the distress was void altogether. Deft. sold the goods, but kept the proceeds for R.:—*Held:* he was not estopped from disputing pltf.'s title, but was entitled to set up the *jus tertii*, as the bailment had been determined by what was equivalent to an eviction by title paramount.—BIDDLE *v.* BOND (1865), 6 B. & S. 225; 5 New Rep. 485; 34 L. J. Q. B. 137; 12 L. T. 178; 29 J. P. 565; 11 Jur. N. S. 425; 13 W. R. 561; 122 E. R. 1179.

Annotations:—**Expld. & Distd.** Kingsman *v.* Kingsman (1880), 6 Q. B. D. 122, C. A.; *Re* Sadler, *Ex p.* Davies (1881), 19 Ch. D. 86, C. A. **Expld. & Apld.** Rogers *v.* Lambert (1890), 24 Q. B. D. 573. **Expld.** Henderson *v.* Williams, [1895] 1 Q. B. 521, C. A. **Refd.** Ross *v.* Edwards (1895), 73 L. T. 100, P. C. **Mentd.** Leese *v.* Martin (1873), L. R. 17 Eq. 224.

220. —— Election—Estoppel.]—After the filing of a liquidation petition the holder of a registered bill of sale executed by debtor instructed an auctioneer to take possession of the chattels comprised in it. The auctioneer took possession, & advertised the goods for sale on behalf of the bill of sale holder. The sale was stopped by injunction, & the auctioneer remained in possession of the goods on behalf of the receiver under the petition. On the appointment of a trustee the auctioneer held possession for him, & ultimately by his directions advertised the goods for sale, the advertisements & the catalogues of the goods being headed "In liquidation. By order of the trustee." The goods were sold, & the proceeds of sale were received by the auctioneer. The bill of sale holder gave him notice not to pay them to the trustee, & he declined to pay them over. The trustee applied to the Bkpcy. Ct. for an order for payment to him, serving notice of his motion on the auctioneer only. On the hearing of the motion an order was made, by consent, that the money should be paid into ct. & the hearing adjourned, notice meanwhile being given to the bill of sale holder, who did not appear on the adjourned hearing. He had meanwhile commenced an action against the auctioneer for the proceeds of sale:—*Held:* the money must be paid out to the trustee, on the ground that the auctioneer had, with full knowledge of the adverse claim, deliberately elected to sell the goods for the trustee, & was estopped from denying his title.—*Re* SADLER, *Ex p.* DAVIES (1881), 19 Ch. D. 86; 45 L. T. 632; 30 W. R. 237, C. A.

221. —— Equitable plea—Jurisdiction.]—An auctioneer having been employed to sell the property of a lunatic by the agent of the committee, an action was afterwards brought by the personal representative of the lunatic against the auctioneer, for the moneys received by him as the produce of the sale. Deft. pleaded equitable pleas of set-off under C. L. P. Act, 1854 (c. 125), & pltf. at law replied. Deft. then filed a bill for an injunction, setting up the same case as in his defence at law, & alleging complicated accounts:—*Held:* (1) there was nothing to show that these accounts could not be taken at law; (2) the pleas must be considered as showing a good defence at law under the above Act; (3) the injunction must be refused.—FAREBROTHER *v.* WELCHMAN (1855), 3 Drew. 122; 3 Eq. Rep. 383; 24 L. J. Ch. 410; 24 L. T. O. S. 286; 3 W. R. 257; 61 E. R. 849.

Annotations:—**Expld. & Distd.** Gompertz *v.* Pooley (1859), 4 Drew. 448. **Refd.** Waterlow *v.* Bacon (1866), 35 L. J. Ch. 643.

222. Account stated—How far binding—Void sale—Resale.]—Pltf. had employed deft. to sell goods by auction, & at the sale a great quantity had been purchased by M. who was afterwards discovered to be insane. It was the custom of the trade that when goods were sold at auction, & the auctioneer did not take the deposit from the purchaser, & the purchaser went away without completing his purchase, that the auctioneer should be liable for the amount of the deposit. About two months after the sale, the goods were again put up at auction & sold at a loss of about £87, & five months afterwards, when the auctioneer was asked for an account, he rendered one, omitting any mention of the second sale, but charging the commission on the full amount obtained by the first sale, when the goods had been sold to M. In an action for money had & received & on an account stated, it was held at the trial that the purchase by M. was so far void as to exclude the liability of the auctioneer for the difference between the prices obtained at the two sales, & it was contended that there was sufficient evidence of an account stated, in which the sum

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223 i. *Set-off by purchaser.*]—C., an auctioneer, was employed to sell certain goods for R. C. & Co. C. sold some of the goods to G. & F., who claimed to set off the value of the goods against a debt due to them by R. C. & Co.:—*Held:* it is the duty of an auctioneer, in the absence of a stipulation to the contrary, to sell for cash, & his liability to his employers is not affected by the fact the goods are sold to a person to whom the employer is indebted at the time of the sale.—KNOX *v.* COCKBURN (1862), 1 Q. S. C. R. 80.—**AUS.**

223 ii. ——.]—To an action for not accounting, deft., an auctioneer, pleaded that "as to the sum of £16 3*s.*, portion of the sum of £ , that goods to the amount of £16 3*s.* were purchased from him by S. & were, by the custom of A., delivered to him without being paid for, & that pltf. was indebted to S. in the sum of £16 3*s.*, & that S. refused to pay to deft. the sum of £16 3*s.*":—*Held:* a bad plea.—CUMMING *v.* BELL (1863), 8 Ir. Jur. 391.—**IR.**

a. *Effect of failure to account.*]—An auctioneer was entrusted by clients with property for sale: he sold & paid the proceeds into his general account at his bankers; he neglected after repeated applications to render account sales or pay over the proceeds; by payments in course of his business his general account dwindled & he became insolvent. The Comrs. refused his certificate because he had "extended for his own benefit or appropriated to his own use trust funds or other property of which he had the charge or disposition as trustee or as an agent only."—*Re* PERRY (1862), 1 W. & W. 150.—**AUS.**

received by the first sale was acknowledged to be due, & it could not be said that there could be any error, inasmuch as deft. had charged the commission on the full sum obtained by the first sale, taking his chance of what might be obtained at the subsequent sale, it being his own negligence that the second sale became necessary :—*Held :* it was only *primâ facie* evidence that he was liable for the amount acknowledged by the account to be due, & as he said that he had received a certain sum, but it turned out that he had not received that sum, he could not be answerable for it without some other agreement between the parties.—SAMUEL *v.* ROBINSON (1847), 8 L. T. O. S. 367.

223. Set-off—Sale of partnership property—Debt due from one partner.]—To an action for money had & received, defts. pleaded, as a set-off, that pltfs. were partners, & that before the money had been received by defts., G., one of pltfs., applied to defts., auctioneers, to sell some property, & that defts. at the time of the application, & at the time of the selling, & at the time when the set-off accrued, believed G. to be the sole owner of the property & had no notice that pltfs. had any interest in it, that the money in question was received upon the sale of the property, & that after G. had so employed defts., & before defts. had notice that G. was not the sole owner, G. became indebted to defts. for money lent, etc. Replication, that at the time of the selling of the property, defts. knew that G. was not the sole owner of it :—*Held :* (1) the plea was bad ; (2) it did not show that G. appeared as sole owner, with the consent or by the default of other pltfs. ; (3) it amounted merely to a set-off of a debt due from one partner to a demand from several partners. —GORDON *v.* ELLIS (1846), 2 C. B. 821 ; 3 Dow. & L. 803 ; 15 L. J. C. P. 178 ; 7 L. T. O. S. 85 ; 10 Jur. 359 ; 135 E. R. 1167.

224. Contract rescinded for fraud—Notice to auctioneer not to pay over proceeds.]—Pltf. instructed deft. to sell a horse for him, representing to deft. that the horse was a useful horse, etc., but that he was not to warrant it. Deft. sold the horse & represented it as a useful horse. The purchaser afterwards rescinded the contract on the ground of fraud, & gave deft. notice not to pay over the purchase-money to pltf. In an action for the purchase-money :—*Held :* these facts afforded deft. a good defence.—STEVENS *v.* LEGH (1853), 22 L. T. O. S. 84 ; 2 W. R. 16 ; 2 C. L. R. 251.

225. Omission to credit trade discount—Misconduct.]—Pltf. employed defts., auctioneers, to sell goods for him by auction upon the terms that they were to be paid a lump sum by way of commission, & were further to be paid "all out-of-pocket expenses," including the expenses of printing & advertising. Defts. in due course sold pltf.'s goods. In rendering their account of the out-of-pocket expenses to pltf. they debited him with the gross amounts of the printers' bill & of the cost of advertising in the newspapers, they having in fact received discounts both from the printers & the newspaper proprietors, a fact of which pltf. had no knowledge. There was evidence of a general custom for printers & newspaper proprietors to deal with auctioneers as principals, & to allow them a trade discount off their retail charges, which discount they would not allow to the auctioneers' customers if they dealt with them directly, & defts., in omitting to disclose the fact of the discounts to pltf. did so in the honest belief that they were lawfully entitled under the custom to receive the discounts & retain them to their own use :—*Held :* although defts. were not entitled to debit pltf. with the gross amounts of the printing & advertising bills, inasmuch as by the terms of the employment they were only to be paid their actual out-of-pocket expenses, yet, as they received the discounts without fraud, & as the duty to account correctly for the out-of pocket expenses was merely incidental to & separable from their main duty connected with the sale of the goods, the omission to disclose the receipt of the discounts to pltf. did not disentitle them to retain their commission.—HIPPISLEY *v.* KNEE BROTHERS, [1905] 1 K. B. 1 ; 74 L. J. K. B. 68 ; 92 L. T. 20 ; 21 T. L. R. 5 ; 49 Sol. Jo. 15.

Annotations :—**Expld.** Swale *v.* Ipswich Tannery (1906), 11 Com. Cas. 88. **Expld. & Distd.** Stubbs *v.* Slater, [1910] 1 Ch. 195.

SECT. 6.—AUCTIONEER'S RIGHT TO REMUNERATION.

SUB-SECT. 1.—IN GENERAL.

226. Construction of contract—Time limit for sale—Meaning of "month."]—An auctioneer was employed to sell land, under a written contract that he should be paid 1 per cent. commission, but, if the estate were not sold within two months after the day of auction, only ½ per cent. :—*Held :* (1) this, by itself, meant "two lunar months," unless there was admissible evidence that the parties meant "calendar months" ; (2) the judge might construe it to mean "calendar months," if the context showed this meaning, or if this appeared to him, from the surrounding circumstances, at the time of making the contract ; (3) if there were evidence that the words were used in a sense peculiar to the trade, business or place, the jury upon this might find such peculiar meaning ; (4) the conduct or correspondence of the parties since the making of the contract was not evidence upon which, alone, a jury might find that the words denoted "calendar months."—SIMPSON *v.* MARGETSON (1847), 11 Q. B. 23 ; 17 L. J. Q. B. 81 ; 12 Jur. 155 ; 116 E. R. 383.

Annotations :—**Expld.** Bruner *v.* Moore, [1904] 1 Ch. 305. **Refd.** Marsh *v.* Higgins (1850), 9 C. B. 551 ; Hutton *v.* Brown (1881), 45 L. T. 343. **Mentd.** Yangtsze Insce. Assocn. *v.* Indemnity Mutual Marine Assce., [1908] 2 K. B. 504, C. A.

See, also, TIME.

227. Claim by action—Reference to master—Matter of account.]—Pltf. sued deft. for work & labour as an auctioneer, & before plea deft. applied under C. L. P. Act, 1854 (c. 125), s. 3, to a judge for an order to refer the matter to a master, upon an affidavit stating "that the matter in dispute in this action consists of mere matter of account, which cannot be conveniently tried in the ordinary way," which order, though opposed by pltf., was made. Upon a subsequent application by pltf. to set aside such order, on the ground that an action for "work & labour" was not within the operation of the above sect. & that it would be competent to deft. to set up a defence of non-liability :—*Held :* (1) such action was within the sect. ; (2) if when before the master deft. set up any other matter of defence, then it would be the proper time for pltf. to apply

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PART VII. SECT. 6, SUB-SECT. 1.

b. *Failure of duty—Loss of commission.*]—An auctioneer, who, by concealing material facts from his employer, has caused loss to him, has no right to the compensation agreed to be paid to him upon a sale being effected.—RING *v.* POTTS (1903), 36 N. B. R. 42.—**CAN.**

c. *Where sale is abortive.*]—An auctioneer is not entitled to charge commission on an abortive sale unless there is an express agreement that he is so to do.—SINCLAIR *v.* STUART (1886), 5 N. Z. L. R. 85.—**N.Z.**

Sect. 6.—Auctioneer's right to remuneration: Subsects. 1, 2 & 3.]

to rescind the order.—CLARK *v.* WARE (1867), 17 L. T. 144.

See, generally, ARBITRATION, Vol. II., pp. 621, 622.

228. —— Claim by other auctioneers—Interpleader.]—Pltfs., auctioneers, sued deft. for £35 12*s.* agreed commission, in respect of the sale of a house. A second firm of auctioneers claimed £25 from deft., for commission in respect of the same sale of the same house :—*Held :* (1) the two claims were not opposing or competing ; (2) there was no jurisdiction to give deft. relief by way of interpleader, either under C. C. R., Ord. 27, r. 13, or under R. S. C., Ord. 57.—GREATOREX *v.* SHACKLE, [1895] 2 Q. B. 249 ; 64 L. J. Q. B. 634 ; 72 L. T. 897 ; 44 W. R. 47 ; 39 Sol. Jo. 602 ; 15 R. 501, D. C.

See, generally, AGENCY, Vol. I., pp. 488 *et seq.*

229. —— Costs received by London agent of solicitors—Privity of contract.]—H. had been employed in a foreclosure action by D. & B., a country firm of solrs., as auctioneer, & when the costs came to be taxed by the London agent, S., he received a voucher from H. for his fees. S. thereupon took the money out of ct. after a taxation, which included this item of H.'s fees. Before he received this money it came to his knowledge that H. had not been paid. In an action by H. against S. to recover these fees as money had & received :—*Held :* (1) there was no privity of contract between them ; (2) the action must fail.—HANNAFORD *v.* SYMS (1898), 79 L. T. 30 ; 14 T. L. R. 530.

SUB-SECT. 2.—WHERE SALE BY AUCTION.

230. Express agreement—Usage of trade.]—A claim by an auctioneer for an allowance of 7½ per cent. on the price of goods sold, exclusive of expenses, can only be supported on the ground of private agreement ; apart from agreement the auctioneer cannot claim any sum beyond the fair *quantum meruit* for his labour.—MALTBY *v.* CHRISTIE (1795), 1 Esp. 339.

Annotation :—**Mentd.** Rankin *v.* Horner (1812), 16 East, 191.

231. Auctioneer trustee.]—A. by deed assigned to B. timber & stock-in-trade upon trust to sell & apply the money arising from the sale (*inter alia*) in paying the expenses of preparing for, making & completing such sale or sales, "including the usual auctioneer's commission & otherwise incidental to the aforesaid trusts." B. was an auctioneer, & had been employed as such by A. :—*Held :* (1) the words appeared to have been inserted to provide for B. being employed in the sale ; (2) B. was entitled to charge his commission.—DOUGLAS *v.* ARCHBUTT (1858). 2 De G. & J. 148 ; 27 L. J. Ch. 271 ; 31 L. T. O. S. 4 ; 4 Jur. N. S. 315 ; 6 W. R. 306 ; 44 E. R. 944, L.JJ.

232. ——.]—An exor. & trustee, who acted as auctioneer in the sale of the trust property :—*Held :* not entitled to charge commission.—KIRKMAN *v.* BOOTH (1848), 11 Beav. 273 ; 50 E. R. 821.

Annotations :—**Mentd.** *Re* Chancellor, Chancellor *v.* Brown (1884), 53 L. J. Ch. 443, C. A. ; *Re* Crowther, Midgley *v.* Crowther (1895), 43 W. R. 571 ; Stanier *v.* Hodgkinson (1903), 73 L. J. Ch. 179.

233. Auctioneer mortgagee.]—A mtgee. cannot, at the time when he advances his money, stipulate for an advantage not naturally arising out of his mtge., & where auctioneers, at the time of advancing their money upon mtge., stipulated for an authority to conduct the sale of the estate & for a commission of 5 per cent., upon the amount of the purchase-money, over & above the repayment of principal & interest :—*Held :* the charge for commission was not covered by the security, but, some expenses having been incurred in taking preliminary steps to sell, a reference to chambers was directed to ascertain the value of the services rendered under the contract.—BROAD *v.* SELFE (1863), 2 New Rep. 541 ; 9 L. T. 43 ; 9 Jur. N. S. 885 ; 11 W. R. 1036.

Annotations :—**Folld.** Field *v.* Hopkins (1890), 44 Ch. D. 524, C. A. **Mentd.** James *v.* Kerr (1889), 40 Ch. D. 449 ; Mainland *v.* Upjohn (1889), 41 Ch. D. 126 ; Biggs *v.* Hoddinott, Hoddinott *v.* Biggs, [1898] 2 Ch. 307, C. A. ; Santley *v.* Wilde (1899), 80 L. T. 155 ; Carritt *v.* Bradley, [1901] 2 K. B. 550, C. A.

234. ——.]—A mtgee. with power of sale was a member of a firm of auctioneers. The firm sold for him :—*Held :* they were not entitled to their commission.—MATTHISON *v.* CLARKE (1854), 3 Drew. 3 ; 61 E. R. 801 ; *sub nom.* MATHISON *v.* CLARK, 3 Eq. Rep. 127 ; 24 L. J. Ch. 202 ; 24 L. T. O. S. 105 ; 18 Jur. 1020 ; 3 W. R. 2 ; *subsequent proceedings* (1855), 25 L. J. Ch. 29.

Annotations :—**Refd.** Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A. **Mentd.** Furber *v.* Cobb (1887), 18 Q. B. D. 494, C. A. ; *Re* Doody, Fisher *v.* Doody, Hibbert *v.* Lloyd, [1893] 1 Ch. 129, C. A. ; Thorne *v.* Heard, [1894] 1 Ch. 599, C. A. ; The Benwell Tower (1895), 72 L. T. 664.

235. —— Sale by subsequent incumbrancers.]—An auctioneer took an absolute assignment of chattels, etc., under a bill of sale by way of mtge., & afterwards conducted the sale of them by auction under an agreement with another incumbrancer :—*Held :* he was entitled to charge the usual commission on such sale, although no provision for a commission had been made either in the bill of sale or the agreement.—MILLER *v.* BEAL (1879), 27 W. R. 403.

236. In respect of what services—Sale in lots—One lot only sold.]—An auctioneer's percentage of 1 per cent. "for valuing & bringing up to sale," which includes the preparation of the conditions of sale & the letting, & then a further charge of 1½ per cent. in addition (total 2½ per cent.), "for putting up to sale, if sold," is a fair & reasonable charge ; & an employment for the purposes of a sale & actually knocking down one lot, however small, out of 89 lots, all included in one sale, & belonging to the same seller, the conditions of sale (being the legal contract between the parties) running over the whole 89 lots, will entitle the auctioneer to recover "both branches" of his commission, namely (1) the 1 per cent. for the valuing & bringing up to sale ; & (2) the remaining 1½ per cent. for the act of putting up & actually knocking down, & thus completing the act of sale. No question as to sundry charges, but every item of that kind merged in the 2½ per cent. general commission, it being expressly understood such percentage should cover every incidental expense.—SIMPSON *v.* MILLTOWN (EARL) (1843), 1 L. T. O. S. 529.

237. Who liable—Action against solicitor stayed.]—An order was made to restrain an action brought by an auctioneer against the solr. in a lunacy for the amount of his bill for appraising & selling property belonging to the lunatic, such sale having been made under the authority of the ct., & the auctioneer having acted on the instructions of the solr., & with the sanction of the master, before whom he had at first carried in his claim ; & a reference was directed for the purpose of ascertaining what would be a proper sum to be allowed him on that account. —*Re* WEAVER (1837), 2 My. & Cr. 441 ; 40 E. R. 708.

Annotations :—**Refd.** Brockwell *v.* Bullock (1889), 22 Q. B. D. 567, C. A. ; *Re* E. G., [1914] 1 Ch. 927, C. A. **Mentd.** Blundell *v.* Gladstone (1839), 9 Sim. 455 ; Ambrose *v.* Dunmow Union (1844), 8 Beav. 43 ; *Re* Clarke, [1898] 1 Ch. 336, C. A.

238. Amount recoverable—Dry dock.]—There is no established custom among auctioneers to regard the sale of a dry dock as exceptional from that of ordinary property.

In an action for commission on the sale of a dry

dock :—*Held :* the agent was entitled to commission in accordance with the scale recognised by the Society of Auctioneers, the Surveyors' Assocn. & the Committee of the Estates Exchange—viz., 1¾ per cent. on the first £10,000, 1 per cent. on the next £10,000, & ½ per cent. on the residue.—NEWMAN *v.* RICHARDSON (1885), 1 T. L. R. 348.

239. —— Sale by mortgagee under power—Court scale.]—Where testator's real estate, subject to a mtge., was sold by auctioneers under the power of sale in the mtge. :—*Held :* (1) the mtgees. having taken directions from the chief clerk during the proceedings for sale, must be taken to have so submitted themselves to the jurisdiction that the sale, though not properly a sale under the direction of the ct., must be treated as subject to the control of the ct. in the same way as if it had been a sale by the ct. ; (2) no more was to be allowed for the auctioneers' charges than on a sale by the ct., though probably the charges made would have been treated as reasonable on a sale out of ct.—*Re* WALFORD, WALFORD *v.* WALFORD (1889), 5 T. L. R. 251, C. A.

240. —— Payable on completion—Rescission.]—Auctioneers, employed by the mtgees.' solrs. to sell certain property by auction, agreed that, if the property was not sold, they would charge a fee of 30 guineas & out-of-pocket expenses. The property was accordingly put up to auction & sold. There being a defect in the title the purchase was rescinded. The auctioneers claimed their full commission :—*Held :* (1) commission was only payable upon a completed sale, viz., in the case of land, when the conveyance was complete, not when there was a mere contract to sell ; (2) the commission was not earned under the terms of the contract itself ; (3) as it was the act of the purchaser that prevented the contract being carried out & not the act of the vendors, the auctioneers were only entitled to the fee of 30 guineas & out-of-pocket expenses.—PEACOCK *v.* FREEMAN (1888), 4 T. L. R. 541, C. A.

Annotation :—**Distd.** Skinner *v.* Andrews & Hall (1910), 26 T. L. R. 340, C. A.

241. —— Payable on sale—Rescission.]—Defts. were instructed to sell by auction a freehold property, on the following terms : "If the property should not be sold at the auction, but should be sold within, say, two months afterwards to a purchaser who has been found by means of your advertisements or posters or through your introduction, then you are to receive half of the commission you would have received if the property had been sold at the auction" ; & "if a sale should take place either before the sale under the hammer or before Oct. 30, 1909, the usual commission of 2½ per cent. upon the first £5,000 & 1½ per cent. upon the balance is to be paid to us, such commission to include all out-of-pocket expenses. If the property remains unsold at Oct. 30, then no charge of any description, whether for out-of-pocket expenses or services, is to be made by us." At the auction the property was knocked down to a purchaser, who signed a contract & paid a deposit to the auctioneer, but subsequently the contract was rescinded by the vendor, in consequence of a requisition being made by purchaser which vendor could not comply with : —*Held :* (1) defts.' commission was payable on the property being knocked down to a purchaser at the auction, notwithstanding that there was no completed sale ; (2) the auctioneers were entitled to retain their commission out of the deposit received from purchaser.—SKINNER *v.* ANDREWS & HALL (1910), 26 T. L. R. 340 ; 54 Sol. Jo. 360, C. A.

242. Effect of negligence—Sale becoming nugatory.]—If an auctioneer employed to sell an estate is guilty of negligence, whereby the sale becomes nugatory, he is not entitled to recover any compensation for his services from the vendor.—DENEW *v.* DAVERELL (1813), 3 Camp. 451.

Annotations :—**Consd.** Souter *v.* Drake (1834), 3 L. J. K. B 31. **Mentd.** Pike *v.* Wilson (1854), 1 Jur. N. S. 59.

SUB-SECT. 3.—WHERE SALE NOT BY AUCTION.

243. Construction of agreement—"Sold"—Sale by different agent.]—An auctioneer agreed with the owner of an estate to put the estate up for sale by auction upon the terms that, if the estate should not be sold, the owner was to pay £200 & the expenses of advertising, but if the estate should be sold, then all expenses were to fall into the commission, which varied according to the value of the estate. The estate was put up to auction, but not sold. The owner afterwards employed another agent, & wrote to the auctioneer, to say that he had done so, & through the agent's agency the estate was sold :—*Held :* the first auctioneer was only entitled to £200 & expenses, & not to commission on the sale of the estate.

In the construction of the contract, the word "sold" means sold by himself ; & he must prove that he sold, either he himself acting solely in it, or that he took the part of deft. in the sale of the estate. There is no proof that the sale was brought about by his act. It is entirely a question for the judge, & not for the jury (PARKE, B.).—GREEN (ASSIGNEE OF RANY) *v.* HALL (1848), 12 L. T. O. S. 151.

244. —— Sale by one member of firm.]—Pltfs. claimed commission on the sale of property sold by private contract by one of defts. for £128,500, after pltfs. had been employed to sell it. The commission claimed was 1 per cent. Defts. contended that, admitting pltfs. to have been employed upon the terms of receiving 1 per cent. as their commission on the purchase-money, the true meaning of the agreement was that such commission was not to become payable, unless the sale was effected by pltfs. themselves, & that the agreement for the sale, having been made by one of defts., pltfs. had not become entitled to their commission. The verdict was for pltfs.—DRIVER *v.* CHOLMONDELEY (1835), 9 C. & P. 559, n.

245. No implied employment to sell by private contract—When no sale by auction.]—On an employment of an auctioneer to sell by auction, there is no employment to sell by private contract if the public sale proves abortive, & evidence of a custom to that effect among auctioneers is not admissible.

Pltf., an auctioneer, claimed 2½ per cent. commission on a sale of deft.'s ground rents to G. The property was put up & bought in at the reserved price, G. being present. G. subsequently purchased by private contract, pltf.'s clerk volunteering to act as an intermediary. The jury found there was no employment of pltf. to sell by private contract, & judgment was given for deft.—MARSH *v.* JELF (1862), 3 F. & F. 234.

246. Sale by private contract—Brought about by auctioneer—Reasonable remuneration.]—An auc-

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PART VII. SECT. 6, SUB-SECT. 2.

240 i. *Amount recoverable—Payable on completion—Vendor's refusal to complete sale.*]—An auctioneer sold land for a vendor on the terms that the purchasers were to pay 5 per cent. commission, & did all that lay upon him to do, but the vendor wrongfully refused to complete the sale :—*Held :* the auctioneer was entitled to recover the agreed remuneration for his services from the vendor.—ROHAN *v.* MOLONY (1905), 39 I. L. T. 207.—IR.

PART VII. SECT. 6, SUB-SECT. 3.

246 i. *Sale by private contract—Brought about by auctioneer.*] — Pltfs., auctioneers, received written authority from deft. to sell a certain cottage belonging to him. Pltfs. issued cards to view, &

Sect. 6.—Auctioneer's right to remuneration: Subsect. 3. Sect. 7.]

tioneer & estate-agent was employed to sell an estate, under an agreement by which he was to receive a commission of 2½ per cent. "if the estate should be sold," &, "in case the estate should not be sold," he was to be paid £25 as a compensation for his trouble & expense. Having put up the estate to auction, & failed to sell it, the agent, being asked by a person who had attended the sale who was the owner of the property, referred him to his principal, & ultimately that person, without any further intervention of the agent, became the purchaser. During the negotiations with the purchaser & before completing the sale to him, deft. had withdrawn the agent's authority to sell the estate:—*Held:* the sale having been effected through the means of the agent, he was entitled to the stipulated commission.—GREEN *v.* BARTLETT (1863), 14 C. B. N. S. 681; 2 New Rep. 279; 32 L. J. C. P. 261; 8 L. T. 503; 10 Jur. N. S. 78; 11 W. R. 834; 143 E. R. 613.

Annotations:—**Consd. & Expld.** Curtis *v.* Nixon (1871), 24 L. T. 706. **Folld.** Steere *v.* Smith (1885), 2 T. L. R. 131. **Apld.** Oetzmann *v.* Emmott (1887), 4 T. L. R. 10. **Consd.** Barnett *v.* Isaacson (1888), 4 T. L. R. 595. **Folld.** Burchell *v.* Gowrie & Blockhouse Collieries, [1910] A. C. 614, P. C. **Refd.** Green *v.* Lucas (1875), 31 L. T. 731. **Mentd.** Inchbald *v.* Western Neilgherry Coffee, Tea & Cinchona Co. (1864), 13 W. R. 95.

247. —— —— ——.]—Deft. employed pltfs. to sell a ship, & agreed that, if a sale was effected to any person "led to make such offer in consequence of" pltfs.' mention or publication of it, pltfs. should be paid commission. Pltfs. advertised the ship, & put her up to auction, but she was not sold. Shortly afterwards S. purchased her by private contract. S. had heard of the auction from a person who had been in communication with pltfs.:—*Held:* pltfs. were entitled to their commission although neither the purchaser nor his agent had seen pltfs.' publication, as he had been led to make an offer by hearing of it.—BAYLEY *v.* CHADWICK (1877), 36 L. T. 740; 3 Asp. M. L. C. 453; *revsd.*, 37 L. T. 593, C. A.; *restored* (1878), 39 L. T. 429, H. L.

248. —— —— —— **Rescission through default of vendor.**]—In the absence of any express contract, auctioneers are entitled to reasonable remuneration for sales by private contract, effected through their instrumentality, even although by the act or default of the vendor the contract is rescinded; & it is for the jury whether the same commission as on sales by auction is reasonable.—CLARK *v.* SMYTHIES (1860), 2 F. & F. 83.

249. Sale by court—Sale after auction—Practice.]—In an administration action an order was made for the sale of lands forming part of the real estate, & an auctioneer was employed to conduct the sale & the usual recognisance was given by him. At the auction the lands were not sold, but shortly afterwards an advantageous sale was effected, not by the auctioneer nor on his introduction, though probably as a consequence of the attempted sale by auction. The auctioneer, whose recognisance had not been vacated, applied to the ct. to be allowed commission on the sale so effected, & there was evidence by auctioneers of experience & eminence to the effect that it was the practice of the ct. to allow commission in such a case. KEKEWICH, J., doubting the existence of such a practice, & a master, to whom the question was referred, stating that he did not know of any practice of the Ch. Div. to allow an auctioneer employed by the ct. a commission on a sale effected after the auction but within a reasonable time thereafter, & before recognisance vacated, such sale not being effected by the auctioneer himself or on his introduction, & that he had always absolutely refused to allow such commission, the application was dismissed.—*Re* MAITLAND, PICKTHALL *v.* DAWES (1903), 47 Sol. Jo. 709.

250. Withdrawal of instructions—Sale through agency of auctioneer.]—There is no custom that where property is put into an auctioneer's hands for sale &, before he has had an opportunity of selling it, is withdrawn & sold through another channel, the auctioneer is entitled to a commission of 2½ per cent. on the price realised. It is otherwise if the auctioneer can show that the sale was brought about by something which he has done.—WILLIAMS *v.* TUCKETT (1900), *Times*, March 9.

251. —— —— **Evidence of usage.**]—Pltf. was employed to sell ground rents by auction, on the terms of receiving a commission of 1 per cent. "on sale." After he had advertised the sale, but before the day of sale, deft. sold the ground rents by private contract. Three auctioneers proved the custom of the trade to be that after an auctioneer was employed & the property advertised by him, he was

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put posters on the ground. Before authority to sell was revoked, B., seeing a poster put on the cottage by pltfs. stating that the property was for sale, & directing persons to apply to W. & W. (pltfs.), inquired where she could find W. & W. She afterwards met deft. & bought the property:—*Held:* the property having been placed in pltfs.' hands for sale & the sale having taken place through their means, & before the authority to sell was revoked, pltfs. were entitled to their commission.—WATKIN *v.* CRISFORD (1883), 4 N. S. W. L. R. 133.—**AUS.**

246 ii. —— *Not brought about by auctioneer.*]—The administrator of the estate of a deceased person instructed an auctioneer to submit the real estate of deceased to public auction. One property did not reach the reserve & was passed in. The property was subsequently sold privately by the administrator at a sum below the reserve, but higher than the same beneficiary's best bid at the auction. The auctioneer thereupon claimed commission on the sale on the grounds that the property had never been withdrawn from his hands & that the sale had been the result of the buyer having attended the auction owing to his efforts & advertising:—*Held:* the sale was not brought about by the efforts of the auctioneer, & he was not entitled to commission.—*Re* WILLIAMS (1912), 14 W. A. L. R. 20.—**AUS.**

246 iii. —— ——.]—Pltf. was employed by deft. to sell property by auction; a sale was not effected at the auction, but the property was shortly afterwards sold by deft. to a private purchaser:—*Held:* as the sale was not effected at the auction, & as the subsequent purchaser was not introduced through pltf., a claim for auctioneer's fees did not lie.—BURNS *v.* LANGFORD (1901), 35 I. L. T. 148.—**IR.**

250 i. *Withdrawal of instructions.*]—Where an auctioneer had been retained by the solr. for the owners of an estate to conduct a sale of the estate by auction, & a sale by auction did not take place owing to the estate having been disposed of by private treaty:—*Held:* the auctioneer was entitled to recover commission from the solr.—HUNTER *v.* MARTIN (1903), 37 I. L. T. 91.—**IR.**

250 ii. —— *Sale through other agents—Custom.*]—A custom that where property is placed in the hands of an auctioneer for sale, & afterwards withdrawn & sold without the intervention of such auctioneer within three months from the time when so placed in his hands for sale, such auctioneer is entitled to be paid the full commission on such sale, as if he had himself effected it, is unreasonable & bad.

Pltfs., auctioneers, sued for work & labour & commission. The contract was contained in a letter from defts. to pltfs. in these terms: "The lowest price for the whole of the property is £29,000. . . . As an inducement to your effecting a speedy sale, we agree, provided you obtain our price as named herein, to pay you the full commission of 2½ per cent." Pltfs. made efforts to effect a sale, but without success. Defts. withdrew the property from pltfs.' hands, & sold it through other agents:—*Held:* pltfs. were not entitled to recover anything from defts.—HARDIE *v.* BROWN (1886), 7 N. S. W. L. R. 303.—**AUS.**

250 iii. —— *Sale through agency of auctioneer.*]—L. instructed V., an auctioneer, to sell certain stock by public auction at a commission of 5 per cent. Before the date fixed for the sale L. disposed of the stock privately. V. sued L. for commission at the agreed rate on the price realised:—*Held:* V. was entitled to a reasonable remuneration for his services in the matter, & the transaction having been brought about by his advertisement of the sale & particulars obtained by the purchasers from him, his remuneration should be fixed at 5 per cent. of the purchase price of the stock thus sold, in addition to his expenses actually incurred in advertising the sale.—VIGNE *v.* LEO, 9 H. C. 229.—**S. AF.**

entitled to the full commission on a sale being effected, although not through his direct agency. The question left to the jury was, whether this custom was so notorious that deft. must have known it, & that if so, it was engrafted in the contract. The jury found for pltf. for the full commission.—RAINY *v.* VERNON (1840), 9 C. & P. 559.

252. —— —— Renewal of previous negotiations.]—Defts., trustees of an estate, being directed to sell the property, offered it to D. for £60,000 but without effect, as D. did not feel inclined to give more than £51,000 for it. Before this pltf. was applied to by defts. to know on what terms he would undertake to "knock down" the property. Pltf. replied that he should expect 20 guineas for preliminary expenses & 1 per cent. commission for an actual sale, but that in the event of the property being bought in, he should only claim 50 guineas & all disbursements, these latter being included in the 1 per cent. commission on a sale. These terms were assented to, & pltf. took his measures to dispose of the estate on Aug. 31. Before that day defts. renewed their treaty with D., who, on Aug. 30, concluded it by becoming the purchaser at the price originally named by the trustees. This took place without the privity of pltf., who, when acquainted with the matter, put in his claim to the 1 per cent. commission, & called several eminent auctioneers on his behalf to prove that by the custom of the trade the full amount was payable in the circumstances of the case. It was left to the jury to say whether, although pltf. might have had nothing to do with the actual sale to D., he was not fairly entitled to his full commission on the purchase-money paid by D., as though he had "knocked down the estate" to him. The jury returned a verdict for pltf. for the full amount claimed.—ROBINS *v.* BURKE (1846), 5 L. T. O. S. 322.

253. Settled land—Sale on behalf of tenant for life—Charges payable out of capital.]—Settled lands were sold under Settled Land Act, 1882 (c. 38), by the tenant for life, who had mtged. his interest. At the auction the reserve price was not reached, but on the following day the property was sold at that price by private contract. The auctioneer's charge for conducting the sale was to be ¼ per cent. commission :—*Held :* the trustees should pay the auctioneer's commission, & the tenant for life was entitled to have the auctioneer's charges paid out of the purchase-money.—*Re* BECK, *Re* CARTINGTON ESTATE (1883), 24 Ch. D. 608 ; 52 L. J. Ch. 815 ; 49 L. T. 95 ; 31 W. R. 910.

Annotations :—**Mentd.** Cardigan *v.* Curzon-Howe (1888), 37 W. R. 247 ; *Re* Peel's S. E., [1910] 1 Ch. 389.

254. Sale by tender—Scale of charges.]—Under a bkpcy. the stock was sold by an auctioneer in the country by tender :—*Held :* the auctioneer was entitled to be paid on the same scale as the one in use at Basinghall Street, that being a scale of payments intermediate between those employed in sales by auction & sales by valuation.—*Re* MACKENNA, *Ex p.* HUNT (1854), 5 De G. M. & G. 387 ; 23 L. J. Bcy. 43 ; 24 L. T. O. S. 29 ; 2 W. R. 682 ; 43 E. R. 920, L. C.

SECT. 7.—LIEN.

255. For charges, commission & auction duty.]—An auctioneer has a special property in goods intrusted to him for sale, with a lien for the charges of the sale, the commission, & the auction duty which he is bound to pay (LORD LOUGHBOROUGH). —WILLIAMS *v.* MILLINGTON (1788), 1 Hy. Bl. 81 ; 126 E. R. 49.

Annotations :—**Expld. & Distd.** Coppin *v.* Walker (1816), 7 Taunt. 237. **Apprvd.** Davis *v.* Danks (1849), 3 Exch. 435 ; Taplin *v.* Florence (1851), 10 C. B. 744. **Folld.** Robinson *v.* Rutter (1855), 4 E. & B. 954. **Apprvd.** Woolfe *v.* Horne (1877), 2 Q. B. D. 355. **Folld.** Davis *v.* Artingstall (1880), 49 L. J. Ch. 609 ; Manley *v.* Berkett, [1912] 2 K. B. 329. **Refd.** Sykes *v.* Giles (1839), 5 M. & W. 645 ; Rayner *v.* Grote (1846) 15 M. & W. 359 ; Wood *v.* Baxter (1883), 49 L. T. 45 ; Consolidated Co. *v.* Curtis, [1892] 1 Q. B. 495.

256. Marshalling securities.]—Defts., auctioneers, had sold for a customer a brewery, & part of the proceeds of the sale was in their hands, subject to their claim for charges incurred in connection with the sale ; they had also in their hands the balance of the price of some furniture sold by them for the same customer. Pltf. was a creditor of defts.' customer, & he by letter charged the proceeds of the sale of the brewery in favour of pltf. Defts. wrote to pltf. acknowledging the receipt of the letter of charge. Defts. afterwards paid their customer the balance of the price of the furniture, & appropriated the part of the proceeds of the sale of the brewery in their hands to the payment of their charges :—*Held :* (1) the letter of charge & defts.' acknowledgment thereof amounted to a good equitable assignment in favour of pltf. ; (2) defts., as auctioneers, had a lien for their charges upon the part of the proceeds of the sale of the brewery in their hands ; (3) defts.' acknowledgment of the letter of charge was not a waiver of their lien ; (4) defts. were at liberty to appropriate the part of the proceeds of the sale of the brewery in their hands to the payment of their charges, & were not

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PART VII. SECT. 7.

d. *In respect of what debts—General balance.*]—Auctioneers received horses to sell on commission & kept them in stables in connection with their sale yard until they were sold, & made advances against them to the owner. There had been a previous course of dealing between the parties, on which a balance arose in favour of the auctioneers. The owner became bkpt. :—*Held :* the auctioneers were entitled to a lien over the horses in their stables for the general balance due to them on all their transactions with him.—MILLER *v.* HUTCHESON & DIXON (1881), 8 R. (Ct. of Sess.) 489 ; 18 Sc. L. R. 304.—**SCOT.**

f. —— ——.] — The tenant of a farm arranged with a firm of auctioneers to conduct a displenishing sale of the stock & cropping of the farm on Oct. 26, 1900. The tenant, was sequestrated on Jan. 11, 1901. At the date of the sale, as the result of a series of transactions between the auctioneers & the tenant, the tenant was due to the auctioneers a balance of £244, part of the balance being alleged to be an advance of £200 made by the auctioneers to the tenant on Sept. 26, 1900. In a question with the tenant's trustee in bkpcy., the auctioneers claimed to retain the sum of £244, being part of the proceeds of the displenishing sale, in payment of the debt due to them by the tenant :—*Held :* the auctioneers having no right to retain for a general balance were not entitled to retain the proceeds of the sale in order to repay in full unsecured advances made by them to the tenant.—CRAIG'S TRUSTEE *v.* MACDONALD, FRASER & Co. (1902), 39 Sc. L. R. 773.—**SCOT.**

g. —— *Manager's promissory note.*] —In a composition after bkpcy., a manager was appointed by resolution of the creditors, with a definite duty in the management of a grazing & farming estate. The auctioneer received from him a note telling him that he could deduct from the proceeds of the auction a sum due on the manager's promissory note. The auctioneer knew that the writer was then acting as manager :—*Held :* the auctioneer had not any specific lien on the property sold by him in violation of the manager's duty.—*Re* GREHAN (1866), 11 Ir. Jur. 40.—**IR.**

h. *What covered by lien — Maps & plans.*]—An auctioneer has no lien on maps left with him to sell land by, such plans not being regarded as title deeds, which are *quasi* part of the land. —BLACKBURN *v.* MACDONALD (1857), 6 C. P. 380.—**CAN.**

k. —— *Goods sold on owner's premises—Effect of rendering account to vendor.*]—An auctioneer's lien extends to goods bought in by the owner, where the latter acquiesces in an account charging him as a purchaser. So it extends to goods sold on the owner's premises.

Where some goods at an auction have been bought in by the owner, & the auctioneer furnishes an account to the owner, wherein he credits himself with the purchase-money of the goods bought in, & debits himself with the whole proceeds of the auction, including such purchase-money, these facts do not hinder the auctioneer from founding a lien on the goods so bought in.—PURCELL *v.* DOUGLAS (1867), 16 W. R. 438.—**IR.**

Sect. 7.—Lien. Sect. 8.]

bound to take payment of their charges out of the price of the furniture in order to enable pltf. to obtain payment of his charge; (5) the doctrine of marshalling did not apply.—WEBB *v.* SMITH (1885), 30 Ch. D. 192; 55 L. J. Ch. 343; 53 L. T. 737; 1 T. L. R. 235, C. A.

257. When lien excluded—Repudiation of owner's title.]—A picture was intrusted by pltf. to B. for sale, & B. deposited it with deft., an auctioneer. When pltf. demanded it (without tendering anything for warehouse-rent), deft. refused to deliver it up until a debt of £8 due to him from B. was discharged:—*Held:* the repudiation of pltf.'s title precluded deft. from afterwards setting up a lien on the picture for warehouse-rent.—DIRKS *v.* RICHARDS (1842), 4 Man. & G. 574; 5 Scott, N. R. 534; 6 Jur. 562; 134 E. R. 236.

Annotations:—**Refd.** *Re* Llewellin, [1891] 3 Ch. 145. **Mentd.** Clements *v.* Flight (1846), 16 M. & W. 42.

258. Pleading lien.]—In an action of detinue in respect of fifty trees, it appeared that pltf. bought the trees at a sale by auction, at which deft. acted as auctioneer, but that deft. claimed that he had a lien on the trees for his commission & charges. The question being whether in an action of detinue a lien could be set up under a plea denying that the goods were pltf.'s:—*Held:* the plea let in the defence of lien.—LANE *v.* TEWSON (1841), 12 Ad. & El. 116, n.; 1 Gal. & Dav. 584; 11 L. J. Q. B. 17; 5 Jur. 1037; 113 E. R. 754.

Annotations:—**Dbtd.** Mason *v.* Farnell (1844), 12 M. & W. 674. We cannot agree with the decision in *Lane* v. *Tewson*; the case was not fully argued before the ct., nor were the authorities which we think have decided the question (that the right of lien must be pleaded) fully laid before them (ALDERSON, B.).

See, further, LIEN.

SECT. 8.—REIMBURSEMENT AND INDEMNITY BY VENDOR.

259. Revocation of authority—Liability previously incurred.]—An owner may, at any time before the contract is legally completed, interfere & revoke the auctioneer's authority, but he does so at his peril; & if the auctioneer has contracted any liability in consequence of his employment & the subsequent revocation or conduct of the owner, he is entitled to be indemnified.—WARLOW *v.* HARRISON (1859), 1 E. & E. 309; 29 L. J. Q. B. 14; 1 L. T. 211; 6 Jur. N. S. 66; 8 W. R. 95; 120 E. R. 925, Ex. Ch.

Annotations:—**Mentd.** Wiley *v.* Crawford (1861), 1 B. & S. 265; Mainprice *v.* Westley (1865), 6 B. & S. 420; *Re* Agra & Masterman's Bank, *Ex p.* Asiatic Banking Corpn. (1867), 2 Ch. App. 391, L.JJ.; Harris *v.* Nickerson (1873), L. R. 8 Q. B. 286; Woolf *v.* Horne (1877), 46 L. J. Q. B. 534; Johnston *v.* Boyes, [1899] 2 Ch. 73; Rainbow *v.* Hawkins, [1904] 2 K. B. 322; McManus *v.* Fortescue, [1907] 2 K. B. 1, C. A.

260. Employer not owner—Damage incurred by owner—Indemnity by employer.]—Pltf., an auctioneer, sold goods under order of deft., who had no right to dispose of them, & the true owner afterwards recovered against pltf. A declaration in case, which alleged that deft., being possessed of the goods, represented to pltf. that he was entitled to dispose of them, that pltf. in consequence at deft.'s request sold them by auction &, after deducting certain charges for his trouble, paid the residue of the proceeds to deft., that deft. deceived pltf. in this, that he was not at the time of the sale entitled to dispose of the goods; that the true owner afterwards recovered the value from pltf. & that deft. refused to reimburse him:—*Held:* sufficient after verdict.

Every man who employs another to do an act, which the employer appears to have a right to authorise him to do, undertakes to indemnify him for all such acts as would be lawful if the employer had the authority he pretends to have. Auctioneers do not take regular indemnities. These would be indeed surprised, if, having sold goods for a man & paid him the proceeds, & having suffered afterwards in an action at the suit of the true owners they were to find themselves wrongdoers, & could not recover compensation from him who had induced them to do the wrong (BEST, C.J.).—ADAMSON *v.* JARVIS (1827), 4 Bing. 66; 12 Moore, C. P. 241; 5 L. J. O. S. C. P. 68; 130 E. R. 693.

Annotations:—**Apld.** Betts *v.* Gibbins (1834), 2 Ad. & El. 57. **Expld.** Ormrod *v.* Huth (1845), 5 L. T. O. S. 268, Ex. Ch.; Morley *v.* Attenborough (1849), 18 L. J. Ex. 148. **Distd.** Robson *v.* Devon (1857), 5 W. R. 724. **Consd.** Dugdale *v.* Lovering (1875), L. R. 10 C. P. 196. **Expld.** Birmingham & District Land Co. *v.* L. & N. W. Ry. Co. (1886), 56 L. J. Ch. 956, C. A. **Apprvd.** Palmer *v.* Wick & Pulteneytown Steam Shipping Co., [1894] A. C. 318, H. L. **Consd.** The Englishman & The Australia, [1895] P. 212. **Distd.** Halbronn *v.* International Horse Agency & Exchange, [1903] 1 K. B. 270. **Refd.** Elliot *v.* Von Glehn (1849), 13 Q. B. 632; Barker *v.* Furlong, [1891] 2 Ch. 172; Burrows *v.* Rhodes, [1899] 1 Q. B. 816; Leslie (R.) *v.* Reliable Advertising & Addressing Agency, [1915] 1 K. B. 652; London Assocn. for Protection of Trade *v.* Greenlands, [1916] 2 A. C. 15, H. L.

261. Costs of legal proceedings—Action for reimbursement.]—Where an auctioneer has sold an estate, the title of which is objected to, & on his refusal to return the deposit, & action is brought, in which he afterwards pays the costs, the auctioneer cannot recover these costs against the principal in an action for money paid to his use; he must declare specially.—SPURRIER *v.* ELDERTON (1803), 5 Esp. 1.

262. Action for slander of title—Mistake as to identity.]—Defts. instructed pltf., an auctioneer carrying on business in Paris, to advertise for sale a mare which they represented to him was a thoroughbred mare entered & described in the English stud book under the name of P. Pltf. accordingly advertised the mare for sale as so named & described. A Frenchman, the owner of a thoroughbred mare also called P., brought an action in France against pltf., alleging that he had suffered damage through defts.' mare being advertised for sale under that name, & recovered damages. In an action by pltf. against defts. for an indemnity, it was found as a fact that the representation made by defts. as to the identity of their mare was true:—*Held:* defts. were not liable, the damages recovered from pltf. not being due to any wrongful act on their part but to the mistake made in the French ct. as to the identity of the mare.

The mere fact of the employment of an auctioneer does not render the employer liable to indemnify such auctioneer in respect of all acts done by him within scope of his authority (BRUCE, J.).—HALBRONN *v.* INTERNATIONAL HORSE AGENCY & EXCHANGE, LTD., [1903] 1 K. B. 270; 72 L. J. K. B. 90; 88 L. T. 232; 51 W. R. 622; 19 T. L. R. 138.

Annotation:—**Dbtd.** Williams *v.* Lister, Llewellyn Brothers, Third Parties (1913), 109 L. T. 699, C. A.

263. Costs of action against auctioneer.]—Where an agent, *e.g.*, an auctioneer, duly carries out the orders of his principal, & is, in consequence, made deft. in an action, & the action is dismissed for want of prosecution, the indemnity implied by law includes the costs of properly defending the action,

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PART VII. SECT. 8.

263 i. *Costs of action against auctioneer.*]—Where an auctioneer sells land under conditions providing for payment of a deposit to him "as agent for the vendor" he is not liable in an action to recover the deposit; & if he suffer judgment therein, he cannot recover against his principal the costs of such action.—MCMILLAN *v.* READ (1877), 3 V. L. R. 284.—**AUS.**

taxed as between solr. & client.—WILLIAMS *v.* LISTER & CO., LLEWELLYN BROTHERS, THIRD PARTIES (1913), 109 L. T. 699, C. A.

264. Negligence—Repayment of deposit.]—An auctioneer failed to insert a clause in the conditions of sale that the vendor of a leasehold should not be called upon to show the title of the lease, in consequence of which the sale went off, through the purchaser calling for the title, which the vendor could not furnish:—*Held:* the auctioneer was not entitled to recover from the vendor the amount of the deposit he had been compelled to pay back to the purchaser.—DENEW *v.* DAVERELL (1813), 3 Camp. 451.

Annotations.:—**Consd.** Sonter *v.* Drake (1834), 3 L. J. K. B. 31. **Mentd.** Pike *v.* Wilson (1854), 1 Jur. N. S. 59.

265. Auction duty—Liability for.]—An action of special *assumpsit* to recover from deft. money paid by pltf. to the collector of excise, for the auction duty payable on the sale of a real estate, cannot be maintained by an auctioneer against the highest bidder at a sale by auction, to whom he knocked down the lot, upon deft.'s undertaking, founded on a condition that the excise duty should be paid by the purchaser, where the auctioneer so conducted the sale intrusted to him, that the bidding could not, in the circumstances, be considered a valid legal contract on the part of the bidder, with reference to the conditions, nor the bidder an actual purchaser of the lot, who would be bound to complete his purchase. Such action cannot be supported on the count for money paid to deft.'s use, because deft. not having been a purchaser, was not liable to the payment of any duty, nor was the auctioneer compellable or authorised to pay the duty on deft.'s account. The proper course to be pursued by an auctioneer, who has been called upon to pay the excise duties on sales at auction, is to proceed by action, on the implied *assumpsit*, raised by law, against the vendor, his employer, which he may maintain if he has done his duty, leaving the owner to proceed against the bidder upon the express contract arising on the terms of the conditions.—JONES *v.* NANNEY (1824), M'Cle. 25; 13 Price, 76; 148 E. R. 11.

266. —— Mistake as to law.]—An auctioneer was employed to sell an estate, the lowest price of which was fixed by the owner & written down by him on a piece of paper, which was put under a candlestick at the time of sale, with the privity of the auctioneer, but not signed by the owner, nor any notice in writing given to the auctioneer of the price so set down, nor had the auctioneer given the previous notice of the sale to the collector of the duty, as required by Auction Duties Act, 1779 (c. 56), & 28 Geo. 3, c. 37; but being asked at the sale whether he had taken the proper precautions to avoid the duty in case there were no sale, he said that it was his mode to fix a price under the candlestick, & if the bidding did not come up to that price, it was no sale or duty:—*Held:* (1) the duty had attached, though there were no sale, for want of taking the precautions required of the owner by the Acts in such circumstances; (2) the auctioneer, having been sued for the duty on his bond to the Crown, & compelled to pay it, could not recover it over against the owner, he having warranted that proper precautions had been taken to prevent the duty attaching in the event, though both parties were mistaken in the law.—CAPP *v.* TOPHAM (1805), 6 East, 392; 2 Smith, K. B. 443; 102 E. R. 1337.

267. —— Refusal of payment by purchaser—Purchase by puffer.]—Pltf., an auctioneer, was employed to sell lands of two defts. One deft., without pltf.'s knowledge, employed H. to bid for one of the lots, in order to raise the price, & pltf. knocked down the lot to H. Pltf. then sold two other lots belonging to different persons, & at the close of the entire day's sale demanded the auction-duty from H., who refused to pay it. The conditions of sale stated that the auction-duty was to be paid by the purchaser "immediately after the sale." In an action by the auctioneer against defts. for the amount of the auction-duty:—*Held:* (1) H. was to be considered as the highest bidder; (2) there was a valid demand of the duty from H.—WILLSON *v.* CAREY (1843), 11 M. & W. 368; 12 L. J. Ex. 289; 152 E. R. 846.

Note: Auction Duties Act, 1779 (c. 56), & 28 Geo. 3, c. 37, are now repealed.

268. —— Action for money paid.]—Where an auctioneer was employed to sell an estate by auction, which was bought in at the sale, & the Comrs. of Excise refused to remit the duty thereon, & ultimately compelled the auctioneer to pay it:—*Held:* he might recover the duty from his employer in an action for money paid.—BRITTAIN *v.* LLOYD (1845), 14 M. & W. 762; 15 L. J. Ex. 43; 153 E. R. 683.

269. Expenses of abortive sale.]—*Semble:* apart from express contract, auctioneers are entitled to the expenses of abortive attempts at sale, but it is not reasonable that they should charge not only expenses & a fixed fee, but also commission.—CLARK *v.* SMYTHIES (1860), 2 F. & F. 83.

270. Sale under fi. fa.—Sheriff not liable.]—There is no implied promise on the part of a sheriff to indemnify an auctioneer, who sells goods seized under a *fi. fa.*, when employed so to do by the sheriff's officer, to whom the warrant was directed & pltf.'s solr. in the original cause, although the sheriff certified to the excise office that he himself had seized & sold the goods, & he in fact received his poundage from the produce of the sale; & if an action of trespass is brought by the owner of the goods against the auctioneer, the sheriff & others, all the damages awarded in which are levied upon the auctioneer alone, he has no action for a contribution against any of his co-defts. *Qu.:* whether, if the sheriff had himself actually employed & directed the auctioneer to sell the goods there would have been an implied promise of indemnity.—FAREBROTHER *v.* ANSLEY (1808), 1 Camp. 343.

Annotations:—**Refd.** Shackell *v.* Rosier (1836), 2 Bing. N. C. 634. **Mentd.** Betts *v.* Gibbins (1834), 2 Ad. & El. 57; Burrows *v.* Rhodes, [1899] 1 Q. B. 816.

271. Interpleader—Insolvency of vendor.]—An auctioneer, who is sued by an intended purchaser for the deposit, upon a sale not taking effect, will not be allowed the benefit of Interpleader Act, 1831 (c. 58), without bringing the money into ct. & giving security for costs, if there be any question as to the solvency of the vendor; nor is an auctioneer in such circumstances entitled to have the costs of the application paid out of the fund in ct.—DELLER *v.* PRICKETT (1850), 15 Q. B. 1081; 20 L. J. Q. B. 151; 16 L. T. O. S. 212; 15 Jur. 168; 117 E. R. 769.

Annotation:—**Expld.** Ridgway *v.* Jones (1860), 1 L. T. 368.

272. —— Claim for reimbursement allowed.]—In an action against an auctioneer to recover back a deposit, the vendor claiming to be entitled to the money, deft. obtained a rule under Interpleader Act, 1831 (c. 58). Vendor subsequently abandoning his claim:—*Held:* deft. having acted *bonâ fide*, was entitled to his costs out of the fund, pltf. having a remedy over against vendor.—PITCHERS *v.* EDNEY (1838), 4 Bing. N. C. 721; 1 Arn. 267; 6 Scott, 582; 7 L. J. C. P. 276; 132 E. R. 966.

See, also, Nos. 198—201, 228, *ante.*
See, generally, INTERPLEADER.

Part VIII.—Rights and Liabilities in Relation to Purchaser.

SECT. 1.—AUCTIONEER'S RIGHT TO SUE PURCHASER IN HIS OWN NAME.

273. Right to sue—Price of goods sold.]—An auctioneer, employed to sell the goods of a third party by auction, may maintain an action for goods sold & delivered against a buyer, though the sale was at the house of such third party, & the goods were known to be his property.—WILLIAMS *v.* MILLINGTON (1788), 1 Hy. Bl. 81; 126 E. R. 49.

Annotations:—**Expld. & Distd.** Coppin *v.* Walker (1816), 2 Marsh. 497; Sykes *v.* Giles (1839), 5 M. & W. 645. **Apld.** Davis *v.* Danks (1849), 3 Exch. 435. **Expld. & Apprvd.** Taplin *v.* Florence (1851), 10 C. B. 744. **Apprvd.** Robinson *v.* Rutter (1855), 4 E. & B. 954. **Expld. & Folld.** Davis *v.* Artingstall (1880), 49 L. J. Ch. 609. **Consd.** Wood *v.* Baxter (1883), 49 L. T. 45. **Refd.** Woolfe *v.* Horne (1877), 2 Q. B. D. 355; Consolidated Co. *v.* Curtis, [1892] 1 Q. B. 495; Manley *v.* Berkett, [1912] 2 K. B. 329. **Mentd.** Rayner *v.* Grote (1846), 15 M. & W. 359.

274. —— ——.]—The right of an auctioneer to sue rests upon his interest in the contract & his lien on the goods & on their price.—FAIRLIE *v.* FENTON (1870), L. R. 5 Exch. 169; 39 L. J. Ex. 107; 22 L. T. 373; 18 W. R. 700.

Annotations:—**Mentd.** Mollett *v.* Robinson (1870), L. R. 5 C. P. 646; Paice *v.* Walker (1870), L. R. 5 Exch. 173; Fleet *v.* Murton (1871), L. R. 7 Q. B. 126; Sharman *v.* Brandt (1871), L. R. 6 Q. B. 720; Hutchinson *v.* Tatham (1873), L. R. 8 C. P. 482; Southwell *v.* Bowditch (1876), 1 C. P. D. 374, C. A.; Harper *v.* Vigers, [1909] 2 K. B. 549.

275. —— ——.]—**Sale on auctioneer's premises by owner.**]—A horse, having been offered for sale by auction, & having been bought in, was subsequently sold on the auctioneer's premises by the owner to deft. By the conditions of sale the auctioneer was entitled to the same commission as if he had sold the horse, & he paid the owner the price of it, less such commission. Deft. was acquainted with the practice at the auction rooms:—*Held*: the auctioneer could maintain an action for the price of the horse.—FREEMAN *v.* FARROW (1886), 2 T. L. R. 547.

276. —— **I.O.U. taken in payment of deposit.**]—Pltf.'s auctioneers were employed to sell certain premises, which were put up to auction for sale & knocked down to deft. as the highest bidder & purchaser. Deft. signed a contract in writing, acknowledging himself the purchaser, & that he had paid by way of deposit a sum in part of the purchase-money. He had not in fact actually paid any part of the purchase-money, but had given an I.O.U. to the auctioneers for the deposit:—*Held*: the auctioneers were entitled upon an account stated to recover the sum for which the I.O.U. was given, as the giving of the I.O.U. was the same as if the auctioneers had lent the money & then received it in respect of the deposit for vendor.—CLEAVE *v.* MOORE (1857), 28 L. T. O. S. 255; 3 Jur. N. S. 48; 5 W. R. 234.

PART VIII. SECT. 1.

1. *Right to sue—Distinction between sale of goods & sale of land.*]—Upon a sale of real estate the auctioneer has no such right to sue in his own name as he has on a sale of goods arising from his qualified property in them; while on a sale of real estate the right to sue depends on the written contract alone.—CHERRY *v.* ANDERSON (1876), 10 I. R. C. L. 204.—**IR.**

273 i. —— *Price of goods sold.*]—An auctioneer may maintain an action in his own name for goods sold by him at auction.—COATE *v.* TERRY (1875), 24 C. P. 571.—**CAN.**

273 ii. —— —— *Counterclaim on vendor's warranty.*]—Two horses were sold by auctioneers at an auction sale as a pair of carriage horses; the auctioneer's salesman at the sale read out an advertisement, including a statement made with the authority of the vendor, that they were thoroughly educated to their work. In an action by the auctioneer on a cheque given for the price:—*Held*: the statement amounted to a warranty by the vendor, though not by the auctioneers, & no counterclaim for breach of it could be maintained against them.—CAMPBELL *v.* SMITH (1887), 13 V. L. R. 439.—**AUS.**

273 iii. —— —— *Conacre lettings.*]—The rule enabling an auctioneer to sue in his own name for the price of goods sold by him applies to an auction of conacre, such auction being more of the nature of a sale of goods than of a sale of land or of an interest in land.—M'ILROY *v.* QUIGLEY (1916), 50 I. L. T. 23.—**IR.**

273 iv. —— —— *Sale on credit—Action before expiry of period—Set-off.*]—Where by the conditions of sale purchasers were to have six months' credit, giving approved indorsed notes:—*Held*: (1) the sale was an unconditional sale on credit & could not be treated as a sale for cash on the purchaser's refusal to give an indorsed note; (2) an action for goods sold & delivered would not lie till the period of credit expired; (3) a plea of set-off was, therefore, inadmissible in an action by the auctioneer, before the period of credit had expired, for failing to give the indorsed note on demand.—WAKEFIELD *v.* GORRIE (1848), 5 U. C. R. 159.—**CAN.**

273 v. —— *Loss on resale.*]—In an action to recover from the purchaser of goods by auction the loss on the resale, it appeared that the goods had been resold to a person who was a partner of the auctioneer, though not in the auctioneer's business:—*Held*: this afforded no defence to the action.—CLARKSON *v.* NOBLE (1846), 2 U. C. R. 361.—**CAN.**

273 vi. —— ——.]—Pltf., an auctioneer, sued deft. to recover the difference between the amount of the purchase-money of a horse sold at auction to deft. & the amount realised on a resale. The conditions of sale provided that if any purchaser failed to complete his purchase the lot should be resold at his risk. The horse was knocked down to him; immediately after the sale the horse was taken to his stables, & remained there until the next day, when pltf. delivered an account for the price. Deft. then sent the horse back to pltf.'s stables, where pltf. resold it & sued for the difference:—*Held*: there was sufficient evidence of delivery & acceptance, & pltf. was entitled to resell.—O'BRIEN *v.* BARKER, 4 J. R. N. S. 64.—**N.Z.**

273 vii. —— —— *Misrepresentation.*]—V., an auctioneer, sold cattle by public auction on account of R. They were described in the advertisement as "immuned beasts," & the auctioneer stated that he had ascertained from the military authorities that, while the usual "permit" under martial law would be required, there would be no obstacle to their removal to any place in the district which was not an infected area or which the authorities considered safe. L. purchased some of the cattle. On applying to the military for a permit for their removal, he was told that he must first obtain a certificate from a certain veterinary surgeon that the cattle themselves were free from disease, which certificate on being applied for was refused. L. repudiated the purchase, & V. resold the cattle at a loss, & sued L. for damages for breach of contract:—*Held*: an auctioneer can maintain an action against a purchaser for the price of goods sold or for damages for breach of contract, but the contract had been induced by misrepresentation, without which L. would not have purchased, & he was not liable for the breach.—VIGNE *v.* LEO, 9 H. C. 196.—**S. AF.**

273 viii. —— *Auction duty.*]—Civil bill by an auctioneer against the purchaser of lands sold by auction for the amount of the auction duty on the purchase-money. The terms of sale were that the highest bidder was to be the purchaser, & was to pay the auction duty:—*Held*: the remedy by action for auction duty was, by 54 Geo. 3. c. 82, s. 12, amended by 58 Geo. 3. c. 79, only given to the auctioneer as against the person who had employed him to sell.—MURPHY *v.* KELLY (1841), 2 Craw. & D. 216.—**IR.**

273 ix. —— *Poundage fee.*]—When pltf. & deft. in an execution agree that a fee shall be paid by the purchaser to the auctioneer, & the purchaser is aware of such agreement, the auctioneer may sue him for his fees. A condition of sale to the above effect is evidence of sale to the agreement, in an action against the purchaser.—SIDLEY *v.* M'DONNELL (1833), Hayes & Jo. 221.—**IR.**

276 i. —— *I.O.U. taken in payment of deposit.*]—Under conditions of sale by the auction the deposit was payable to the auctioneer immediately after the sale. The auctioneer, without the consent of the vendor, took the purchaser's I.O.U. for the amount:—*Held*: an action lay at the suit of the auctioneer against the purchaser for the amount of the I.O.U.—HODGENS *v.* KEON, [1894] 2 I. R. 657, 662.—**IR.**

276 ii. —— *I.O.U. taken for auction fees.*]—Where a purchaser at an auction is, under the conditions of sale, liable to pay auction fees, & gives to the auctioneer an I.O.U. for the amount of such fees, the auctioneer can, even if the sale subsequently falls through by reason of the vendor's failure to make title, recover against such purchaser the amount of the I.O.U. as due on an account stated.—GILLEN *v.* GIBSON (1909), 44 I. L. T. 17.—**IR.**

276 iii. —— *Promissory note for fees.*]—Certain land was knocked down to deft.

277. —— Cheque taken in payment—Vendor guilty of misrepresentation.]—At a sale by auction deft. purchased pictures, which, upon the instructions of the owner, were described as being by well known artists, & deft. gave the auctioneer a cheque for the price. Two days later the auctioneer settled with & paid the owner. Subsequently deft. repudiated the contract & stopped payment of the cheque. In an action upon the cheque the jury found that deft. was induced to purchase the pictures by misrepresentations fraudulently made by the owner, but not fraudulently made by the auctioneer :—*Held :* the auctioneer was entitled to recover the amount of the cheque from deft.—HINDLE *v.* BROWN (1908), 98 L. T. 791, C. A.

278. —— Vendor not owner—Express promise—Cannot sue.]—A. having proved the will of B., in which she supposed herself to be appointed extrix., employed C., an auctioneer, to sell the goods of B. They were sold to D., who, as an inducement to C. to let him remove the goods without payment, expressly promised to pay C. as soon as the bill should be made out. Probate was afterwards granted to E., the real extrix., who gave notice to D. not to pay the price to C. :—*Held :* notwithstanding the express promise, C. could not sue D. for the price.

The auctioneer's right to sue subsists, where the right of no third person intervenes, but where such right is established, & the person employing the auctioneer is proved not to be the owner, it then becomes clear that the auctioneer, who can have no interest in the goods but what he derives from his employer, has no longer any claim upon the property against the right owner (DENMAN, C.J.).—DICKENSON *v.* NAUL (1833), 4 B. & Ad. 638 ; 1 Nev. & M. K. B. 721 ; 110 E. R. 596.

Annotations :—**Folld.** Allen *v.* Hopkins (1844), 13 M. & W. 94. **Mentd.** Bailey *v.* Harris (1849), 12 Q. B. 905.

279. —— Statute of Frauds—Cannot sue on note signed by himself as agent for purchaser.]—The agent contemplated by Stat. Frauds, s. 17, who is to bind deft. by his signature, must be a third person, & not the other contracting party ; & where an auctioneer wrote down deft.'s name by his authority opposite to the lot purchased :—*Held :* in an action brought in the name of the auctioneer, the entry in such book was not sufficient to take the case out of the Act.—FAREBROTHER *v.* SIMMONS (1822), 5 B. & Ald. 333 ; 106 E. R. 1213.

Annotations :—**Distd.** Bird *v.* Boulter (1833), 4 B. & Ad. 443. **Apprvd.** Sharman *v.* Brandt (1871), L. R. 6 Q. B. 720. **Mentd.** Wethered *v.* Calcutt (1842), 4 Man. & G. 566.

280. —— Goods resold on purchaser's default.]—Pltfs., auctioneers, sold shares by auction to deft. at £79 on condition that if not paid for by a particular time, the owner might resell them. Deft. not paying, pltfs. exercised the right of resale, & sold at £63. Pltfs. sued in *assumpsit* to recover £79, & were non-suited :—*Held :* the non-suit was right, as pltfs. were not agents of deft. to resell, but pltfs. might have recovered in an action for damages the loss on resale & expenses.—LAMOND *v.* DAVALL (1847), 9 Q. B. 1030 ; 16 L. J. Q. B. 136 ; 11 Jur. 266 ; 115 E. R. 1569.

Annotations :—**Refd.** Pott *v.* Flather (1847), 11 Jur. 735 ; Chinery *v.* Viall (1860), 5 H. & N. 288. **Mentd.** Rogers *v.* Hadley (1863), 2 H. & C. 227.

281. —— Payment to owner.]—If an auctioneer sells goods & delivers them, without notice of any lien or claim which he has on the owner, & the buyer, without such notice, settles for the goods with the owner, the auctioneer cannot sue the buyer for the price of the goods. So, if the auctioneer sells the goods of B. as the goods of A., & the buyer, without notice, takes the goods with the auctioneer's assent, & pays the price of them to A., the auctioneer cannot afterwards maintain an action for the price. No implied contract to pay arises on the auctioneer's giving up his lien by delivery of the goods.—COPPIN *v.* WALKER (1816), 7 Taunt. 237 ; 2 Marsh. 497 ; 129 E. R. 95.

Annotations :—**Consd.** Robinson *v.* Rutter (1855), 4 E. & B. 954. The first part of the marginal note in *Coppin* v. *Walker* is not justified by the decision ; and in the very next reported case of *Coppin* v. *Craig* the ct. appears to have expressed an opinion that the auctioneer had a lien as well on the proceeds of the sale as the specific article sold (CAMPBELL, C.J.). **Refd.** Coppin *v.* Craig (1816), 2 Marsh. 501. **Mentd.** Isberg *v.* Bowden (1853), 8 Exch. 852 ; Holmes *v.* Tutton (1855), 1 Jur. N. S. 975.

282. —— ——.]—To a declaration for the price of a horse sold & delivered by pltf. to deft., deft. pleaded that pltf. sold the horse, as auctioneer agent & trustee for K., & that deft. had paid K. before action brought :—*Held :* a bad plea.—ROBINSON *v.* RUTTER (1855), 4 E. & B. 954 ; 24 L. J. Q. B. 250 ; 25 L. T. O. S. 127 ; 1 Jur. N. S. 823 ; 3 W. R. 405 ; 3 C. L. R. 1195 ; 119 E. R. 355.

Annotations :—**Expld. & Distd.** Grice *v.* Kenrick (1870), L. R. 5 Q. B. 340. **Apprvd.** Webb *v.* Smith (1885), 30 Ch. D. 192, C. A. **Refd.** Manley *v.* Berkett, [1912] 2 K. B. 329.

283. —— —— Commission & charges paid.]—Pltf., an auctioneer, was employed by W. to sell goods by auction. W. was indebted to deft. in £60, & before the sale it was agreed between W. & deft. that any goods deft. might buy at the auction should go in payment of his claim against W. Pltf. had no notice of this agreement at the time of the sale. Deft. bought several lots, to the amount of £49, & pltf. allowed him to take them away on the faith of his paying for them, but deft. supposed that he was taking them in pursuance of the agreement with W. The day after the sale pltf. paid W. £90 on account of the sale. Afterwards deft. informed

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at an auction by pltf., the auctioneer. Deft. gave the vendor a promissory note for the deposit & gave pltf. another note for his fees as auctioneer under the conditions of sale. The vendor issued a writ for the amount of the note given to him, & the action was compromised on the terms that the purchaser was to pay the vendor his costs, & the vendor was to cancel the note given him. In an action by the auctioneer on his note a judgment was entered for him for the full sum. A motion was brought that the judgment be changed into a judgment for deft. on the ground that there was no sale, & that as the auctioneer could not have directly recovered his fees from the purchaser there was no consideration for the note :—*Held :* there was sufficient consideration & the auctioneer could recover. — MONTGOMERY *v.* FLEMING (1905), 39 I. L. T. 229.—**IR.**

277 i. —— *Cheque taken in payment—Vendor guilty of misrepresentation.*]—A cheque for the price of horses was given by the purchaser to the auctioneers, who retained the cheque but paid part of the price to the vendor. The horses turned out not educated to their work, & deft. tendered them back to the auctioneers, who refused them. Deft. then instructed them to resell the horses, which they did for a less price. Upon an action brought by the auctioneers on the cheque against the purchaser :—*Held :* he was not entitled to set up the difference in price as a set-off, & pltfs. were entitled to recover the full amount of the cheque.—CAMPBELL *v.* SMITH (1887), 13 V. L. R. 439.—**AUS.**

277 ii. —— ——.] — An auctioneer sold two horses by public auction to a purchaser who settled for the price by giving the auctioneer his cheque, post-dated several days after the sale, & the auctioneer then gave his cheque for the purchase price, less his commission, to the owner of the animals. The purchaser took possession of the horses, but, on the following day, discovering that a third person held a lien on them, stopped payment of the cheque :—*Held :* the auctioneer was entitled to recover the amount of the cheque from the purchaser.—TRAPP *v.* PRESCOTT (1912), 17 B. C. R. 298 ; 50 S. C. R. 263 ; 21 W. L. R. 521 ; 2 W. W. R. 650 ; 5 D. L. R. 183.—**CAN.**

277 iii. —— —— *Mistake.*]—A purchaser at auction, by consent of the auctioneer, paid the deposit by cheque instead of in cash, as the contract provided. The purchaser subsequently stopped payment of the cheque on the ground that the contract was induced by mistake. The auctioneer sued the purchaser at law upon the cheque. In a suit to rescind the contract & stay the action at law, the ct. refused to grant an interlocutory injunction to the hearing except on terms of the purchaser paying into ct. forthwith the amount of the deposit.—LISTER *v.* COWDERY (1900), 21 N. S. W. Eq. 4.—**AUS.**

Sect. 1.—Auctioneer's right to sue purchaser in his own name. Sect. 2: Sub-sect. 1.]

pltf. of the agreement between deft. & W., & after this notice pltf., on the demand of W., paid over to him the balance due on the sale, including the £49 alleged to be due from deft., after deducting his (pltf.'s) commission & charges as auctioneer. Pltf. having brought an action against deft. for the amount of his purchases at the sale:—*Held:* the action was not maintainable because (1) pltf.'s lien for his charges had been satisfied before action; (2) the facts, which showed that W. would not have been entitled to recover, established a defence to the action by pltf.; (3) there was no deceit practised by deft. on pltf.; (4) there were no facts beyond the mere receipt of the goods from which a promise on the part of deft. to pay could be inferred; (5) the payment by pltf. to W. after notice of the agreement between him & deft. could not prejudice the rights of deft.—GRICE *v.* KENRICK (1870), L. R. 5 Q. B. 340; 39 L. J. Q. B. 175; 22 L. T. 743; 18 W. R. 1155.

Annotation:—**Consd.** Manley *v.* Berkett, [1912] 2 K. B. 329.

284. —— Use & occupation—Lands let for disclosed principal.]—In an action for use & occupation of lands by the sufferance & permission of pltfs., it appeared that the lands were let by auction by pltfs., E. & T., auctioneers, to deft., under conditions which stated the letting to be "by E. & T., auctioneers." One of the conditions was: "The rent is to be paid into the hands of E. & T., auctioneers, or to their order, at two payments," etc. At the foot of the document was written, "Approved by me, D. J." D. J. was the tenant at the time of the sale. Nothing else appeared in the conditions to show on whose behalf the letting was. Pltfs. gave evidence to show that D. J., being indebted to them, had authorised them to let the lands as above, pay the rent due to D. J.'s landlord, & retain any surplus in satisfaction of their own debt. Evidence to a contrary effect was given for deft. The judge, in summing up, left it to the jury whether pltfs. had let the lands as agents for D. J. or on their own behalf:—*Held:* (1) the conditions imported a letting by D. J., E. & T. acting as his agents; (2) the document ought to have been so explained to the jury, & the judge not having so explained it, a new trial must be granted. *Semble:* in such a case the auctioneer could not maintain use & occupation.—EVANS *v.* EVANS (1835), 3 Ad. & El. 132; 1 Har. & W. 239; 111 E. R. 363.

Annotations:—**Expld. & Distd.** Fisher *v.* Marsh (1865), 6 B. & S. 411. **Expld. & Apld.** Mainprice *v.* Westley (1865), 6 B. & S. 420. **Consd.** Wood *v.* Baxter (1883), 49 L. T. 45. **Mentd.** Bramble *v.* Spiller (1870), 18 W. R. 316.

285. —— —— Lands let without disclosure of agency.]—In an action for the hire of land, let by pltf. to deft., it appeared that, by permission of O. Corpn. & a committee of freemen, races were held annually on P. M. Common, the fee of which was in the corpn., & on which the freemen had a right of depasturing cattle, & a committee, under whose management the races were, erected a temporary grand stand, & caused the land adjoining to it & part of the racecourse to be let by public auction for the erection of booths, stalls, etc. In 1864 pltf., who was employed by the race committee, issued handbills announcing that "the ground for booths, stalls, etc., will be let by auction by Mr. J. F. on, etc." The conditions for sale were headed "Conditions for letting standings for booths, etc., on P.M. Common during the races. By Mr. J. F." At the auction deft. was declared the taker of one of the lots, & he took possession of & occupied it during the races:—*Held:* (1) there was evidence of a contract by deft. with pltf. personally; (2) an action for use & occupation was maintainable.—FISHER *v.* MARSH (1865), 6 B. & S. 411; 34 L. J. Q. B. 177; 12 L. T. 604; 29 J. P. 646; 11 Jur. N. S. 795; 13 W. R. 834; 122 E. R. 1247.

Annotations:—**Consd.** Wood *v.* Baxter (1883), 49 L. T. 45. **Refd.** Woolfe *v.* Horne (1877), 2 Q. B. D. 355.

286. —— Set-off between owner & purchaser—Auctioneer with notice.]—If pltf., an auctioneer, sues a purchaser for the price of goods sold by him as such, deft. may set off a debt due to him from the principal vendor of which the auctioneer had notice.—JARVIS *v.* CHAPPLE (1815), 2 Chit. 387.

Annotation:—**Expld. & Distd.** Isberg *v.* Bowden (1853), 8 Exch. 852.

287. —— —— Delivery without payment.]—Where an auctioneer had sold goods, & delivered them without payment:—*Held:* as he had parted with his lien, deft. might set off against the price a debt due from the owner of the goods to deft.

Where the auctioneer had sold to deft. the goods of A. in a sale of the goods of B.:—*Held:* this was such fraud, that deft. might set off a debt due to him from B. against the price of the goods of A.—COPPIN *v.* CRAIG (1816), 7 Taunt. 243; 2 Marsh. 501; 129 E. R. 97.

Annotations:—**Expld. & Distd.** Dowden *v.* Isby (1853), 1 W. R. 392. **Consd. & Apld.** Robinson *v.* Rutter (1855), 4 E. & B. 954. **Refd.** Holmes *v.* Tutton (1855), 1 Jur. N. S. 975.

288. —— —— Agreement between owner, purchaser & auctioneer.]—Pltfs., auctioneers, were employed by F. to sell cattle for him by auction. Prior to the sale F. had given orders to certain of his creditors directing pltfs. to pay these creditors out of the proceeds of the intended sale, & pltfs. agreed to act upon these orders. Pending the sale F. had also become indebted to pltfs. for money lent & paid & for services rendered upon the terms that they should repay themselves out of the proceeds of the sale. The sale was held upon the condition (*inter alia*) that the price of any cattle bought was to be paid to pltfs. Whilst the sale was proceeding an arrangement was entered into between F. & deft., to whom F. was indebted to a considerable extent, that the price of any cattle bought by deft. might be set off against F.'s debt to deft., but this arrangement was not communicated to pltfs. either during or directly after the sale. Deft. bought a number of cattle at the sale, the purchase price of which exceeded the amount of F.'s debt to him, & being known to pltfs. was allowed to remove the cattle without having paid for them. Excluding the amount of deft.'s purchases, pltfs. received sufficient money to satisfy their lien for commission & charges in respect of the sale, but not sufficient to pay F.'s creditors or their own debt; but, including the amount of deft.'s purchases, the sale realised sufficient to satisfy all claims, leaving a small sur-

287 i. —— *Set-off between owner & purchaser—Delivery without payment.*]—Pltf., an auctioneer, was employed by M. to sell her furniture & effects by public auction, the terms & conditions of sale being that each purchaser should pay cash before removing the articles purchased. Defts. purchased goods, which they removed without paying for. When the auctioneer called to collect the money they claimed to deduct certain debts alleged to be due by M. incurred prior to the auction, & tendered the balances of their purchase-moneys to the auctioneer. In an action for goods sold & delivered by the auctioneer:—*Held:* defts. were not entitled to set off as against the auctioneer the debts due to them by M., & the mere fact of being allowed to remove the articles without paying for them on the spot did not put them in any better position.—MAXWELL *v.* COYLE & WADSWORTH (1899), 33 I. L. T. Jo. 131.—IR.

287 ii. —— —— *Extent of set-off.*]—In an action by an auctioneer for the price of goods sold by him, the purchaser may rely on any set-off that he may have against the owner of the goods, but the set-off is limited to the amount which the auctioneer would be bound to hand over to the owner.—TRAYNOR *v.* LARKIN (1916), 50 I. L. T. 17.—IR.

plus. Deft. having refused to pay pltfs. the price of the cattle which he had bought, upon the ground that he was entitled to rely on the arrangement with F. as to set-off, pltfs. brought an action to recover the whole of the price of the cattle bought by deft. Before action deft. tendered & subsequently paid to pltfs. the difference between the amount of F.'s debt to him & the price of the cattle which he had bought :—*Held :* (1) deft. was not entitled, in the circumstances, to set up as an equitable defence to pltfs.' claim the arrangement as to set-off made between him & F., as such arrangment could not defeat the previous agreement between F. & pltfs. as to the disposition of the proceeds of the sale, on the faith of which agreement pltfs. had acted ; (2) deft. was only entitled to be paid by pltfs. the surplus remaining after deducting from the total amount realised by the sale the debts owing to the other creditors, as well as what was owing to pltfs. in respect of F.'s debt to them & their commission & charges for conducting the sale, this surplus being the only amount which pltfs. would have been bound to pay over to F.—MANLEY & SONS, LTD. *v.* BERKETT, [1912] 2 K. B. 329 ; 81 L. J. K. B. 1232.

289. —— —— After settlement of auctioneer's charges.]—At a sale by auction of A.'s goods, B., a creditor of A., became a purchaser, &, contrary to the conditions of sale, removed the goods without paying for them :—*Held :* if the auctioneer, after satisfaction of his charges, could maintain an action against B. for the price, B. might in that action, or in a similar action by the assignees under the subsequent bkpcy. of A., set off the amount of A.'s debt to him, by way of equitable defence, if not at law.—HOLMES *v.* TUTTON (1855), 5 E. & B. 65 ; 24 L. J. Q. B. 346 ; 25 L. T. O. S. 177 ; 1 Jur. N. S. 975 ; 3 C. L. R. 1343 ; 119 E. R. 405.

Annotations :—**Consd.** Manley *v.* Berkett, [1912] 2 K. B. 329. **Mentd.** Turner *v.* Jones (1857), 1 H. & N. 878 ; Newman *v.* Rook (1858), 4 C. B. N. S. 434 ; Tilbury *v.* Brown (1860), 30 L. J. Q. B. 46 ; Murray *v.* Arnold (1862), 3 B. & S. 287 ; Hopkins *v.* Clarke (1864), 4 B. & S. 836 ; Wood *v.* Dunn (1865), L. R. 1 Q. B. 77 ; *Re* Adams, *Ex p.* Greenaway (1873), 29 L. T. 75 ; Emanuel *v.* Bridger (1874), L. R. 9 Q. B. 286 ; *Re* Keyworth, *Ex p.* Tate (1874), 43 L. J. Bcy. 55 ; Lowe *v.* Blakemore (1875), L. R. 10 Q. B. 485 ; Stevens *v.* Phelips (1875), 10 Ch. App. 417, L.JJ. ; *Re* Watt, *Ex p.* Joselyne (1878), 8 Ch. D. 327, C. A. ; *Re* Stanhope Silkstone Collieries Co. (1879), 40 L. T. 204, C. A.

290. Action for price—Statute of Frauds—Delivery.]—An auctioneer at a sale, where it was one of the conditions that a deposit should be paid immediately, & the remainder before the goods were delivered, knocked down a lot & handed it to the bidder, who looked at it for three or four minutes, & then returned it to the auctioneer, saying that he was mistaken in the price. The auctioneer said he would take it back only to keep for his use. No part of the price was paid :—*Held :* it was a question of fact for the jury whether, in such circumstances, there had been a delivery to satisfy Stat. Frauds.—PHILLIPS *v.* BISTOLLI (1824), 2 B. & C. 511 ; 3 Dow. & Ry. K. B. 822 ; 2 L. J. O. S. K. B. 116 ; 107 E. R. 474.

Annotations :—**Distd.** Tomkinson *v.* Staight (1856), 17 C. B. 697. **Mentd.** Maberley *v.* Sheppard (1833), 10 Bing. 99 ; Malins *v.* Freeman (1838), 6 Scott, 187.

291. Resale under conditions—Claim for differences—Statute of Frauds—Acceptance.]—On the sale of horses advertised as the property of P. by auction the conditions of sale provided (*inter alia*) that the sale was to be for ready money, that horses sold were to be paid for & taken away at the close of the sale, but that they were not to be taken away unless paid for, & if not paid for were to be resold & purchaser charged with the difference. The horses were knocked down to deft. for 100 guineas. He paid no deposit, but, with the auctioneer's assent, left the horses in P.'s stables till the following Monday, when he refused to pay for them on the ground that they were not the property of P. & that as regards one of them there was a breach of warranty. The auctioneer then resold the horses for £47 & sued deft. for the difference & his expenses :—*Held :* the conduct of deft. in leaving the horses, with the assent of pltf., in the stables was evidence of an acceptance of the horses within Stat. Frauds, s. 17.—FARRER *v.* KIRKBY (1888), 4 T. L. R. 543.

See, also, Part III., Sect. 2, *ante.*

SECT. 2.—LIABILITY OF AUCTIONEER TO PURCHASER.

SUB-SECT. 1.—IN GENERAL.

292. Principal undisclosed—Personal liability.]—Where an auctioneer does not disclose the name of his principal at the time of the sale, he is personally liable to an action for damage for not completing the contract.—HANSON *v.* ROBERDEAU (1792), Peake, 163.

Annotations :—**Apld.** Franklyn *v.* Lamond (1847), 4 C. B. 658. **Consd.** Wood *v.* Baxter (1883), 49 L. T. 45.

293. —— ——.]—When an auctioneer sells without disclosing the name of his principal, the character & extent of the contract he enters into with the purchaser depends upon the conditions of sale, upon what is said by the auctioneer at the time, upon the surrounding circumstances, & upon the nature of the subject-matter of the sale.—WOOD *v.* BAXTER (1883), 49 L. T. 45.

Annotation :—**Expld. & Apld.** Payne *v.* Elsden (1900), 17 T. L. R. 161.

294. —— Evidence inadmissible to discharge auctioneer.]—Pltf. bought a quantity of hemp by auction at the rooms of defts., brokers in Liverpool. Defts. delivered an invoice in their own name as sellers. On payment being made by pltf., defts. gave him an order on C. & D. for the goods, which on presentation was refused, & pltf. could not obtain delivery of the goods :—*Held :* defts. were bound by the representation in the invoice, & could not offer evidence to show that they sold as agents for C. & D. & pltf. knew C. & D. to be the principals at the time of sale by auction.—JONES *v.* LITTLEDALE (1837), 6 Ad. & El. 486 ; 1 Nev. & P. K. B. 677 ; Will. Woll. & Dav. 240 ; 6 L. J. K. B. 169 ; 112 E. R. 186.

Annotations :—**Apprvd.** Higgins *v.* Senior (1841), 8 M. & W. 834. **Dbtd.** Holding *v.* Elliott (1860), 5 H. & N. 117. **Folld.** Royal Exchange Assce. *v.* Moore (1863), 2 New Rep. 63 ; **Apprvd.** Fleet *v.* Murton (1871), L. R. 7 Q. B. 126. **Refd.** Johnston *v.* Usborne (1841), 11 Ad. & El. 549 Southwell *v.* Bowditch (1876), 45 L. J. Q. B. 630, C. A.

PART VIII. SECT. 2, SUB-SECT. 1.

292 i. *Principal undisclosed—Personal liability.*]—A ship was sold by an auctioneer in his own name without any stipulation as to the time & manner of its transfer :—*Held :* the auctioneer was liable to the purchaser for the owner's failure to execute the transfer.—BURNS *v.* HART (1810), Py. R. 63 ; 2 R. de L. 77, 79.—**CAN.**

292 ii. —— ——.]—An auctioneer sold goods without disclosing his principal, & gave his own receipt for the purchase-money ; the purchaser was subsequently evicted by the owner :—*Held :* purchaser entitled to recover the purchase-money & costs of the eviction from the auctioneer.—WARRINGTON *v.* VIGNE, 2 H. C. 204.—**S. AF.**

292 iii. —— —— *Warranty.*]—An auctioneer who warrants the thing he sells without disclosing his principal is personally responsible for the warranty.—FERRIER *v.* DODS & GRAY (1865), 3 Macph. (Ct. of Sess.) 561 ; 37 Sc. Jur. 270.—**SCOT.**

292 iv. —— *No duty to disclose vendor.*]—It is not the duty of the auctioneer after the sale to disclose the name of the vendor.—DOWELL *v.* ALLAN (1836), 8 Sc. Jur. 225.—**SCOT.**

Sect. 2.—Liability of auctioneer to purchaser: Subsects. 1 & 2.]

295. —— Vendor's name subsequently disclosed.]—An auctioneer, selling without disclosing the name of his principal, is personally liable for performance of the contract of sale, though he afterwards offers to give the name of his employer.—FRANKLYN *v.* LAMOND (1847), 4 C. B. 637; 16 L. J. C. P. 221; 9 L. T. O. S. 246; 11 Jur. 780; 136 E. R. 658.

Annotations:—**Expld. & Folld.** Fisher *v.* Marsh (1865), 6 B. & S. 411. **Consd.** Wood *v.* Baxter (1883), 49 L. T. 45. **Distd.** Payne *v.* Elsden (1900), 17 T. L. R. 161.

296. Principal disclosed — Non-delivery.]—Auctioneers are not in the position of ordinary agents, but may be personally liable for non-delivery of goods, even though they sell for disclosed principals, & although a condition of sale, by which goods sold are to be cleared out by the purchaser within a given time, has not been complied with, at all events where such condition is not a condition precedent.—WOOLFE *v.* HORNE (1877), 2 Q. B. D. 355; 46 L. J. Q. B. 534; 36 L. T. 705; 41 J. P. 501; 25 W. R. 728.

Annotations:—**Consd.** Wood *v.* Baxter (1883), 49 L. T. 45. **Consd. & Apld.** Rainbow *v.* Howkins, [1904] 2 K. B. 322. **Mentd.** Manley *v.* Berkett, [1912] 2 K. B. 329.

297. —— —— Sale of Goods Act, 1893 (c. 71), s. 4.]—At a public auction a horse was put up for sale by the auctioneer without reserve & was knocked down to pltf., the highest *bonâ fide* bidder, for £15 15*s*. Before the auctioneer had entered pltf.'s name in his book as purchaser he discovered that he ought to have offered the horse with a reserve price of £25, & he thereupon put up the horse again & himself bid 17 guineas, & the horse was bought in. The principal's name was disclosed by the auctioneer at the auction. In an action against the auctioneer for (*inter alia*) the delivery up of the horse, or 25 guineas, its value:—*Held:* (1) an action might, in certain circumstances, be maintained against an auctioneer for the wrongful refusal to deliver a chattel sold at a public auction, although the principal's name was disclosed to the buyer at the time of the sale; (2) the action could not be maintained, on the ground that there was no signed contract, as required by the above sect., the value of the article being about £10.—RAINBOW *v.* HOWKINS, [1904] 2 K. B. 322; 73 L. J. K. B. 641; 91 L. T. 149; 53 W. R. 46; 20 T. L. R. 508; 48 Sol. Jo. 494, D. C.

Annotation:—**Dbtd.** McManus *v.* Fortescue, [1907] 2 K. B. 1, C. A.

298. —— Contract signed as agent.]—A., an auctioneer, being employed to sell an estate belonging to B., entered into & signed an agreement with C., for the purchase, in his own name, as agent of B., & B. shortly afterwards signed it, & added, "I hereby sanction this agreement, & approve of A.'s having signed same on my behalf":—*Held:* A. was not personally responsible.—SPITTLE *v.* LAVENDER (1821), 2 Brod. & Bing. 452; 5 Moore, C. P. 270; 129 E. R. 1041.

Annotations:—**Consd.** Gaby *v.* Driver (1828), 2 Y. & J. 549. **Distd.** Tanner *v.* Christian (1855), 4 E. & B. 591. **Expld. & Distd.** Paice *v.* Walker (1870), 22 L. T. 547. **Mentd.** Bramwell *v.* Spiller (1870), 21 L. T. 672.

299. Delivery—What constitutes—Goods on land of third party.]—Defts., auctioneers, sold by public auction to pltf. a rick of hay, the produce of a crop distrained for rent, & which remained upon the land. By the conditions of sale, the lot was to be taken away at the purchaser's expense, within one week; but, at the time of the sale the auctioneers obtained from the tenant, & read in the auction-room, a written consent that the hay should remain upon the premises for an extended period. Before the expiration of that time, pltf., having paid for the hay, received from defts. an order upon the tenant to permit him to carry it away. The tenant refusing to allow the hay to be removed, pltf. sued defts., who pleaded "that they did deliver to pltf. the possession of the rick of hay, according to their promise in that behalf":—*Held:* a good answer to the action, since as between pltf. & defts. there was a sufficient delivery of the hay, as defts. had done all in their power to give pltf. possession of it.

An auctioneer generally undertakes to deliver, or to furnish the means of delivery of, the article he sells to the purchaser (TINDAL, C.J.).—SALTER *v.* WOOLLAMS (1841), 2 Man. & G. 650; Drinkwater, 146; 3 Scott, N. R. 59; 10 L. J. C. P. 145; 133 E. R. 906.

Annotations:—**Refd.** Taplin *v.* Florence (1851), 15 Jur. 402; Wood *v.* Baxter (1883), 49 L. T. 45.

300. Wrongful delivery to third party—Detinue.]—An action of detinue will lie against an auctioneer, who, having sold a picture to pltf., & received a deposit on the sale by the hands of his clerk, afterwards sells it *bonâ fide* to a third party, who refuses to deliver it to pltf.—JONES *v.* DOWLE (1841), 9 M. & W. 19; 1 Dowl. N. S. 391; 11 L. J. Ex. 52; 152 E. R. 9.

Annotations:—**Mentd.** Whitehead *v.* Harrison (1844), 6 Q. B. 423; R. *v.* Johnson (1884), 50 L. T. 759, C. C. R.

301. —— Action of tort.]—Pltf., a dealer, bought a hydraulic press from deft., an auctioneer, at a sale, under conditions of sale requiring payment before delivery. Time was allowed for payment. Payment was tendered within the time allowed, but deft. refused to deliver the press, having contracted to resell it, & in fact reselling it, subsequent to the tender. Pltf. had also contracted to sell the press, after delivery, at a profit. In an action the sole issue in dispute, viz., whether there had been tender within the time allowed for payment, was found in favour of pltf., & evidence of pltf.'s loss of profit on resale having been given as a measure of damage, judgment was given for pltf. for £29 15*s*. 3*d*. Deft. contended that the action was one for breach of contract, & that costs could only be recovered on the county ct. scale:—*Held:* (1) the action was for a wrongful conversion subsequent to & independent of the contract passing the property; (2) it was an action of tort in which, more than £20 having been recovered, costs followed on the High Ct. scale.—COHEN *v.* FOSTER (1892), 61 L. J. Q. B. 643; 66 L. T. 616; 8 T. L. R. 519.

302. Auctioneer accepting fictitious bids—Action for rescission.]—Ptlf., who had bought property at an

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295 i. —— *Vendor's name subsequently disclosed—Election to sue vendor.*]—The purchaser of a horse at an auction, at which the name of the owner was not disclosed, brought an action against the auctioneer, to whom he alleged the price had been paid, & also against the principal, who had subsequently disclosed, for repetition of the price:—*Held:* purchaser not entitled to sue both the auctioneer & the principal, & having raised his action against the latter along with the auctioneer, he must be held to have elected to sue the principal.—FERRIER *v.* DODS & GRAY (1865), 3 Macph. (Ct of Sess.) 561; 37 Sc. Jur. 270.—**SCOT.**

296 i. *Principal disclosed—No personal liability.*]—An auctioneer is not liable in his own name on a sale made by him, as such auctioneer, for a disclosed principal.—LARUE *v.* FRASER (1877), 21 L. C. J. 309.—**CAN.**

296 ii. ——.]—An auctioneer, acting for a disclosed exposer, & in accordance with his instructions, incurs no liability to a person claiming to be a purchaser for implement & damages.—FENWICK *v.* MACDONALD, FRASER & CO. (1904), 6 F. (Ct. of Sess.) 850.—**SCOT.**

302 i. *Auctioneer accepting fictitious bids—Action for deceit.*]—An auctioneer misrepresented to a purchaser certain bogus bids as genuine, whereby the purchaser was induced to give an inflated price for a farm. The purchaser suspected the fraud & refused to complete, whereupon the vendor sued him for specific performance. The purchaser

auction & paid a deposit to the auctioneers, brought an action against the vendors & the auctioneers to have the contract rescinded, the deposit repaid with interest, the costs of the action paid, & for damages. The statement of claim alleged that all, or nearly all, of the biddings previous to that of pltf. were fictitious, & were either biddings by the vendors or their agents or were announced by the auctioneers without any bidding having in fact been made. The auctioneers applied for liberty to pay the deposit into ct., & to have the action dismissed against them on such payment being made. An order was made that, the vendors undertaking to pay the auctioneers their costs of the action, without prejudice to how they should ultimately be borne, & to pay any interest & damages, to which pltf. might be held entitled, & the auctioneers undertaking in the event of the vendors not carrying out their undertaking to pay to pltf. interest on the deposit up to the time of payment into ct. & the costs of the action up to & including that application in the event of the ct. holding pltf. entitled to such interest & costs, the auctioneers should be at liberty to pay the deposit into ct., & that all further proceedings against them should be stayed:—*Held:* the order must be discharged, the auctioneers not having submitted to give pltf. all the relief which he could in any event be entitled to against them, for if the allegations in the statement of claim were established, pltf. would be entitled to have judgment against them for the deposit with interest, & to have an order for costs of the action against all defts.—HEATLEY *v.* NEWTON (1880), 19 Ch. D. 326; 51 L. J. Ch. 225; 45 L. T. 455; 30 W. R. 72, C. A.

Annotations:—**Mentd.** *In the goods of* Patrick (1889), 58 L. J. P. 36, C. A.; Frankenburgh *v.* Great Horseless Carriage Co., [1900] 1 Q. B. 504, C. A.

Liability for misrepresentation.]—*See* MISREPRESENTATION & FRAUD.

SUB-SECT. 2.—FOR BREACH OF IMPLIED WARRANTIES.

303. Of authority to sell.]—Pltf. agreed with defts., auctioneers, to purchase an estate for £975, & it was agreed he should pay the deposit in nine days & give his note for it at that date, which he did. T., one of defts., by the desire of his partner D., gave pltf. a receipt for the deposit & signed a printed particular which together amounted to an agreement in writing. In a few hours after this transaction D. & T. called on a friend of pltf.'s to acquaint him they had just received a letter stating that the estates were sold for more money & requesting the particular & receipt to be returned, & pltf. refusing to relinquish the agreement, they by the next post sent to him his note of hand & a particular signed by him, both of which he instantly returned. The money in payment of the note having been tendered & refused. Pltf. filed a bill against the owner of the estate & his trustees for sale, who denied the authority of defts. to sell, in consequence of which pltf. was advised not to proceed with his bill. In an action against defts. in which he proved that the estate was worth £2,117 10*s.*:—*Held:* as defts. had no authority to sell, pltf. was entitled to recover £261 for costs, interest, expenses, etc., but not any damages for the loss of his bargain.—JONES *v.* DYKE (undated), Sugden's "Vendors & Purchasers," 14th ed., p. 813.

Annotations:—**Distd.** Gaby *v.* Driver (1828), 2 Y. & J. 549. **Consd.** Engel *v.* Fitch (1868), L. R. 3 Q. B. 314; Bain *v.* Fothergill (1874), L. R. 7 H. L. 158, H. L. **Mentd.** Walker *v.* Moore (1829), 10 B. & C. 416; Hodges *v.* Litchfield (1835), 1 Hodg. 40; Sainsbury *v.* Jones (1839), 5 My. & Cr. 1; Malden *v.* Fyson (1847), 11 Q. B. 292; Pounsett *v.* Fuller (1856), 17 C. B. 660; Sikes *v.* Wild (1861), 1 B. & S. 587; Lock *v.* Furze (1866), L. R. 1 C. P. 441; Aberaman Ironworks *v.* Wickens (1868), L. R. 5 Eq. 485.

304. ——.]—If an auctioneer sell an estate without a sufficient authority, so that the purchaser cannot obtain the benefit of his bargain, he will be compelled to pay all the costs which purchaser may have been put to & the interest of the purchase-money if it has been unproductive, but not damages for loss of bargain.—BRATT *v.* ELLIS (1805), Sugden's "Vendors & Purchasers," 14th ed., p. 237.

Annotations:—**Distd.** Gaby *v.* Driver (1828), 2 Y. & J. 549. **Consd.** Engel *v.* Fitch (1868), 9 B. & S. 85. **Mentd.** Walker *v.* Moore (1829), 10 B. & C. 416; Sainsbury *v.* Jones (1839), 5 My. & Cr. 1; Pounsett *v.* Fuller (1856), 17 C. B. 660; Sikes *v.* Wild (1861), 1 B. & S. 587; Lock *v.* Furze (1866), L. R. 1 C. P. 441; Aberaman Ironworks *v.* Wickens (1868), L. R. 5 Eq. 485; Bain *v.* Fothergill (1874), L. R. 7 H. L. 158, H. L.

305. —— **Action for deceit.**]—Where an auctioneer sold goods taken in execution by the sheriff, without communicating to the bidders that the goods were also claimed by the assignees of the judgment debtor, & received the proceeds:—*Held:* (1) the auctioneer was liable to the purchaser, the measure of damages being the extent to which purchaser had been damnified; (2) it was no defence that the auctioneer had requested purchaser to give him a written notice not to pay over the proceeds & that, purchaser having omitted to give such notice, the auctioneer paid them over.

An action for money had & received does not lie;

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having no proof of the fraud entered into a consent settling the action, & each party bore his own costs of the action. The purchaser then sued the auctioneer in deceit, & the auctioneer admitted the fraudulent bids:—*Held:* the costs of the action for specific performance were recoverable against deft. as damages.—INGRAM *v.* GILLEN (1910), 44 I. L. T. 103.—**IR.**

m. *Fees paid by purchaser to auctioneer—Sale of land—Failure to make title.*]—Where a sale was declared off in consequence of the vendor's inability to make title:—*Held:* auctioneer not liable to repay the auction fees to the purchaser.—ADAMS *v.* M'KEOWN (1892), 26 I. L. T. Jo. 504.—**IR.**

n. *Commission paid to auctioneer — Right to recover—Abortive sale.*]—Lands were sold by auction upon condition that the highest bidder on being declared the purchaser should pay the auctioneer's commission at the rate of 5 per cent. on the whole of the purchase-money. The purchase subsequently fell through owing to the vendor not being able to make title:—*Held:* purchaser entitled to recover the commission from the auctioneer.—MURPHY *v.* HARTE (1912), 46 I. L. T. 197.—**IR.**

p. *Express warranty of title.*] — An auctioneer at an attempted sale of goods warranted them, saying they were his own, & he would stand between the purchaser & loss. Having sold the property by auction a few days subsequently to a bidder on the former occasion, & the goods having been claimed & taken by a third party under a chattel mtge. which covered them, the auctioneer was held responsible to the purchaser.—SOMERS *v.* O'DONOHUE (1859), 9 C. P. 208.—**CAN.**

PART VIII. SECT. 2, SUB-SECT. 2.

303 i. *Of authority to sell.*] — An auctioneer who offers goods for sale by auction warrants his authority to sell them. If, therefore, he sells goods by mistake & their owner afterwards reclaims them, he is liable to the purchaser for breach of warrant of authority.—ANDERSON *v.* JOHN CROALL & SONS, LTD. (1904), 11 S. L. T. 163; 6 F. (Ct. of Sess.) 153.—**SCOT.**

303 ii. —— *Sale of land — Measure of damages.*]—Defts., professing to have authority from the owner, contracted to sell land to pltf.; they had no such authority, & the sale was never carried out. Pltfs. brought an action against defts. for breach of contract. The only evidence given at the trial of the market value of the land at the time the contract was made was that the land was sold eighteen months afterwards at an advance of £120. The judge on this evidence, considering the price brought at the resale, gave a verdict for pltf., with £120 damages. On a motion for a new trial:—*Held:* the measure of damages was the difference between the contract price & the market value of the land at the time of the contract, but the judge was wrong in taking as such market value the price for which the land was sold eighteen months afterwards. Other evidence ought to have been given to show what was the market value at the time of the contract. A new trial was ordered.—HOLLAND *v.* HARDY (1882), 3 N. S. W. L. R. 450.—**AUS.**

Sect. 2.—Liability of auctioneer to purchaser: Subsect. 2. Part IX. Sects. 1 & 2.]

the action lies on the ground that pltf. has been deceived & is the worse for the deceit (GIBBS, C.J.). —PETO *v.* BLADES (1814), 5 Taunt. 657; 128 E. R. 849.

Annotations:—**Consd.** Baylis *v.* London Bp., [1913] 1 Ch. 127, C. A. *Peto* v. *Blades* is so ill reported that there is some doubt whether deft. was the sheriff himself or only his auctioneer (HAMILTON, L.J.).

306. Of authority to sell without reserve.]—An auctioneer, who puts property up for sale without reserve, contracts that the sale shall be without reserve, & this contract is made with the highest *bonâ fide* bidder, & in case of a breach of it, he has a right of action against the auctioneer.

Deft., an auctioneer, advertised the sale of a horse by auction, without reserve. Pltf. bid the highest except the owner, & deft. knocked down the horse to the owner. Pltf. claimed it as being the highest *bonâ fide* bidder. In an action against the auctioneer alleging that pltf. was the highest bidder, & that deft. was the agent of pltf. to complete the contract on behalf of pltf. for the purchase of the horse, deft. traversed those allegations:—*Held:* (1) (MARTIN & WATSON, BB., & BYLES, J.) although deft. was entitled to the verdict on the issue upon the second allegation, pltf. was entitled to recover upon the facts, inasmuch as his contract with deft. had been broken; (2) (WILLES, J. & BRAMWELL, B.) deft. had not authority to sell without reserve, & an action could be maintained, alleging an undertaking by him that he had such authority, & a breach of that undertaken.—WARLOW *v.* HARRISON (1859), 1 E. & E. 309; 29 L. J. Q. B. 14; 1 L. T. 211; 6 Jur. N. S. 66; 8 W. R. 95; 120 E. R. 925, Ex. Ch.

Annotations:—**Consd.** Mainprice *v.* Westley (1865), 6 B. & S. 420. **Distd.** Harris *v.* Nickerson (1873), L. R. 8 Q. B. 286; Rainbow *v.* Howkins, [1904] 2 K. B. 322. **Consd.** McManus *v.* Fortescue, [1907] 2 K. B. 1, C. A. **Mentd.** Wiley *v.* Crawford (1861), 1 B. & S. 265, Ex. Ch.; *Re* Agra & Masterman's Bank, *Ex p.* Asiatic Banking Corpn. (1867), 2 Ch. App. 391, L.JJ.; Woolf *v.* Horne (1877), 46 L. J. Q. B. 534; Johnston *v.* Boyes (1899), 68 L. J. Ch. 425.

307. ——.]—A declaration alleged that deft., an auctioneer, published handbills representing that at a certain day & place he would offer certain premises for peremptory sale by public auction, that pltf., confiding in those representations, attended at that time & place, & his bid was the highest except a sum bidden by an agent on the part of the vendor, but deft. would not accept pltf. as a purchaser. It appeared in evidence that the handbills stated that on the day & place in question the premises would be offered by deft. "for peremptory sale by auction, by direction of the mtgee. with a power of sale, subject to such conditions as will be then declared. For further particulars apply to Mr. H., solr., or to the auctioneer." H. was the person who bought in the premises:—*Held:* no contract on which deft. could be sued personally was proved. *Semble:* where an auctioneer, without disclosing his principal, advertises a sale without reserve, he personally contracts that there shall be a sale without reserve. MAINPRICE *v.* WESTLEY (1865), 6 B. & S. 420; 34 L. J. Q. B. 229; 13 L. T. 560; 30 J. P. 103; 11 Jur. N. S. 975; 14 W. R. 9; 122 E. R. 1250.

Annotations:—**Mentd.** Harris *v.* Nickerson (1873), L. R. 8 Q. B. 286; Rainbow *v.* Howkins, [1904] 2 K. B. 322.

308. —— **Sale void for want of writing.**]—Deft., an auctioneer was instructed by the owner of a pony to sell it at a public auction with a reserve price of £25. When the pony was put up at the sale the name of the vendor was disclosed, but deft. inadvertently stated that the sale was without reserve. The pony was knocked down to pltf. for 15 guineas. Deft. immediately afterwards discovered his error & put the pony up for sale again, when it was bought in for 17 guineas. No note or memorandum of the sale to pltf. was made. Pltf. brought an action against deft., claiming (*inter alia*) damages for breach of warranty of authority by deft.:—*Held:* there was in the circumstances a contract binding on the vendor on which he could (but for the absence of a written memorandum) have been successfully sued by pltf. & there had been no breach of warranty of authority by deft.—RAINBOW *v.* HOWKINS, [1904] 2 K. B. 322; 73 L. J. K. B. 641; 91 L. T. 149; 53 W. R. 46; 20 T. L. R. 508; 48 Sol. Jo. 494, D. C.

Annotations:—**Consd.** McManus *v.* Fortescue, [1907] 2 K. B. 1, C. A. A principal who gives authority to an auctioneer to sell subject to a reserve price gives no power to the auctioneer, either expressly or impliedly to accept a less price; the case of *Rainbow* v. *Howkins*, so far as it is inconsistent with this view, cannot be regarded as in harmony with well-established principles (FLETCHER MOULTON, L.J.).

309. —— **Sale subject to reserve.**]—At a sale by auction subject to a reserve price on the article sold, where the fact that there is a reserve is known, the offer of the auctioneer to sell, the bidding, & the knocking down of the article to the highest bidder are all subject to the condition that the reserve price should be reached, & the fact that the auctioneer knocks down the article to a bidder who has bid a less price than the reserve gives the latter no right of action against the auctioneer for breach of warranty of authority to accept the bid.—MCMANUS *v.* FORTESCUE, [1907] 2 K. B. 1; 76 L. J. K. B. 393; 96 L. T. 444; 23 T. L. R. 292; 51 Sol. Jo. 245, C. A.

310. Of authority to make representations—Not claim for indemnity.]—The vendor of a house brought an action against the purchaser, & the auctioneer who advertised & sold it, for specific performance of the contract or damages. Purchaser stated that he was induced to purchase the house in consequence of the advertisement in the newspapers inserted by the auctioneer, representing that the purchase-moneys would be allowed to remain on mtge. The representation was alleged to have been unauthorised, & purchaser applied by summons under R. S. C., Ord. 16, r. 55, for leave to serve his co-deft., the auctioneer, with a notice claiming indemnity from him against the claim of vendor:—*Held:* (1) this was not a case for indemnity within the rule; (2) the summons must be dismissed.—CATTON *v.* BENNETT (1884), 26 Ch. D. 161; 53 L. J. Ch. 685; 50 L. T. 383; 32 W. R. 485.

Annotation:—**Mentd.** Tritton *v.* Bankart (1887), 3 T. L. R. 420.

311. None as to vendor's title.]—Where an auctioneer sells by auction standing corn with the straw, for an unnamed principal, the price to be paid at once, & the crop to be moved immediately after it has arrived at maturity at the purchaser's expense, there is a contract by the auctioneer to give the purchaser all proper authority to enter upon the land, & to cut & carry away the corn & straw, but there is no actual warranty of the validity of the title of his principal to sell.—WOOD *v.* BAXTER (1883), 49 L. T. 45.

Annotation:—**Apld.** Payne *v.* Elsden (1900), 17 T. L. R. 161.

312. ——.]—Deft., an auctioneer, sold by auction to pltf. a piano which had been seized under a distress warrant for rent in arrear. The warrant was invalid, & the piano was claimed from pltf. by the true owner, & was delivered up to him:—*Held:* there was no implied warranty of title on the part of deft.—PAYNE *v.* ELSDEN (1900), 17 T. L. R. 161.

311 i. *None as to vendor's title.*]—An auctioneer who sells goods as auctioneer only, though not naming his principal, does not warrant the title to the goods sold; he does no more than engage that he is authorised by his principal to sell. —TRAPP *v.* PRESCOTT (1912), 17 B. C. R. 298; 50 S. C. R. 263.—**CAN.**

Part IX.—Rights and Liabilities in Relation to Third Parties.

SECT. 1.—RIGHT OF AUCTIONEER TO SUE THIRD PARTIES.

313. Trespass—Indictment—Goods.]—It is the same thing whether goods be sold on the premises of the owner or in an auction room. The possession is in the auctioneer & it is he who makes the contract. If they should be stolen he might maintain trespass or an indictment for larceny (HEATH, J.).—WILLIAMS *v.* MILLINGTON (1788), 1 Hy. Bl. 81 ; 126 E. R. 49.

Annotations :—**Consd. & Expld.** Coppin *v.* Walker (1816), 7 Taunt. 237. **Expld.** Sykes *v.* Giles (1839), 5 M. & W. 645. **Consd.** Rayner *v.* Grote (1846), 15 M. & W. 359. **Expld.** Taplin *v.* Florence (1851), 10 C. B. 744. **Consd.** Woolfe *v.* Horne (1877), 2 Q. B. D. 355. **Expld. & Apld.** Davis *v.* Artingstall (1880), 49 L. J. Ch. 609. **Consd.** Wood *v.* Baxter (1883), 49 L. T. 45. **Refd.** Davis *v.* Danks (1849), 3 Exch. 435 ; Robinson *v.* Rutter (1855), 4 E. & B. 954 ; Consolidated Co. *v.* Curtis, [1892] 1 Q. B. 495 ; Manley *v.* Berkett, [1912] 2 K. B. 329.

314. —— Unsevered fixtures.]—An auctioneer put into possession of fixtures attached to the freehold for the purpose of selling them, the purchaser being bound to detach & remove them, has not such a possession as will support trespass *de bonis asportatis* for their wrongful removal.—DAVIS *v.* DANKS (1849), 3 Exch. 435 ; 18 L. J. Ex. 213 ; 12 L. T. O. S. 428 ; 154 E. R. 915.

See, generally, BAILMENT.

SECT. 2.—LIABILITY OF AUCTIONEER TO THIRD PARTIES.

315. Conversion—What amounts to—Negotiating sale—Delivery to purchaser.]—Where an auctioneer only settles the price as between vendor & purchaser & takes his commission, he is not liable for conversion if vendor has no title to sell. But where an auctioneer receives goods into his custody & on selling them hands them over to purchaser with a view of passing the property in them, he is liable for conversion, & is not in the position of a packing agent or carrier who merely purports to change the position of the goods & not the property therein.—BARKER *v.* FURLONG, [1891] 2 Ch. 172 ; 60 L. J. Ch. 368 ; 64 L. T. 411 ; 39 W. R. 621 ; 7 T. L. R. 406.

Annotations :—**Refd.** *Re* Magnus, *Ex p.* Salaman (1910), 80 L. J. K. B. 71, C. A. **Mentd.** Consolidated Co. *v.* Curtis, [1892] 1 Q. B. 495.

316. —— Refusal to deliver to owner.]—Where the hirer of a piano sends it to an auctioneer to be sold, the auctioneer is guilty of a conversion if he refuses to deliver it up unless the expense incurred be first paid.—LOESCHMAN *v.* MACHIN (1818), 2 Stark. 311.

Annotations :—**Distd.** Ferguson *v.* Cristall (1828), 2 Moo. & P. 524. **Apld.** Cooper *v.* Willomatt (1845), 1 C. B. 672. **Mentd.** Fenn *v.* Bittleston (1851), 7 Exch. 152.

317. —— Return to person from whom received.]—A., a tenant, owed rent to B., his landlord. B. distrained for more rent than was due, & removed the goods to the auction rooms of C., & A. gave C. notice not to sell, & C. delivered the goods back to the person from whom he received them :—*Held :* as some rent was due from A. to B., C. was not liable to A. in an action of trover.—WHITWORTH *v.* SMITH (1832), 5 C. & P. 250 ; 1 Mood. & R. 193.

318. —— Sale under execution.]—A pianoforte of the pltf.'s was lent by him to W., in whose possession in Sept., 1845, it was seized by his landlord under a distress for rent. The landlord remained in possession of the goods, with W.'s consent till Oct. 15 ; on that day an execution was put into the premises at the suit of L., under which the officer seized the pianoforte & removed it to the premises of deft., an auctioneer, for sale, & deft. afterwards refused to deliver it to pltf., & sold it under the directions of the sheriff's officer :—*Held :* pltf. entitled to recover in trover.—TURNER *v.* FORD (1846), 15 M. & W. 212 ; 15 L. J. Ex. 215 ; 10 J. P. 426 ; 153 E. R. 826.

Annotation :—**Mentd.** Beckham *v.* Drake (1849), 2 H. L. Cas. 579.

319. —— Goods sold—Goods returned—Measure of damages.]—An auctioneer, having been requested by A. to sell certain goods, agreed to do so at a warehouse where they were stored by A. The day before the sale he received notice that B., A.'s wife, claimed the goods, notwithstanding which he put them up for sale & returned to A. those not sold. B. having proved her right to the goods :—*Held :* (1) the auctioneer was liable for the value of the goods returned to A., as well as of those sold ; (2) an inquiry must be granted to ascertain the value of the goods at the date of the notice.—DAVIS *v.* ARTINGSTALL (1880), 49 L. J. Ch. 609 ; 42 L. T. 507 ; 29 W. R. 137.

320. —— Sale of hired goods.]—Pltf. by agreement let some cabs on hire to P., who took them to deft., an auctioneer, & obtained from him an advance upon them. Deft., by P.'s instructions, & without any notice of pltf.'s property in the goods, subsequently sold them by auction, &, having recouped himself for his advance, commission, & expenses, handed over the balance to P. :—*Held :* pltf. was entitled to recover damages from deft. for conversion of the goods.

Supposing a man were to come into an auctioneer's yard holding a horse by the bridle & to say : "I want to sell my horse ; if you will find a purchaser, I will pay commission," & the auctioneer says, "Here is a man who wants to sell a horse ; will any one buy him ?" If he then & there finds him a purchaser & the seller himself hands over the horse, there could be no act on the part of the auctioneer which could render him liable to an action for conversion (BRAMWELL, L.J.).—COCHRANE *v.* RYMILL

PART IX. SECT. 1.

q. *Interest in or possession of goods.*]—Pltfs., auctioneers, sold certain furniture belonging to H. by public auction to B., who was allowed to remove the furniture ; he sold & delivered it to K., who sold & delivered it to deft. After the sale by auction pltfs. paid the price to H., they having warranted payment. There was no evidence that H. was present at the sale or was aware of a condition of sale that all goods were to remain the property of the auctioneers until paid for, whether removed or otherwise. Four days after the sale pltfs. sought to collect the price from B., but he was not to be found. In an action to recover the furniture or its value :—*Held :* (1) in order to succeed, pltfs. must first prove that the property in the furniture had passed to them, & that, in the absence of proof that H. knew of the condition or that it was an usual condition of auction sales, no contract between him & pltfs. could be implied that the property was to pass to the auctioneers upon their selling it to a bidder ; (2) the payment of the price by pltfs. to H. had not the effect of transferring the property to them, inasmuch as at the time of such payment pltfs. had already parted with the possession of the furniture.—MARCUS *v.* STAMPER & ZONTENDYK (1910), A. D. 58.—**S. AF.**

PART IX. SECT. 2.

320 i. *Conversion—Sale of hired goods.*]—A piano was hired from a firm by K. & given to an auctioneer, who sold it with other effects :—*Held :* the firm who owned the piano, & who were owed some instalments of the amount of hire, were entitled to recover from the auctioneers the value of it.—THOMPSON *v.* GAMBLE (1873), 8 I. L. T. Jo. 500.—**IR.**

r. —— *Sale of consigned goods.*]—Pltfs. were assignees of a bill of lading for one hundred casks of spirits of turpentine & five hundred & one barrels of resin, for which they had discounted the shipper's draft on R., the consignee.

Sect. 2.—Liability of auctioneer to third parties.]

(1879), 40 L. T. 744 ; 43 J. P. 572 ; 27 W. R. 776, C. A.

Annotations :—**Distd.** National Mercantile Bank *v.* Rymill (1881), 44 L. T. 767, C. A. **Consd.** Barker *v.* Furlong, [1891] 2 Ch. 172 ; Consolidated Co. *v.* Curtis, [1892] 1 Q. B. 495. **Refd.** National Mercantile Bank *v.* Hampson (1880), 28 W. R. 424. **Mentd.** National Mercantile Bank *v.* Rymill (1881), 44 L. T. 307 ; Turner *v.* Hockey (1887), 56 L. J. Q. B. 301.

321. —— —— Factors Act, 1889 (c. 45), s. 9.]—Pltfs. let a piano by a hiring agreement, the piano on payment of all the instalments to become the property of the hirer. The hirer delivered the piano to deft., an auctioneer, to be sold by auction, some instalments being then unpaid. Deft. received the piano in good faith, without notice of pltfs.' rights, sold it, & paid the proceeds to the hirer. In an action for conversion of the piano :—*Held :* (1) the hirer had agreed to buy, & had obtained, with the consent of pltfs., possession of the piano ; (2) the delivery by the hirer to deft. had the same effect as if the hirer were a mercantile agent ; (3) the words "delivery under any agreement for sale" in the sect. were not confined to delivery to the person receiving the goods pursuant to a sale by the person delivering them ; (4) the words "agreement for sale, pledge, or other disposition" included a delivery of goods to be sold, by the person receiving, for the benefit of the person delivering ; (5) deft. was protected from liability by the above sect.—SHENSTONE & CO. *v.* HILTON, [1894] 2 Q. B. 452 ; 63 L. J. Q. B. 584 ; 71 L. T. 339 ; 10 T. L. R. 557 ; 10 R. 390.

322. —— Goods consigned to agent for sale—Factors Act, 1889 (c. 45), s. 9.]—Goods were consigned by pltfs. to H., a mercantile agent, for sale by him on their behalf for cash or on the hire system. H. sent the goods to defts., a firm of auctioneers for sale by auction, & obtained from them an advance upon the goods in contemplation of their sale. In an action by pltfs. against defts. for conversion of the goods :—*Held :* (1) the transaction was not "a sale, pledge, or other disposition of the goods made by a mercantile agent when acting in the ordinary course of business of a mercantile agent" within the above sect. ; (2) defts. were not protected by the provisions of the Act.—WADDINGTON & SONS *v.* NEALE & SONS (1907), 96 L. T. 786 ; 23 T. L. R. 464, D. C.

See further, AGENCY Part V., Sect. 3, Sub-sect. 10.

323. —— Goods subject to bill of sale.]—B., an undischarged bkpt., to whom his creditors had given, by a resolution duly passed, a certain quantity of his furniture, assigned that furniture by bill of sale to pltf., & afterwards sent it to deft., an auctioneer, who sold it & paid the money received to bkpt. In an action for conversion :—*Held :* pltf. was entitled to the furniture, for bkpt. could, under the resolution of his creditors, dispose of it to pltf., & there was no *jus tertii* which deft. could set up.—BROWN *v.* HICKINBOTHAM (1881), 50 L. J. Q. B. 426, C. A.

324. —— ——.]—Pltfs. were the holders of a bill of sale, including certain horses & harness. The grantor of the bill of sale without pltfs.' knowledge took the horses & harness to deft.'s repository in the city of London for sale by auction, they were entered in the catalogue, deft. knowing nothing of the bill of sale. Before the auction the grantor of the bill of sale sold the horses & harness by private contract in deft.'s yard. The purchase-money was paid to deft. who deducted commission & paid the balance to the seller, & the horses & harness were delivered to the purchaser. Horses were sold under the same conditions in deft.'s yard whether sold privately or by auction. In an action for conversion of the horses & harness :—*Held :* deft. was not guilty of conversion.—NATIONAL MERCANTILE BANK *v.* RYMILL (1881), 44 L. T. 767, C. A.

Annotation :—**Consd.** Consolidated Co. *v.* Curtis, [1892] 1 Q. B. 495.

325. —— ——.]—An auctioneer who, in the ordinary course of his business, sells by public auction for A. goods ostensibly belonging to A., but really belonging to B., & without notice pays over the proceeds of sale to A., is not guilty of a conversion.

The grantor of a bill of sale which included a cow took the cow to a public market kept by N. corpn. & placed it in one of the pens rented by deft., an

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They forwarded the draft to their agents with instructions to deliver the bill of lading to R. when the draft was paid. R. accepted the draft, but did not pay the same, & the bill of lading was retained by pltfs.' agents. The invoice was sent to R., to whom the captain of the vessel, by which the goods were shipped, delivered the goods without the production of the bill of lading. Subsequently R. delivered ninety barrels of the turpentine to defts., auctioneers, for the purpose of being sold by defts. on account of R., upon which they advanced R. $1,000. Defts. after advertising the sale sold the turpentine at public auction & paid the balance of the net proceeds to R., & defts. did not know that R. had not possession of the bill of lading until pltfs., by notice in writing, demanded the turpentine of them :—*Held :* (1) pltfs. were entitled in an action of trover to recover from defts. the invoice of the turpentine, with interest on the amount from the day the demand was made ; (2) the instructions from pltfs. to their agents to deliver the bill of lading upon payment of the draft, was admissible evidence in the action.—PEOPLE'S NATIONAL BANK OF CHARLESTON *v.* STEWART (1879), 19 N. B. R. 268. —**CAN.**

323 i. —— *Goods subject to bill of sale.*]—An auctioneer who, at the instance of the mtgor., sells at auction in the ordinary course the goods in a chattel mtge., valid & in full force as regards the parties to it, & delivers possession of the goods to the purchaser, is liable to the mtgee. for conversion of the goods. JOHNSTON *v.* HENDERSON (1896), 28 O. R. 25.—**CAN.**

323 ii. —— *Payment to vendor after notice.*]—M., who was possessed of a farm, was in the habit of employing deft., an auctioneer, to let the grazing & manage the land for her. Deft. sometimes paid in advance the rents & taxes, & when he let the meadows or sold the crops he received the money, & after deducting what was due he paid the balance to M. M. had deposited with deft. the title-deeds of the farm by way of equitable mtge. In Nov., 1900, M. applied to pltf. for advances to pay off the amount due to deft., & also some rent that was due, which pltf. agreed to make upon the security of the agreement hereinafter stated, & also upon getting the title-deeds. On Dec. 29, 1900, M. signed an agreement, whereby, in consideration of pltf. paying for M. £200, she assigned to pltf., as security therefor, the authority to let & manage her farm, & out of the proceeds of such letting to retain such sums to liquidate the above, & M. appointed pltf. her auctioneer & salesman to dispose of same & to retain the sums advanced out of the proceeds, together with commission & expenses, & hand M. the balance ; this agreement to be irrevocable. Pltf. paid off deft., & paid the rent due. Pltf. in Jan., 1901, advertised the meadows for grazing, but owing to the action of M. the attempt to let them proved abortive, & the grass was allowed to spring into meadow. On July 5, pltf. advertised the meadows for sale, but they were not sold. M. subsequently employed deft. to sell her meadows, & they were sold on July 16. On July 19 pltf.'s solr. wrote to deft., informing him of the agreement of Dec. 29, 1900, & cautioning him not to pay over the proceeds of the sale to M. Notwithstanding this, deft. paid over the balance of the money to M., after deducting the expenses of the auction & commission :—*Held :* deft., having had notice of the agreement of Dec. 29, 1900, before he paid the balance of the proceeds of the sale to M., was liable to pltf. for the amount of the balance.—COONAN *v.* O'CONNOR, [1903] 1 I. R. 465, C. A.—**IR.**

s. *Injunction — Parting with proceeds of sale of tenant's goods—Landlord's claim for rent.*]—Pending the proceedings in an action for rent, & before judgment, deft. called an auction of all the stock & effects on the farm tenanted, on which pltf. had been prevented from distraining in consequence of the disturbed state of the district :—*Held :* an injunction should not be granted to restrain the auctioneer from parting with the proceeds of the sale pending the recovery of judgment.—MAX *v.* BUCKLEY (1882), 16 I. L. T. 1, C. A.—**IR.**

t. —— *Both land and defendant out of jurisdiction.*]—Deft. & land the subject-matter of the suit out of the jurisdiction. Substituted service on an auctioneer selling the land on behalf of deft., & an injunction to restrain the selling, directed.—WILKIE *v.* FATTORINI (1862), 1 N. S. W. S. C. R. 32.—**AUS.**

auctioneer, whom he instructed to sell it. Deft. had before this sold several cows in the same way for him. Deft. without notice or knowledge of the bill of sale in question, or that the cow was not the property of the person instructing him, sold the cow, & immediately after he received the money paid it over to the ostensible seller, he having previously paid the auctioneer in cash the amount of his commission :—*Held :* the grantee of the bill of sale could not maintain an action against the auctioneer for the value of the cow.—TURNER *v.* HOCKEY (1887), 56 L. J. Q. B. 301, D. C.

Annotations :—**Consd.** Barker *v.* Furlong, [1891] 2 Ch. 172 : With regard to *Turner* v. *Hockey* it appears to me that if it is to be supported it must be on the ground that the learned judges took this view on the facts before them that the auctioneer had done nothing but act as a mere conduit pipe ; but if the facts are rightly reported I doubt if on those facts I should personally have come to the conclusion they appear to have arrived at (ROMER, J.); Consolidated Co. *v.* Curtis, [1892] 1 Q. B. 495.

326. —— ——.]—The owner of household furniture assigned it by bill of sale to pltfs. Subsequently she employed defts., auctioneers, to sell it by auction at her private house. Defts. sold without notice of the bill of sale & delivered it to the purchasers :—*Held :* they were liable to pltfs. in trover.—CONSOLIDATED CO. *v.* CURTIS & SON, [1892] 1 Q. B. 495 ; 61 L. J. Q. B. 325 ; 56 J. P. 565 ; 40 W. R. 426 ; 8 T. L. R. 403 ; 36 Sol. Jo. 328.

327. —— —— **Proof of damage.**]—A mtgee. of goods can only recover against an auctioneer, who has sold them by direction of the mtgor., the actual damage he has sustained by the injury to his security.

The grantor of a bill of sale for £54 on certain furniture, after paying off £29, employed deft., an auctioneer, to sell a portion of the furniture. In an action for conversion against the auctioneer by the holder of the bill of sale :—*Held :* pltf. was only entitled to recover the damage actually sustained.

Pltf. must prove the value of the goods left & the price likely to be realised, & if he is fully secured with what is left, he has not sustained any damage (CAVE, J.).—MYERS *v.* MARSH (1883), 1 Cab. & El. 116.

328. —— **Sale of goods obtained by fraud.**]—A. falsely represented to B., the owner of goods, that he was sent by C. to purchase goods for C., & by means of this fraud obtained possession of goods. He took them to deft., an auctioneer, & sold them not in market overt. In an action of trover by B. against the auctioneer :—*Held :* he was entitled to recover.—HIGGONS *v.* BURTON (1857), 26 L. J. Ex. 342 ; 29 L. T. O. S. 165 ; 5 W. R. 683.

Annotations :—**Consd.** Johnson *v.* Credit Lyonnais, Johnson *v.* Blumenthal (1877), 26 W. R. 195, C. A. **Expld.** R. *v.* Central Criminal Court JJ. (1886), 55 L. T. 486. **Refd.** Cundy *v.* Lindsay (1878), 26 W. R. 406, H. L. ; G. W. Ry. Co. *v.* London & County Banking Co. (1901), 50 W. R. 50, H. L. **Mentd.** Richards *v.* Johnson (1859), 33 L. T. O. S. 206 ; Gobind Chunder Sein *v.* Ryan (1861), 15 Moo. P. C. C. 230, P. C. ; Hardman *v.* Booth (1863), 32 L. J. Ex. 105 ; Lindsay *v.* Cundy (1876), 45 L. J. Q. B. 381.

329. —— ——.]—Pltf., the owner of goods, delivered them on credit, on a supposed contract of sale, to E. G., professing to act for G. & Co., packers, but in reality intending to appropriate them fraudulently to himself & T., partners in a business of a different kind. E. G., having received the goods, handed them to deft., an auctioneer, who made advances upon them in good faith, & sold them to repay himself, before notice :—*Held :* deft. was liable in trover to pltf.—HARDMAN *v.* BOOTH (1862), 1 H. & C. 803 ; 1 New Rep. 240 ; 32 L. J. Ex. 105 ; 7 L. T. 638 ; 9 Jur. N. S. 81 ; 11 W. R. 239 ; 158 E. R. 1107.

Annotations :—**Folld.** Fowler *v.* Hollins (1870), 19 W. R. 180. **Consd.** Hollins *v.* Fowler (1875), L. R. 7 H. L. 757, H. L. ; Lindsay *v.* Cundy (1877), 2 Q. B. D. 96, C. A. ; Whitehorn *v.* Davison, [1911] 1 K. B. 463, C. A. **Refd.** Oppenheimer *v.* Frazer & Wyatt, [1907] 2 K. B. 50, C. A. **Mentd.** Cole *v.* North Western Bank (1875), L. R. 10 C. P. 354, Ex. Ch. ; Arnold *v.* Cheque Bank, Arnold *v.* City Bank (1876), 1 C. P. D. 578 ; Cundy *v.* Lindsay (1878), 3 App. Cas. 459, H. L. ; G. W. Ry. Co. *v.* London & County Bank (1901), 85 L. T. 152, H. L.

330. —— **Partnership goods—Assignees of one partner.**]—An auctioneer, being employed by a solvent partner to sell certain partnership goods, was sued by the assignees of the insolvent partner in trover for their conversion :—*Held :* the action did not lie, the assignee & solvent partner being tenants in common.—LEWIS *v.* WHITE (1863), 2 New Rep. 81 ; 8 L. T. 320.

331. —— **Sale of bankrupt's goods—Allowance of payment for rent, etc.**]—In an action of trover by the assignees of a bkpt. against an auctioneer who sold bkpt.'s property, the auctioneer should be allowed any sum that he has paid for rent, & also a reasonable sum for the expenses of the sale, but not any part of the expense of removing the goods from the premises.—GRIMSHAW, ETC. (ASSIGNEES OF WIGGINTON) *v.* ATTERWELL (1837), 8 C. & P. 6.

332. Rescue—Sale in disregard of distress.]—Pltfs., brewers, were the lessors of a public-house to D., under an agreement which gave them all the rights & remedies of landlords for rent against the effects of the tenant for the recovery of any book-debts for liquors sold by them to him. There being moneys due in respect of such debts, pltfs. sent their bailiff with a written authority to distrain for the amount, who showed his authority to deft., an auctioneer then on the premises, took an inventory & made a valuation. D. & deft. thereupon proceeded to sell the goods in disregard of such distress, deft. putting up & knocking down the goods by auction, the tenant handing them to the purchasers :—*Held :* though pltfs. had not such possession as to enable them to sue for conversion, they could maintain an action for rescue against deft., for knowingly assisting in transferring the dominion & property in the goods seized to the respective purchasers.—IREDALE *v.* KENDALL (1878), 40 L. T. 362.

333. Money had & received—Sale with notice of owner's claim.]—If a person, *e.g.*, an auctioneer, employed as an agent for another in the sale of any property, had notice that what he is about to sell is not his principal's, & yet he continues to sell, he is personally liable in an action for the produce of the sale.—HARDACRE *v.* STEWART (1804), 5 Esp. 103.

334. Monition—Sale of ship's tackle on invalid magistrate's warrant.]—As it was not competent for magistrates to levy distresses upon a vessel in the custody of the Admiralty Ct. at the suit of seamen for their wages, under 7 & 8 Vict. c. 112, a monition was decreed against an auctioneer who had acted upon the magistrates' warrants, & had removed part of the tackle & furniture of the ship.—THE WESTMORELAND (1845), 2 Wm. Rob. 394 ; 4 Notes of Cases, 173.

335. Damages—Withdrawal of property advertised.]—Deft., an auctioneer, advertised in the London papers that certain brewing materials, plant, & office furniture would be sold by him at B. on a certain day & two following days. Pltf., a commission broker in London, having a commission to buy the office furniture, went down to the sale ; on the third day, on which the furniture was advertised for sale,

335 i. *Damages — Injuries to servant.*]—An auctioneer selling goods in the premises of another is not responsible for the sufficiency of these premises or of appliances connected with them, so as to be liable in damages for injuries caused to his own servant by their insufficiency.—NELSON *v.* SCOTT, CROALL & SONS (1892), 19 R. (Ct. of Sess.) 425 ; 29 Sc. L. R. 354.—**SCOT.**

335 ii. —— *Expulsion of person attending auction.*]—A person attending an auction cannot be expelled without proper motives, & it is on the auctioneer to prove such motives.—MARTINEAU

Sect. 2.—Liability of auctioneer to third parties.]

all the lots of furniture were withdrawn. Pltf. brought an action against deft. to recover for his loss of time & expenses:—*Held:* pltf. could not maintain the action, for the advertising the sale was a mere declaration, & did not amount to a contract with any one who might act upon it, nor to a warranty that all the articles advertised would be put up for sale.—HARRIS *v.* NICKERSON (1873), L. R. 8 Q. B. 286; 42 L. J. Q. B. 171; 28 L. T. 410; 37 J. P. 536; 21 W. R. 635.

Annotations:—**Refd.** Carlill *v.* Carbolic Smoke Ball Co. (1892), 67 L. T. 837, C. A.; Rainford *v.* Keith (James) & Blackman Co., [1905] 1 Ch. 296.

336. —— Injury to person attending sale.]—WALKER *v.* CRABB, No. 10, *ante.*

337. —— Nuisance.]—Pltf. kept a coffee-house in a narrow street near Covent Garden. Defts. carried on an extensive business as auctioneers in the same neighbourhood, having an outlet at the rear of their premises next adjoining pltf.'s house, where they were constantly loading & unloading goods into & from vans. The vans intercepted the light from pltf.'s coffee-shop to such an extent that he was obliged to burn gas nearly all day, & access to the shop was obstructed by the horses standing in front of the door, & the stench arising from their frequent staleing there rendered pltf.'s dwelling incommodious & uncomfortable:—*Held:* the evidence disclosed such direct & substantial private & particular damage to pltf., beyond that suffered by the rest of the public, as to entitle him to maintain an action.—BENJAMIN *v.* STORR (1874), L. R. 9 C. P. 400; 43 L. J. C. P. 162; 30 L. T. 362; 22 W. R. 631.

Annotations:—**Refd.** Boyce *v.* Paddington B. C., [1903] 2 Ch. 556, C. A. **Mentd.** Lyon *v.* Fishmongers' Co. (1875), 10 Ch. App. 681, n.; Fritz *v.* Hobson (1880), 14 Ch. D. 542; Barber *v.* Penley, [1893] 2 Ch. 447; Martin *v.* L. C. C. (1898), 79 L. T. 170; Heath's Garage *v.* Hodges (1915), 14 L. G. R. 195.

338. Landlord—Promise to pay rent—Statute of Frauds.]—Deft., an auctioneer, being about to sell property on certain premises, promised the landlord that, if he would forbear to distrain for the arrears of rent, he would pay them out of the proceeds of the sale:—*Held:* this was not a promise to pay the debt of another within Stat. Frauds.—BAMPTON *v.* PAULIN (1827), 4 Bing. 264; 12 Moore, C. P. 497; 5 L. J. O. S. C. P. 168; 130 E. R. 769.

Annotation:—**Expld.** Rounce *v.* Woodyard (1846), 8 L. T. O. S. 186.

339. —— —— ——.]—A. being indebted to pltf. for half a year's rent of a farm, due on Mar. 25, deft., an auctioneer, was about to sell the goods of A. on the premises in the month of Aug. On the day of the sale pltf. (the landlord) came there to distrain for his rent. Deft., in consideration that pltf. would not distrain, verbally promised to pay him not only the rent due, but the rent that would become due at the Michaelmas following:—*Held:* (1) the promise to pay the accruing rent was a promise founded on a new consideration, distinct from the demand which pltf. had had against A., & was void by Stat. Frauds, s. 4; (2) the promise being entire & in the commencement void in part, was void altogether; & pltf. could not recover from deft. the rent due on Mar. 25.—THOMAS *v.* WILLIAMS (1830), 10 B. & C. 664; 5 Man. & Ry. K. B. 625; 8 L. J. O. S. K. B. 314; 109 E. R. 597.

Annotations:—**Apprvd.** Wood *v.* Benson (1831), 2 Cr. & J. 94. **Apld.** Head *v.* Baldrey (1837), 6 Ad. & El. 459. **Expld.** Tatton *v.* Wade (1856), 4 W. R. 548, Ex. Ch. **Consd.** Fitzgerald *v.* Dressler (1859), 5 Jur. N. S. 598. **Refd.** Falmouth *v.* Thomas (1832), 1 Cr. & M. 89; Harman *v.* Reeve (1856), 25 L. J. C. P. 257; Harburg Indiarubber Comb Co. & Winter *v.* Martin (1902), 71 L. J. K. B. 529, C. A. **Mentd.** Green *v.* Cresswell (1839), 10 Ad. & El. 453.

340. Liability as executor de son tort.]—B. was manager of some ironworks, & as such lived in a house in the neighbourhood. He died intestate & insolvent on June 22, 1877. Shortly after his decease & before letters of administration could be taken out, the widow was required to vacate the premises, & it became necessary to remove the furniture which belonged to the deceased. Part of it was taken by her to a smaller house, & afterwards purchased by her at a valuation, & the residue sold by auction. The proceeds of the auction, as well as the price of the goods retained by the widow, were duly handed over to the administrator afterwards appointed. Actions having been brought against both the widow & the auctioneer, charging them respectively as exors. *de son tort:*—*Held:* they were not liable, on the ground that there had been no wrongful intermeddling with the assets, or dealing with them in such way as denoted a usurpation of the functions of an exor.—PETERS *v.* LEEDER, PETERS *v.* BORGUET (1878), 47 L. J. Q. B. 573; 43 J. P. 37.

Annotation:—**Mentd.** A.-G. *v.* New York Breweries Co. [1897] 1 Q. B. 738.

Wrongful sale of bankrupt's goods.]—*See* BANKRUPTCY & INSOLVENCY.

Sale in disregard of injunction, etc.]—*See* CONTEMPT OF COURT, ATTACHMENT & COMMITTAL.

Distress—Privilege from.]—*See* DISTRESS.

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v. MARLEAU (1879), 9 R. L. 530.—**CAN.**

340 i. *Liability as executor de son tort.*]—An auctioneer is not liable as exor. *de son tort* who, acting under the instructions of his employer, does not deliver over possession of chattels, his employer receiving the purchase-money directly on the spot.—KENNEDY *v.* M'EVOY (1892), 27 I. L. T. 11.—**IR.**

340 ii. —— *Evidence.*]—An auctioneer who sells assets of a deceased person is liable for debts of deceased as exor. *de son tort,* unless he can show that he acted under an exor. who has proved the will.—NULTY *v.* FAGAN (1886), 22 L. R. Ir. 604.—**IR.**

AUDITOR.

See Companies; Local Government.

AUTHOR.

See Copyright and Literary Property; Libel and Slander; Press and Printing.

AUTREFOIS ACQUIT AND AUTREFOIS CONVICT.

See Criminal Law and Procedure.

AVERAGE.

See Insurance; Shipping and Navigation.

AVOWRY.

See DISTRESS.

BAIL.

See ADMIRALTY; CRIMINAL LAW AND PROCEDURE; CROWN PRACTICE; EXECUTION; MAGISTRATES; SHERIFFS AND BAILIFFS.

BAILIFF.

See COPYHOLDS; SHERIFFS AND BAILIFFS.

BAILMENT.

PAGE

PART I. IN GENERAL 53

SECT. 1. DEFINITION AND CLASSIFICATION OF BAILMENT 53

SECT. 2. INVOLUNTARY BAILEES 58

PART II. GRATUITOUS BAILMENT 59

SECT. 1. DEPOSIT 59

SUB-SECT. 1. WHAT CONSTITUTES A DEPOSIT 59

SUB-SECT. 2. DUTIES OF BAILOR AND BAILEE 60

SUB-SECT. 3. GOODS SENT FOR SALE OR RETURN OR FOR SALE ON COMMISSION : *see* SALE OF GOODS.

SUB-SECT. 4. GOODS FOUND 64

SECT. 2. MANDATE 67

SECT. 3. GRATUITOUS LOAN FOR USE 69

SECT. 4. GRATUITOUS QUASI-BAILMENT 70

PART III. BAILMENT FOR VALUABLE CONSIDERATION 72

SECT. 1. HIRE OF CUSTODY 72

SUB-SECT. 1. MEASURE OF DILIGENCE 72

SUB-SECT. 2. WAREHOUSEMEN, WHARFINGERS, AND DOCK COMPANIES 75

SUB-SECT. 3. CARRIERS AS WAREHOUSEMEN 79

SUB-SECT. 4. BOARDING-HOUSE KEEPERS 82

SUB-SECT. 5. RAILWAY CLOAK-ROOMS AND RECEIVING OFFICES 83

SUB-SECT. 6. CUSTODY OF ANIMALS : *see* ANIMALS.

SUB-SECT. 7. CUSTODY OF DOCUMENTS BY SOLICITORS : *see* SOLICITORS.

SUB-SECT. 8. CUSTODY BY BANKERS : *see* BANKERS & BANKING.

SUB-SECT. 9. LIABILITY TO DISTRESS : *see* DISTRESS.

SUB-SECT. 10. LIEN OF BAILEE : *see* LIEN.

SECT. 2. HIRE OF CHATTELS 85

SUB-SECT. 1. THE CONTRACT OF HIRING 85

SUB-SECT. 2. RIGHTS AND OBLIGATIONS OF OWNER 86

A. As between Owner and Hirer 86

B. As between Owner and Third Parties 88

SUB-SECT. 3. RIGHTS AND OBLIGATIONS OF HIRER 89

A. As between Hirer and Owner 89

B. As between Hirer and Third Parties 92

PAGE

Sub-sect. 4. Determination of Contract 92
Sub-sect. 5. Remedies of Owner and Hirer 92

Sect. 3. Hire Purchase 92
Sub-sect. 1. Nature of Contract 92
Sub-sect. 2. Rights and Obligations of the Parties 95

Sect. 4. Hire of Work and Labour 98

Part IV. CONSIDERATIONS COMMON TO ALL CLASSES OF BAILMENT . . . 99

Sect. 1. General Rights and Obligations of Bailor and Bailee inter se . . . 99
Sub-sect. 1. Obligation of Bailee to Redeliver 99
Sub-sect. 2. Estoppel of Bailee 100
Sub-sect. 3. Attornment by Bailee 102
Sub-sect. 4. Obligation of Bailee to observe Terms of Bailment . . . 105
Sub-sect. 5. Obligation of Bailee to account to Bailor 105
Sub-sect. 6. Duty to protect Bailor's Title 106
Sub-sect. 7. Termination of Bailment 106
Sub-sect. 8. Remedies of Bailor and Bailee. 108

Sect. 2. Rights and Obligations as regards Third Parties 110
Sub-sect. 1. Rights of Bailor against Third Parties 110
Sub-sect. 2. Rights of Bailee against Third Parties 112
Sub-sect. 3. Rights of Third Parties against Bailor 114
Sub-sect. 4. Rights of Third Parties against Bailee 115

Sect. 3. Statute of Limitations 116

Sect. 4. Joint Bailors and Bailees 116

Agency, generally . . *See* Agency.
Contracts for Work and Labour . . . ,, Work & Labour.
Interpleader . . ,, Interpleader.
Larceny by Bailee . ,, Criminal Law & Procedure.
Limitation of Actions . ,, Limitation of Actions.
Negligence, generally . ,, Negligence.
Position, as Bailees, of—
Agisters of Cattle . ,, Animals.
Auctioneers . . ,, Auction & Auctioneers.
Bankers . . . ,, Bankers & Banking.
Carriers . . . ,, Carriers.
Dock Companies . ,, Shipping & Navigation.
Factors . . ,, Agency.
Innkeepers . . ,, Inns & Innkeepers.
Position, as Bailees, of—
Pawnbrokers . . *See* Pawns & Pledges.
Printers and Publishers . . . ,, Press & Printing.
Railway Companies . ,, Carriers.
Receivers of Goods sent on Approval or for Sale on Commission ,, Sale of Goods.
Servants intrusted with Masters' Goods . ,, Master & Servant.
Sheriffs . . . ,, Sheriffs & Bailiffs.
Shipowners, Charterers and Masters . ,, Shipping & Navigation.
Solicitors . . . ,, Solicitors.
Travellers . . ,, Master & Servant.
Position of Bailee on Bankruptcy . . ,, Bankruptcy & Insolvency.
Trover . . . ,, Trover.

Part I.—In General.

SECT. 1.—DEFINITION AND CLASSIFICATION OF BAILMENT.

1. General principle.]—There are six sorts of bailments. The first sort of bailment is a bare, naked bailment of goods, delivered by one man to another to keep for the use of the bailor; & this I call a *depositum*. The second sort is when goods or chattels that are useful are lent to a friend *gratis* to be used by him; & this is called *commodatum*, because the thing is to be restored *in specie*. The third sort is when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio*, & the lender is called *locator* & the borrower *conductor*. The fourth sort is when goods or chattels are delivered to another as a pawn to be a security to him for money borrowed of him by the bailor; & this is called in Latin *vadium* & in English a pawn or pledge. The fifth sort is when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody who is to carry them or do something about them *gratis*, without any reward for such his work or carriage (LORD HOLT, C.J.)—COGGS *v.* BERNARD (1703), 2 Ld. Raym. 909; 1 Com. 133; 92 E. R. 107.

Annotations:—**Refd.** Hartop *v.* Hoare (1743), 3 Atk. 44; Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357, Ex. Ch.; Dansey *v.* Richardson (1854), 3 E. & B. 144; The Winkfield, [1902] P. 42, C. A. **Mentd.** Anon. (1692), 2 Salk. 522; Buckmyr *v.* Darnall (1704), 2 Ld. Raym. 1085; Grand Opinion for the Prerogative concerning the Royal Family (1717), Fortes. Rep. 401; Robinson *v.* Green (1723), 1 Stra. 574; Skelton *v.* Osborn (1729), 1 Barn. K. B. 260; Boucher *v.* Lawson (1736), Lee *temp.* Hard. 194; Kettle *v.* Bromsall (1738), Willes, 118; Charitable Corpn. *v.* Sutton (1742), 2 Atk. 400; Ryall *v.* Rowles (1750), 1 Ves. Sen. 348; Pasley *v.* Freeman (1789), 3 Term Rep. 51; Elsee *v.* Gatward (1793), 5 Term Rep. 143; Guilliam *v.* Barnett (1804), 2 Smith, K. B. 155; Gibson *v.* Inglis (1814), 4 Camp. 72; Cavenagh *v.* Such (1815), 1 Price, 328; Pippin *v.* Sheppard (1822), 11 Price, 400; Storr *v.* Crowley (1825), M'Cle. & Yo. 129; Whitehead *v.* Greetham (1825), 2 Bing. 464, Ex. Ch.; Corbett *v.* Packington (1827), 6 B. & C. 268; Gledstane *v.* Hewitt (1831), 1 Tyr. 445; *Ex p.* Cording (1832), 4 B. & Ad. 198; R. *v.* Cording (1832), 1 Nev. & M. K. B. 35; M'Kenzie *v.* M'Leod (1834), 10 Bing. 385; Vaughan *v.* Menlove (1837), 3 Bing. N. C. 468; Boorman *v.* Brown (1842), 3 Q. B. 511, Ex. Ch.; Ross *v.* Hill (1846), 2 C. B. 877; G. N. Ry. Co. *v.* Shepherd (1852), 8 Exch. 30; Lewis *v.* Nicholson (1852), 21 L. J. Q. B. 311; Mickleth waite *v.* Merrill (1852), 19 L. T. O. S. 61; Shepherd *v.* G. N. Ry. Co. (1852), 19 L. T. O. S. 324; Balfe *v.* West (1853), 13 C. B. 466; Crouch *v.* L. & N. W. Ry. Co. (1854), 14 C. B. 255; Baxendale *v.* Eastern Counties Ry. Co. (1858), 27 L. J. C. P. 137; Blakemore *v.* Bristol & Exeter Ry. Co. (1858), 8 E. & B. 1035; Syred *v.* Carruthers (1858), E. B. & E. 469; Belfast & Ballymena Ry. Co. *v.* Keys (1861), 9 H. L. Cas. 556, H. L.; MacCarthy *v.* Young (1861), 6 H. & N. 329; Marriott *v.* Anchor Reversionary Co. (1861), 3 De G. F. & J. 177, L.C. & L.JJ.; Martin *v.* Reid (1862), 11 C. B. N. S. 730; Taylor *v.* Caldwell (1863), 3 B. & S. 826; Beal *v.* South Devon Ry. Co. (1864), 11 L. T. 184, Ex. Ch.; Pigot *v.* Cubley (1864), 15 C. B. N. S. 701; P. & O. Steam Navigation Co. *v.* Shand (1865), 3 Moo. P. C. C. N. S. 272, P. C.; Swire *v.* Leach (1865), 5 New Rep. 314; Donald *v.* Suckling (1866), L. R. 1 Q. B. 585; Grill *v.* General Iron Screw Collier Co. (1866), 12 Jur. N. S. 727; Skelton *v.* L. & N. W. Ry. Co. (1867), L. R. 2 C. P. 631; Giblin *v.* McMullen (1868), L. R. 2 P. C. 317, P. C.; Readhead *v.* Mid. Ry. Co. (1869), L. R. 4 Q. B. 379, Ex. Ch.; Liver Alkali Co. *v.* Johnson (1874), L. R. 9 Exch. 338, Ex. Ch.; Searle *v.* Laverick (1874), L. R. 9 Q. B. 122; Nugent *v.* Smith (1875), 1 C. P. D. 19; Cohen *v.* G. E. Ry. Co. (1876), 45 L. J. Q. B. 298; Harris *v.* G. W. Ry. Co. (1876), 1 Q. B. D. 515; Hoare *v.* G. W. Ry. Co. (1877), De Colyar's County Ct. Cases, 192; Bergheim *v.* G. E. Ry. Co. (1878), 3 C. P. D. 221, C. A.; Foulkes *v.* Met. Dist. Ry. Co. (1880), 28 W. R. 526, C. A.; Cutler *v.* North London Ry. Co. (1887), 56 L. T. 639; The Moorcock (1889), 14 P. D. 64, C. A.; Shaw *v.* G. W. Ry. Co., [1894] 1 Q. B. 373; Harris *v.* Perry, [1903] 2 K. B. 219, C. A.; Wallis *v.* G. N. Ry. Co. (Ireland) (1903), 12 Ry. & Can. Tr. Cas. 38; Cheshire *v.* Bailey, [1905] 1 K. B. 237, C. A.; Clarke *v.* West Ham Corpn., [1909] 2 K. B. 858, C. A.; Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305, C. A.; Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A.; Attenborough *v.* Solomon, [1913] A. C. 76, H. L.; Hatton *v.* Car Maintenance Co. (1914), 110 L. T. 765; Banbury *v.* Bank of Montreal (1918), 87 L. J. K. B. 1158, H. L.

2. —— Founded on Roman law.]—No one who has read the treatise of Story J. on Bailments, the essay of Sir William Jones, & the judgment of Lord Holt in *Coggs v. Bernard* (No. 1, *supra*) can doubt that the common law of England as to bailments is founded upon, though it has not exactly adopted, the Roman law. It is true that Lord Holt rests as for authority solely on Bracton; but the treatise of Bracton adopts all the divisions of the Roman law in the very words of the Roman text, & further adopts the exception of the Roman law & the Roman reasons for it. The divisions may be the logical divisions of the subject, & so be naturally adopted by all in every country who treat the subject logically; but the exception [*i.e.*, in the case of common carriers], both in the Roman Empire & in England, was no natural exception, but one depending entirely on public policy, arising from the manner in which some particular kinds of business were carried on in both places. It is obvious that Bracton, or English judges before him, adopted into the English the Roman law (BRETT, J.).—NUGENT *v.* SMITH (1875), 1 C. P. D. 19; 45 L. J. Q. B. 19; 33 L. T. 731; 24 W. R. 237; 3 Asp. M. L. C. 87; *revsd.* on another point (1876), 1 C. P. D. 423, C. A.

Annotations:—**Mentd.** Kopitoff *v.* Wilson (1876), 1 Q. B. D. 377; Nichols *v.* Marsland (1876), 2 Ex. D. 1, C. A.; Box *v.* Jubb (1879), 48 L. J. Q. B. 417; Woodley *v.* Michell (1883), 11 Q. B. D. 47, C. A.; Lister *v.* L. & Y. Ry. (1903), 72 L. J. K. B. 385; The West Cock (1911), 80 L. J. P. 97, C. A.; Watkins *v.* Cottell, [1916] 1 K. B. 10.

3. —— ——.]—The great case of *Coggs* v. *Bernard* (No. 1, *supra*) is now the leading case on the law of bailments, & Lord Holt, in that case, referred so much to the Civil law that it might perhaps be thought that this principle was there derived direct from the civilians, & was not generally applicable in English law except in the case of bailments; but the same law had been already adopted by the English law as early as the Book of Assizes.—TAYLOR *v.* CALDWELL (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L. J. Q. B. 164; 8 L. T. 356; 27 J. P. 710; 11 W. R. 726; 122 E. R. 309.

Annotations:—**Refd.** Krell *v.* Henry, [1903] 2 K. B. 740, C. A. **Mentd.** Appleby *v.* Meyers (1866), L. R. 1 C. P. 615; Boast *v.* Firth (1868), L. R. 4 C. P. 1; Robinson *v.* Davison (1871), L. R. 6 Exch. 269; Castle *v.* Playford (1872), 26 L. T. 315, Ex. Ch.; Howell *v.* Coupland (1874), L. R. 9 Q. B. 462; Jackson *v.* Union Marine Insce. (1874), L. R. 10 C. P. 125, Ex. Ch.; *Re* Arthur, Arthur *v.* Wynne (1880), 14 Ch. D. 603; Marshall *v.* Schofield (1882), 52 L. J. Q. B. 58, C. A.; Chapman *v.* Withers (1888), 57 L. J. Q. B. 457; Turner *v.* Goldsmith, [1891] 1 Q. B. 544, C. A.; *Re* Jamieson & Newcastle S.S. Freight Insce. Assocn., [1895] 1 Q. B. 510; Blum *v.* Ansley (1900), 16 T. L. R. 249; Nickoll & Knight *v.* Ashton, Eridge, [1900] 2 Q. B. 298; Lumsden *v.* Barton (1902), 19 T. L. R. 53; Blakeley *v.* Muller, Hobson *v.* Pattenden (1903), 19 T. L. R. 186; Clark *v.* Lindsay (1903), 88 L. T. 198; Scott *v.* Coulson, [1903] 2 Ch. 249, C. A.; Elliott *v.* Crutchley, [1903] 2 K. B. 476; Herne Bay Steam Boat Co. *v.* Hutton, [1903] 2 K. B. 683, C. A.; Civil Service Co-op. Soc. *v.* General Steam Navigation Co., [1903] 2 K. B. 756, C. A.; Chandler *v.* Webster, [1904] 1 K. B. 493, C. A.; *Re* Hull & Meux, [1905] 1 K. B. 588, C. A.; Grimsdick *v.* Sweetman, [1909] 2 K. B. 740; The Salvador (1909) 25 T. L. R. 727, C. A.; Stephens *v.* Junior Army & Navy Stores, [1914] 2 Ch. 516, C. A.; *Re* Worthington, *Ex p.* Pathé Frères, [1914] 2 K. B. 299, C. A.; *Re* Shipton, Anderson & Harrison, [1915] 3 K. B. 676; Associated Portland Cement Manufacturers *v.* Cory (1915), 31 T. L. R. 442; Horlock *v.* Beal, [1916] 1 A. C. 486, H. L.; Tamplin (F. A.) S.S. Co. *v.* Anglo-Mexican Petroleum Products Co.,

Sect. 1.—Definition and classification of bailment.]

[1916] 2 A. C. 397, H. L.; Smith, Coney & Barrett *v.* Becker, Gray, [1916] 2 Ch. 86, C. A.; *Re* Newman, Raphael's Claim, [1916] 2 Ch. 309, C. A.; Leiston Gas Co. *v.* Leiston-cum-Sizewell U. C., [1916] 2 K. B. 428, C. A.; Lloyd Royal Belge Soc. Anon. *v.* Stathatos (1917), 33 T. L. R. 390; Scottish Navigation Co. *v.* Souter, Admiral Shipping Co. *v.* Weidner, Hopkins, [1917] 1 K. B. 222, C. A.; Metropolitan Water Board *v.* Dick, Kerr, [1917] 2 K. B. 1, C. A.; Blackburn Bobbin Co. *v.* Allen, [1918] 1 K. B. 540.

4. Bailment is delivery upon condition.]—It is not correct to use the expression "contract of bailment" in a sense which implies that every bailment must necessarily in itself be a contract. I do not so understand the definitions of the term "bailment." It is perfectly true that in almost all cases a contract either express or implied by law accompanies a bailment, but it seems to me that there may be a complete bailment without the contract. According to all the definitions, as for instance, those given in Sir William Jones, Blackstone, & Kent's Commentaries, it would appear that a bailment consists in the delivery of an article upon a condition or trust. It is true that the authors of those various definitions go on to say that there is a promise or contract to restore the goods, but this is not, as it seems to me, the bailment itself, but a contract that arises out of it (LORD COLERIDGE, C.J.).—R. *v.* MCDONALD (1885), 15 Q. B. D. 323; 52 L. T. 583; 49 J. P. 695; 33 W. R. 735; 1 T. L. R. 465, 561; 15 Cox, C. C. 757, C. C. R.

Annotation:—**Folld.** R. *v.* Ashwell (1885), 16 Q. B. D. 190, C. C. R.

5. ——.]—It is only necessary that a person should have care of a chattel to make him a bailee; a contract is not essential.—R. *v.* ROBSON (1861), Le. & Ca. 93; 31 L. J. M. C. 22; 5 L. T. 402; 26 J. P. 179; 8 Jur. N. S. 64; 10 W. R. 61; 9 Cox, C. C. 29, C. C. R.

Annotation:—**Refd.** R. *v.* McDonald (1885), 15 Q. B. D. 323, C. C. R.

6. ——.]—To constitute a person bailee of a chattel there must be a bailment, & not a mere delivery of the chattel. There must be a delivery of a chattel upon contract express or implied to return it or obey the mandate with which the delivery is clogged, or, in other words, a delivery upon condition (SMITH, J.).

Bailment is not a mere delivery on a contract, but is a contract itself. Sir William Jones speaks of it as that contract which the lawyers call bailment. "Bailment or delivery of goods to another person for a particular use," says Sir William Blackstone. "Bailment is a compendious expression to signify a contract resulting from delivery" (Story on Bailments). Twice over in Story on Contracts the author speaks of bailment as itself a contract. "*Depositum* (that is, bailment) is a contract," says Grotius in his introduction to Roman-Dutch law. "The contract of bailment" is not a mere loose & common phrase, but is the accurate expression of a legal idea (LORD COLERIDGE, C.J.).—R. *v.* ASHWELL (1885), 16 Q. B. D. 190; 55 L. J. M. C. 65; 53 L. T. 773; 50 J. P. 181, 198; 34 W. R. 297; 2 T. L. R. 151; 16 Cox, C. C. 1, C. C. R.

Annotation:—**Mentd.** R. *v.* Flowers (1886), 16 Q. B. D. 643, C. C. R.

7. Contract of bailment—Effect on property.]—A general bailment alters no property.—ATKIN *v.* BARWICK, as reported in (1719) 1 Stra. 165; 93 E. R. 450.

Annotations:—**Mentd.** Alderson *v.* Temple (1768), 1 Wm. Bl. 660; Harman *v.* Fishar (1774), 1 Cowp. 117; Salte *v.* Field (1793), 5 Term Rep. 211; Smith *v.* Field (1793), 5 Term Rep. 402; Tooke *v.* Hollingworth (1793), 5 Term Rep. 215; Barnes *v.* Freeland (1794), 6 Term Rep. 80; Mills *v.* Ball (1801), 2 Bos. & P. 457; Neate *v.* Ball (1801), 2 East, 117; Richardson *v.* Goss (1802), 3 Bos. & P. 119; Bartram *v.* Farebrother (1828), 4 Bing. 579; James *v.* Griffin (1836), 1 M. & W. 20; Lyon *v.* Holt (1839), 5 M. & W. 250; Sadler *v.* Belcher (1843) 2 Mood. & R. 489; Van Casteel *v.* Booker (1848), 2 Exch. 691; Heinckey *v.* Earle (1857), 8 E. & B. 410; Cook *v.* Lister (1863), 13 C. B. N. S. 543.

8. —— **Identical subject-matter not to be returned—Money.**]—A person who receives money on behalf of another does not thereby become a bailee of the money, not being bound to hand over the particular sum which he receives.—R. *v.* HOARE (1859), 1 F. & F. 647.

Annotation:—**Refd.** R. *v.* Tomkinson (1881), 44 L. T. 821, C. C. R.

9. —— —— ——.]—A bailment under Fraudulent Trustees Act, 1857 (c. 54), means one where the same property is to be returned, & not one in which different property is to be returned.—R. *v.* GARRETT (1860), 2 F. & F. 14; 8 Cox, C. C. 368.

Annotation:—**Refd.** R. *v.* Tomkinson (1881), 44 L. T. 821, C. C. R.

10. ——————.]—The bailment intended by Fraudulent Trustees Act, 1857 (c. 54), s. 4, is a deposit of something to be returned *in specie;* & one with whom money has been deposited, & who is under an obligation to return the amount, but not the identical coin deposited, is not a bailee of the money within the sect. — R. *v.* HASSALL (1861), Le. & Ca. 56; 30 L. J. M. C. 175; 4 L. T. 561; 25 J. P. 613; 7 Jur. N. S. 1064; 9 W. R. 708; 8 Cox, C. C. 491, C. C. R.

Annotations:—**Distd.** R. *v.* Holloway, *Ex p.* George (1897), 66 L. J. Q. B. 830. **Refd.** R. *v.* Tomkinson (1881), 44 L. T. 821, C. C. R.; R. *v.* De Banks (1884), 13 Q. B. D. 29, C. C. R.; R. *v.* Ashwell (1885), 16 Q. B. D. 190, C. C. R.; Moss *v.* Hancock, [1899] 2 Q. B. 111.

Larceny by bailee, *see* CRIMINAL LAW & PROCEDURE.

11. —— —— **Sale distinguished.**]—A bailment on trust implies that there is reserved to the bailor the right to claim a redelivery of the property deposited in bailment. Wherever there is a delivery of property on a contract for an equivalent in money, or some other valuable commodity, & not for the return of the identical subject-matter in its original or an altered form, this is a transfer of property for value—it is a sale & not a bailment.

Corn was deposited by farmers with a miller, to be stored & used as part of the current consumable stock or capital of the miller's trade, & was by him mixed with other corn deposited for the like purpose, subject to the right of the farmers to claim at

PART I. SECT. 1.

11 i. *Contract of bailment—Identical subject-matter not to be returned—Sale distinguished.*]—Where the holder of a hotel licence lends to another hotel licensee liquors, upon terms requiring the borrower to return goods of like quality & quantity, the transaction constitutes a sale or barter, & not a bailment.—O'FLYNN *v.* CARSON (1908), 7 W. L. R. 463; 1 Sask. L. R 47.—**CAN.**

11 ii. —— —— ——.]—When merchandise is received in a warehouse on such terms that the identical goods are so mixed up with others that they cannot be returned, & the well understood course of the business is that, unless a price is agreed on, the party delivering the goods can only require an equivalent amount of the same kind & quality to be accounted for to him, the contract is really one of sale & not of bailment.—LAWLOR *v.* NICOL (1898), 12 Man. L. R. 224.—**CAN.**

11 iii. —— —— ——.]—Wheat was delivered by pltf. to deft., a miller, under a receipt stating that same was received in store "at owner's risk," & that pltf. was entitled to receive the current market price therefor when he called for his money. The wheat to pltf.'s knowledge was mixed with wheat of the same grade & ground into flour. The mill with all its contents was subsequently destroyed by fire, but there had always been in store a sufficient quantity of wheat to answer pltf.'s receipt:—*Held:* the receipt & the facts in connection therewith constituted a bailment of the wheat, & not a sale.—CLARK *v.* MCCLELLAN (1893), 23 O. R. 465.—**CAN.**

11 iv. —— *Delivery of seed under agreement to plant.*]—Where seed is delivered by one person to another to be grown

any time an equal quantity of corn of the like quality, without reference to any specific bulk from which it was to be taken, or in lieu thereof the market price of an equal quantity, on the day on which he made his demand, with a small charge for general purposes:—*Held:* such a transaction amounted to a sale by the farmer to the miller, & was not a bailment of the corn.—SOUTH AUSTRALIAN INSURANCE CO. *v.* RANDELL (1869), L. R. 3 P. C. 101; 6 Moo. P. C. C. N. S. 341; 22 L. T. 843; 16 E. R. 755, P. C.

12. —— Room let as store.]—A person let a room in his house at 2*s.* a week, for the purpose of goods being deposited in it. The room was broken open, & the goods stolen by some one belonging to the family:—*Held:* he was not a bailee of the goods & not answerable for the loss.—PEERS *v.* SAMPSON (1824), 4 Dow. & Ry. K. B. 636; *sub nom.* BEERS *v.* SAMPSON, 2 L. J. O. S. K. B. 212.

13. —— Licence to use real property.]—Pltf., a timber merchant, having sold some boards to deft., an innkeeper, gratuitously permitted him to have them made into a signboard in one of three sheds belonging to him:—*Held:* there was no demise of the shed as real property, nor anything in the nature of, or analogous to, a bailment of it as a chattel, by pltf. to deft., but it was a mere licence to deft. to use it for the purpose of making the signboard.—WILLIAMS *v.* JONES (1865), 3 H. & C. 602; 13 L. T. 300; 29 J. P. 644; 11 Jur. N. S. 843; 13 W. R. 1023; 159 E. R. 668, Ex. Ch.

Annotation:—**Mentd.** Whitmore *v.* Pearson (1868), 16 W. R. 649.

14. —— Goods left in room without notice.]—A committee hired defts.' concert hall. The memorandum of letting for an evening concert contained no mention of a rehearsal, but a rehearsal was held in the hall on the same afternoon without objection. When it had ended pltf., without request or notice to the hall-keeper, placed his double-bass violin safely in a small room attached to the concert-hall, but in the way of the gas bracket. The hall-keeper was defts.' servant, & his duties were to prepare & clean the rooms, open & shut the doors & attend to the gas. In order to light the gas in the small room the hall-keeper moved the violin in such a way that it fell & was broken:—*Held:* there was no bailment to or contract with defts.—NEUWITH *v.* OVER DARWEN INDUSTRIAL CO-OPERATIVE SOCIETY (1894), 63 L. J. Q. B. 290; 70 L. T. 374; 10 T. L. R. 282 10 R. 588.

15. —— Ship worked on system of "thirds"—Master & servant.]—A ketch belonged to two co-owners, of whom deft. was the registered managing owner. There was no written document in existence containing the terms on which the ketch was worked, but it appeared from the evidence that it was worked on a system of thirds, under which the master kept two-thirds of the gross freight, & paid the crew & the costs of provisions & other expenses. The owners received the remaining one-third of the gross freights, subject to the deduction of harbour dues, towage & brokerage, & they paid for the upkeep, repair & insurance of the ship. The master engaged the crew, & he usually arranged the freights without consulting the owners beforehand. He could only be dismissed at the end of a voyage:—*Held:* the master was not a bailee or hirer of the ship, but was the agent or servant of the owners.—ASSOCIATED PORTLAND CEMENT MANUFACTURERS (1910), LTD. *v.* ASHTON, [1915] 2 K. B. 1; 84 L. J. K. B. 519; 112 L. T. 486; 13 Asp. M. L. C. 40; 20 Com. Cas. 165, C. A.

16. Parties to contract—Persons having successive interests in chattels.]—Testatrix specifically bequeathed jewellery & lace to her daughter, with remainder in the event (which happened) of her daughter dying childless to testatrix's son, & appointed them her exor. & extrix. On testatrix's death in 1895 the daughter took possession of the jewellery & lace:—*Semble:* the first taker was in the position of a bailee of the articles, the possession of which on her death she was through her legal personal representative bound to deliver over to the ultimate taker.—*Re* SWAN, WITHAM *v.* SWAN, [1915] 1 Ch. 829; 84 L. J. Ch. 590; 113 L. T. 42; 31 T. L. R. 266.

17. —— Infant—Cannot make contract of bail-

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on the land of the latter, the produce thereof to be returned & paid for at a fixed price per bushel, the transaction is a bailment & not a sale.—STEWART *v.* SCULTHORP (1894), 25 O. R. 544.—**CAN.**

11 v. —— *Delivery of grain.*]—Pltf. delivered wheat to defts., millers, from time to time receiving on delivery tickets, in the following form:—"22/11" (date) "H. L. Cargo 85 B. Wht. J. & E.K." (defts.' miller). Pltf. alleged a sale of the whole; defts. a purchase of part of the wheat delivered & a bailment of the remainder:—*Held:* (1) the tickets showed delivery only & the question of sale or bailment must be determined by extrinsic evidence; (2) on the evidence defts. entitled to judgment.—CARGO *v.* JOYNER (1899), 4 Terr. L. R. 64.—**CAN.**

a.—— *Scow lent to vendor of cargo—Master of ship chartered by purchaser.*]—Deft. was master of a ship, which had been chartered by C. & Co., to carry a load of deals. C. & Co. purchased the deals from J. & Co., & employed them to deliver same alongside the vessel. C. & Co. paid J. & Co. for the scowage & then charged the vessel with the amount so paid for scowage. J. & Co. borrowed a scow from pltfs., which they left loaded with deals alongside the vessel, & fastened to her as directed by the mate. The next morning the scow was missing:—*Held:* the relation of bailor & bailee did not exist as between pltf. & deft.—WETMORE *v.* MCKENZIE (1877), 1 P. & B. 557.—**CAN.**

15 i.—— *Charter of tug.*]—Deft. hired a tug from pltf. under the following contract: "I agree to charter tug . . . to tow two barges from . . . for which I agree to pay . . . owner to supply engineer & captain":—*Held:* not a demise of the tug, but a contract of hiring.—THOMPSON *v.* FOWLER (1893), 23 O. R. 644.—**CAN.**

b. —— *Deposit of certificates for safe keeping.*]—Pltfs. deposited the certificates for shares with defts. for safe-keeping. Defts. executed & delivered to pltfs. a document under seal, by which they held in their safe deposit vaults to the order of pltfs. any dividends received in respect thereof, & guaranteed to pltfs. that the certificates would be kept safely & delivered upon demand under proper authority. The document also provided for the remuneration of defts. The certificates were put into the name of defts. Three hundred & seventy-five of the shares had been acquired by pltfs. under an agreement with A. Co., who had an interest in the prospective profits to be derived from the sale of the shares:—*Held:* defts. were merely bailees & not trustees.—ELGIN LOAN & SAVINGS CO. *v.* NATIONAL TRUST CO. (1905), 5 O. W. R. 466; 10 O. L. R. 41.—**CAN.**

c. —— *Undertaking by steward to return goods sold to seamen.*]—Goods were sold to certain seamen, who signed their own names to the contract, & deft. undertook that he would return the goods to pltf. in the event of their not being paid for:—*Held:* deft., if liable at all, was liable as bailee of the goods, & pltf. could not recover in an action for goods sold & delivered.—LEVINE *v.* SEBASTIAN (1911), 9 E. L. R. 311.—**CAN.**

d. —— *Telephone service.*]—The contract for a telephone service between a city & a subscriber is one of bailment, & the relationship between them is one of landlord & tenant.—EDWARDS *v.* EDMONTON (1915), 8 W. W. R. 441; 25 D. L. R. 825.—**CAN.**

e. —— *Notes delivered for specific purpose.*]—Pltf., the manager of the O. Bank, placed in the hands of D., a broker, thirteen Govt. currency notes, on D.'s representation that there was some co.'s paper which he could procure at a more reasonable rate than in the Calcutta market, if the money were given him to purchase it. If the paper was not procurable, the notes were to be returned to pltf. D. went into a house hired for gambling, & lost at cards & paid away to deft. some of the notes he had received from pltf. Pltf sued deft. to recover the notes so intrusted to D., on the allegation that they had been intrusted by him to D. for a specific purpose, & that deft. was not a *bonâ fide* holder for value. Pltf. stated in evidence "that if the paper had been bought he would either have taken the paper at the most favourable market price for the bank, or have sold it & given D. the profit":—*Held:* upon the case put forward by pltf., the transaction was a short loan, & not a bailment, but upon the evidence the notes were the property of the bank, & remained so in D.'s hands, & pltf. was entitled to recover on behalf of the bank.—BULDEO NARAIN *v.* SCRYMGEOUR (1871), 6 B. L. R. 581.—**IND.**

Sect. 1.—Definition and classification of bailment.]

ment].—Pltf. declared that at deft.'s request he had delivered a mare to deft. to be moderately ridden, and that deft. maliciously intending, etc., wrongfully & injuriously rode the mare, so that she was damaged, etc. :—*Held :* deft. might plead his infancy in bar, the action being founded on contract.—JENNINGS *v.* RUNDALL (1799), 8 Term Rep. 335 ; 101 E. R. 1419.

Annotations :—**Distd.** Burnard *v.* Haggis (1863), 14 C. B. N. S. 45. **Consd.** Walley *v.* Holt (1876), 35 L T. 631. **Folld.** Fawcett *v.* Smethurst (1914), 84 L. J. K. B. 473. **Refd.** Stikeman *v.* Dawson (1847), 1 De G. & Sm. 90 ; Liverpool Adelphi Loan Assocn. *v.* Fairhurst (1854), 9 Exch. 422 ; *Re* King & King, *Ex p.* Unity Joint Stock Mutual Banking Assocn. (1858), 31 L. T. O. S. 124 ; Bartlett *v.* Wells (1862), 1 B. & S. 836 ; Leslie *v.* Sheill, [1914] 3 K. B. 607, C. A. **Mentd.** Green *v.* Greenbank (1816), 2 Marsh. 485 ; Cranch *v.* White (1835), 1 Bing. N. C. 414 ; Pozzi *v.* Shipton (1838), 8 L. J. Q. B. 1 ; Morgan *v.* Ravey (1861), 30 L. J. Ex. 131 ; Earle *v.* Kingscote, [1900] 1 Ch. 203.

18. —— —— —— **Liable in detinue.**]—Pltf. delivered skins to deft. to be finished, upon the supposition that deft. was of full age. Pltf., being desirous to have his goods again, applied to deft., who refused to return them, but offered to buy them & pay for them at £5 per month. Pltf. having declined that offer, deft. stated that he was under age, & would contest the matter at law. Pltf. brought an action in detinue, the declaration alleging, in the first count, a bailment of goods to be delivered on request, &, in the second count, that the skins came to deft.'s hand by finding :—*Held :* pltf. was entitled to recover upon the second count.

The contract being incomplete, on account of the minority of deft., the case is totally different from those which have been founded upon a bailment. In this case, for want of a capacity in deft. to make a complete contract, no bailment was made. This being the case, the action is brought in detinue instead of trover (MANSFIELD, C.J.).—MILLS *v.* GRAHAM (1804), 1 Bos. & P. N. R. 140 ; 127 E. R. 413.

Annotations :—**Refd.** Stikeman *v.* Dawson (1847), 1 De G. & Sm. 90 ; R. *v.* McDonald (1885), 15 Q. B. D. 323, C. C. R. **Mentd.** Gledstane *v.* Hewitt (1831), 1 Tyr. 445 ; Whitehead *v.* Harrison (1844), 6 Q. B. 423 ; Danby *v.* Lamb (1861), 11 C. B. N. S. 423.

19. —— —— —— ——.]—Goods were bailed to an infant to show to his mother, who, the infant said, would probably buy them. The goods were not bought, nor where they returned on demand :—*Held :* the infant was liable to an action for detinue.—BURTON *v.* LEVEY (1891), 7 T. L. R. 248.

20. —— —— —— **Liable for torts outside contract.**]—Deft., an infant, hired a horse for a ride on the road, the owner expressly refusing to allow the horse to be used for jumping. Deft. lent the horse to a friend, who rode it with deft.'s permission across the fields, & at fences, in endeavouring to jump which the horse was injured :—*Held :* this was an actionable wrong independent of any contract, & deft., notwithstanding his infancy, was liable for the injury which had been done to the horse.—BURNARD *v.* HAGGIS (1863), 14 C. B. N. S. 45 ; 2 New Rep. 126 ; 32 L. J. C. P. 189 ; 8 L. T. 320 ; 9 Jur. N. S. 1325 ; 11 W. R. 644 ; 143 E. R. 360.

Annotations :—**Folld.** Walley *v.* Holt (1876), 35 L. T. 631. **Consd.** Fawcett *v.* Smethurst (1914), 84 L. J. K. B. 473. **Refd.** R. *v.* McDonald (1885), 15 Q. B. D. 323, C. C. R. ; Earle *v.* Kingscote, [1900] 1 Ch. 203 ; Leslie *v.* Sheill, [1914] 3 K. B. 607, C. A.

21. —— —— —— ——.]—Deft., an infant, hired from pltf. a mare, which was let to him on condition that he should drive on a certain road & that only one person besides himself should be carried in the trap drawn by the mare. Deft. drove by a different road, & had three other persons in the trap. The mare was seriously injured by deft.'s negligence. In an action for damages :—*Held :* the plea of infancy was no defence, as this was a tort *ultra* the contract.—WALLEY *v.* HOLT (1876), 35 L. T. 631 ; 41 J. P. 56.

22. —— —— —— ——.]—The delivery of goods on a condition to an infant creates in him a special property. His property, however, is not absolute ; it can only exist till the condition is fulfilled ; & the owner then can demand the return of the property & maintain an action for the conversion of it if not redelivered. The law thus recognising a special property in the infant, he is to all intents & purposes a bailee of the goods, though the law does not in his case imply a contract to perform the terms of the bailment.—R. *v.* MCDONALD (1885) 15 Q. B. D. 323 ; 52 L. T. 583 ; 49 J. P. 695 ; 33 W. R. 735 ; 1 T. L. R. 465, 561 ; 15 Cox, C. C. 757, C. C. R.

Annotation :—**Folld.** R. *v.* Ashwell (1885), 16 Q. B. D. 190, C. C. R.

23. —— —— —— ——.]—Deft., who was an infant of twenty years of age, & at the time in question had an allowance of £80 a year, hired from pltf. a motor-car, in order to drive it to a place six miles off to fetch his bag. Pltf. alleged, but did not establish, that the car was to be at deft.'s risk. Deft. having arrived at the place, took a friend for a drive twelve miles farther on. In the course of this additional part of the journey the car was damaged without any negligence on deft.'s part. In an action for damages for breach of contract or for wrongful use of the car :—*Held :* (1) deft. was not liable in tort as nothing which he had done made him an independent tortfeasor ; (2) he was not liable in contract, as the mere hiring of the car did not render him liable for its loss owing to causes not depending upon any want of skill or care on his part. *Semble :* although the hiring of the car for the purpose in question by an infant in the position of deft. might be a necessary, if hired at taxi-cab rates or on reasonable terms, it would not be so if an onerous term, such as that the car should be at the infant's risk, formed part of the contract of hiring.—FAWCETT *v.* SMELTHURST (1914), 84 L. J. K. B. 473 ; 112 L. T. 309 ; 31 T. L. R. 85 ; 59 Sol. Jo. 220.

See, further, INFANTS & CHILDREN.

24. —— **Married woman.**]—A tradesman supplying a married woman, living apart from her husband, with furniture upon hire does not thereby divest himself of the present right of property in such goods, inasmuch as the married woman was incapable of acquiring it by any contract, & if the sheriff take such goods in execution at the suit of the husband's creditor, trover lies by the tradesman.—SMITH *v.* PLOMER (1812), 15 East, 607 ; 104 E. R. 972.

Annotation :—**Mentd.** Hunt *v.* De Blaquiere (1829), 5 Bing. 550.

25. —— ——.]—Prisoner, a married woman, living with her husband, at the request of a lodger in her husband's house, gratuitously took charge of his box containing, as she knew, money. She afterwards broke open the box, & stole the money. The husband had nothing to do with the transaction. Upon a case reserved on an indictment containing counts against prisoner as a bailee & for larceny :—*Held :* (1) either she was a bailee by licence, & guilty on that count, or, if she was not a bailee, was guilty of larceny ; (2) the husband was not a bailee, as he knew nothing about the transaction, & could not be made a bailee against his will.—R. *v.* ROBSON (1861), Le. & Ca. 93 ; 31 L. J. M. C. 22 ; 5 L. T. 402 ; 26 J. P. 179 ; 8 Jur. N. S. 64 ; 10 W. R. 61 ; 9 Cox, C. C. 29, C. C. R.

Annotation :—**Refd.** R. *v.* McDonald (1885), 15 Q. B. D. 323, C. C. R.

26. —— Executor—At law.]—An exor. has an absolute property & is not like a bailee (LORD ELLENBOROUGH, C.J.).—CROSSE *v.* SMITH (1806), 7 East, 246 ; 3 Smith, K. B. 203 ; 103 E. R. 94.

Annotations :—**N. F.** Job *v.* Job (1877), 6 Ch. D. 562. **Mentd.** Stearn *v.* Mills (1833), 4 B. & Ad. 657.

27. —— —— Since Judicature Act, 1873 (c. 66), s. 25 (11).]—Where the assets of a testator have come into the possession of the exor. & are afterwards lost to the estate, the rule at law as well as in equity now is, that the exor. stands in the position of a gratuitous bailee, & cannot be charged without some wilful default.—JOB *v.* JOB (1877), 6 Ch. D. 562 ; 26 W. R. 206.

Annotations :—**Mentd.** Laming *v.* Gee (1878), 48 L. J. Ch. 196 ; Mayer *v.* Murray (1878), 8 Ch. D. 424 ; Morton *v.* Quick, *Re* Aird (1878), 26 W. R. 441, C. A. ; Barber *v.* Mackrell (1879), 12 Ch. D. 534, C. A. ; *Re* Symons, Luke *v.* Tonkin (1882), 21 Ch. D. 757 ; *Re* Wrightson, Wrightson *v.* Cooke, [1908] 1 Ch. 789.

28. —— Servant—Person receiving goods as.]—A parcel was delivered to the guard of a mail coach & by him to the porter of the inn where the mail stopped. It was the porter's business to carry out the parcels brought by the coach, receiving for such duty a portion of the sum demanded for carriage :—*Held :* such porter was not personally responsible for its loss.—CAVENAGH *v.* SUCH (1815), 1 Price, 328 ; 145 E. R. 1419.

See, further, INNS & INNKEEPERS.

See, generally, MASTER & SERVANT.

29. —— Master porter employed by warehouseman—Master & servant.]—A master-porter employed by a warehouseman to hoist or lower goods must be considered not in the light of a bailee, but of a servant, & the party employing him is liable for any injury caused through his negligence or want of skill.

This is very different from the case of a carrier. He is a bailee, & has the entire charge of the property. Here, the porter was employed to do a certain thing, that is merely to remove the goods from the premises (PATTESON, J.).—RANDLESON *v.* MURRAY (1838), 8 Ad. & El. 109 ; 3 Nev. & P. K. B. 239 ; 1 Will. Woll. & H. 149 ; 7 L. J. Q. B. 132 ; 2 Jur. 324 ; 112 E. R. 777.

Annotations :—**Distd.** Milligan *v.* Wedge (1840), 12 Ad. & El. 737 ; Peachey *v.* Rowland (1853), 13 C. B. 182. **Refd.** Quarman *v.* Barnett (1840), 6 M. & W. 499 ; Rapson *v.* Cubitt (1842), 9 M. & W. 710 ; Rich *v.* Basterfield (1847), 4 C. B. 783 ; Murphey *v.* Caralli (1864), 3 H. & C. 462 ; Barker *v.* Herbert, [1911] 2 K. B. 633, C. A. **Mentd.** Allen *v.* Hayward (1845), 7 Q. B. 960 ; Reedie *v.* North Western Ry. Co., Hobbit *v.* North Western Ry. Co. (1849), 13 Jur. 659 ; Pickard *v.* Smith (1861), 10 C. B. N. S. 470.

30. —— Cab driver & cab proprietor.]—Pltf., a cab driver, obtained from deft., a cab proprietor, a horse & cab on the usual terms, which were that the driver should at the end of the day hand over to the proprietor 18*s.*, retaining for himself all the day's earnings over that sum, the day's food for the horse being supplied by the owner, & the latter having no control over the driver after leaving the yard. The horse with which the driver was furnished, which was fresh from the country & had never before been harnessed to a cab, bolted & overturned the cab & injured the driver. The horse was not reasonably fit to be driven in a cab : —*Held* (WILLES, J., *diss.*) : the relation between the parties was that of bailor & bailee, & the proprietor was responsible for the injury sustained by the driver.—FOWLER *v.* LOCK (1872), L. R. 7 C. P. 272 ; 41 L. J. C. P. 99 ; 26 L. T. 476 ; 20 W. R. 672. S. C. on appeal in Ex. Ch., where the ct. was divided on this point (1874), L. R. 9 C. P. 751, n. ; *on further proceedings* (1874), L. R. 10 C. P. 90.

Annotations :—**Distd.** Steel *v.* Lester & Lilee (1877), 3 C. P. D. 121. **Consd.** Gates *v.* Bill, [1902] 2 K. B. 38, C. A. **Refd.** Venables *v.* Smith (1877), 2 Q. B. D. 279 ; King *v.* London Improved Cab Co. (1889), 23 Q. B. D. 281, C. A. ; Doggett *v.* Waterloo Taxi-Cab Co., [1910] 2 K. B. 336, C. A. ; Smith *v.* General Motor Cab Co., [1911] A. C. 188, H. L. ; Kemp *v.* Elisha, [1918] 1 K. B. 228, C. A. **Mentd.** Hyman *v.* Nye (1881), 6 Q. B. D. 685 ; Robertson *v.* Amazon Tug & Lighterage Co. (1881), 7 Q. B. D. 598, C. A.

31. —— ——.]—In the case of horse-drawn cabs, where the driver pays for the cab a percentage of his takings, but is entirely free & uncontrolled as regards applying for a cab & plying for hire, the relation between the proprietor & driver is that of bailor & bailee, but *quoad* third parties the drivers are, under London Hackney Carriages Act, 1843 (c. 86), deemed to be the servants of the proprietors.—SMITH *v.* GENERAL MOTOR CAB CO., LTD., [1911] A. C. 188 ; 80 L. J. K. B. 839 ; 105 L. T. 113 ; 27 T. L. R. 370 ; *sub nom.* BATES-SMITH *v.* GENERAL MOTOR CAB CO., LTD., 55 Sol. Jo. 439 ; 4 B. W. C. C. 249, H. L.

Annotations :—**Refd.** R. *v.* Messer (1911), 82 L. J. K. B. 913, C. C. A. ; Curtis *v.* Plumptre (1913), 6 B. W. C. C. 87, C. A. ; Kemp *v.* Elisha, [1918] 1 K. B. 228, C. A. **Mentd.** Wilmerston *v.* Lynn & Hamburg S.S. Co., [1913] 3 K. B. 931, C. A.

See, further, MASTER & SERVANT ; STREET & AERIAL TRAFFIC.

32. —— Restaurant keeper.]—Plt. entered deft.'s restaurant for the purpose of dining there. A waiter took pltf.'s overcoat from him without being requested to do so, & hung it on a hook behind pltf. The coat was stolen while pltf. was dining :—*Held :* there was evidence to warrant a verdict for pltf., on the grounds (1) there was evidence from which a jury might properly find that deft. was bailee of the coat, & had been guilty of negligence while it was in his custody ; (2) assuming a bailment of the coat, there was evidence of negligence on the part of deft. as bailee.—ULTZEN *v.* NICOLS, [1894] 1 Q. B. 92 ; 63 L. J. Q. B. 289 ; 70 L. T. 140 ; 58 J. P. 103 ; 42 W. R. 58 ; 10 T. L. R. 25 ; 38 Sol. Jo. 26 ; 10 R. 13, D. C.

Annotation :—**Refd.** Orchard *v.* Bush, [1898] 2 Q. B. 284.

—— **Auctioneer.**]—*See* AUCTION & AUCTIONEERS, Part VII., sect 2, p. 28, *ante.*

—— **Boarding-house keeper.**]—*See* Part III., sect. 1, sub-sect. 4, *post.*

—— **Carriers becoming bailees.**]—*See* cases in Part II., sect. 1, sub-sect. 1, Part III., sect. 1, sub-sect. 3, *post.*

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26 i. *Parties to contract—Executor.*]—If the extrix. of an attorney set up a lien for costs on deeds intrusted to her husband, she makes herself bailee of the deeds, & liable for their conversion.—LLOYD *v.* SADLIER (1861), 7 Ir. Jur. 15.—**IR.**

f. —— *Crown — Customs officer.*]—When goods are in the customs examining warehouse for examination & appraisal, the Crown is not a bailee. For the loss of any goods while so in the custody of the customs officers the law affords no remedy, except such as the injured person may have against the officers through whose personal act or negligence the loss happens.—CORSE *v.* R. (1892), 3 Exch. C. R. 13.—**CAN.**

g. —— *Police constable.*]—A police constable having arrested pltf. on a charge, took charge of four camels which were in his possession. The charge having been ultimately dismissed, pltf. demanded the return of the camels, but the constable refused to deliver them pending instructions. Ultimately three were delivered, the fourth, which had been turned out with the others to graze, having died. In an action for recovery of damages for the loss, the magistrate accepted the evidence of the constable, that after the arrest he had retained possession of the camels at the request of pltf., & was a gratuitous bailee, & dismissed the claim :—*Held :* the original possession by the constable having been wrongful, & he having still retained possession adversely to pltf. after the termination of the proceedings, & when requested to deliver, the magistrate was wrong in finding that he was a gratuitous bailee.—MAZULLAH KHAN *v.* MCNAMARA (1911), 13 W. A. L. R. 151.—**AUS.**

h. —— *Person retaining possession of goods after conveyance to trustees.*]—Deft. conveyed all his property to trustees for the benefit of his creditors. Certain goods, of which the trustees had no knowledge, remained in his possession :—*Held :* deft. could not be considered as holding the goods as bailee of the trustees.—MCINTOSH *v.* HASTINGS (1865), 6 All. 234.—**CAN.**

SECT. 2.—INVOLUNTARY BAILEES.

33. Goods sent without request.]—Where a chattel is sent to a man without his knowledge & without any previous communication with him on the subject, he is not a bailee of the chattel, & is not responsible for not keeping it safely.—LETHBRIDGE *v.* PHILLIPS (1819), 2 Stark. 544.

Annotation :—**Apld.** Neuwith *v.* Over Darwen Industrial Co-op. Soc. (1894), 63 L. J. Q. B. 290.

34. ——.]—There is no duty cast upon the recipient with respect to goods sent to him voluntarily by another, & unsolicited by the recipient.—HOWARD *v.* HARRIS (1884), 1 Cab. & El. 253.

35. ——.]—On the occasion of buying some hats from pltfs. it was arranged that pltfs. should send to defts. with the hats certain furs & blouses on approval. Subsequently pltfs. sent three boxes to defts.' house which were taken in & signed for. Shortly afterwards, before any of the boxes had been unpacked, a man called at the house, & by pretending to the servant that a mistake had been made, fraudulently obtained possession of two of the boxes. Pltfs. sued defts. for the price of the stolen goods alleging in the alternative (1) that defts. had not taken reasonable care of the goods as bailees, & (2) that defts. had contracted to return or pay for the goods. As to a great part of the stolen goods defts. relied on the defence that they had not requested such goods to be sent to them :—*Held :* (1) *primâ facie* the loss fell on the owners of the stolen goods, *i.e.*, on pltfs. ; (2) to shift the loss on to defts. pltfs. would have to prove that the goods were delivered upon such terms as would make defts. responsible for their safety ; (3) defts. could not be liable for the goods they had not requested to be sent to them.—BATISTONI *v.* DANCE (1908), *Times*, Jan. 18.

36. Goods refused by consignee—Carriers.]—Carriers, after a refusal of the goods at the consignee's address, are involuntary bailees, & are only bound to act with reasonable care & caution with respect to the goods.

Pltfs., acting upon a supposed order, forwarded goods by defts.' line to the address of a co. from which the order purported to come, but which had, in fact, ceased to carry on business. Defts. tendered the goods at the co.'s late place of business, & the goods were refused. Defts. took back the goods to the station, & posted an advice note to the co., requesting instructions for their delivery. A few days afterwards, N., the person who had written & sent the order in the co.'s name, brought to the station the advice note & a delivery order purporting to be signed by himself for the co., & obtained delivery of the goods :—*Held :* it was a question for the jury whether defts. had acted with reasonable care & caution with respect to the goods after their refusal at the consignee's address, & the jury having found for defts., the ct. refused to disturb the verdict.

Defts.' character of carriers had ceased, & whatever character they filled it was not that. Their position has been not inaptly described as that of involuntary bailees ; without their own default they found these goods in their hands, in circumstances in which the character of carriers under which they received them had ceased (KELLY, C.B.).—HEUGH *v.* LONDON & NORTH WESTERN RY. CO. (1870), L. R. 5 Exch. 51 ; 39 L. J. Ex. 48 ; 21 L. T. 676.

Annotations :—**Refd.** Hiort *v.* Bott (1874), L. R. 9 Exch. 86 ; Hoare *v.* G. W. Ry. Co. (1877), De Colyar's County Ct. Cases, 192.

37. —— ——.]—A railway co. carried goods from one of its stations to another. The goods were misdirected to the order of J., who, upon notice of their arrival, refused to take them :—*Held :* in consequence of the misdirection of the goods the co. became the involuntary bailees of them when they arrived.—HOARE *v.* GREAT WESTERN RY. CO. (1877), 37 L. T. 186 ; 25 W. R. 631, D. C.

Annotations :—**Mentd.** Goldsmith *v.* G. E. Ry. Co. (1881), 29 W. R. 651 ; Stevens *v.* G. W. Ry. Co. (1885), 52 L. T. 324 ; Forder *v.* G. W. Ry. Co. (1905), 74 L. J. K. B. 871,

See, further, Part II., sect. 1, sub-sect. 1, *post.*

38. Bailee must act reasonably.]—Pltfs. sent to deft. an invoice for barley, which stated that the barley was bought by deft. of pltfs. through G. as broker, & also a delivery order, which made the barley deliverable to the order of the consignor or consignee. Deft. had not in fact ordered any barley of pltfs. G. called on deft., who showed him the documents, & told him it was a mistake. G. said that it was so, & asked deft. to indorse the order to him, for the purpose, as he said, of saving the expense of obtaining a fresh delivery order. Deft. indorsed the order to G., who possessed himself of the barley & disposed of it, & then absconded. On the trial of an action of trover for the barley, the jury found that deft. had no intention of appropriating the barley to his own use, but

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PART I. SECT. 2.

36 i. *Goods refused by consignee—Carriers.*]—Pltf. received a notice that "the undermentioned goods consigned to you have arrived here this day ; we will thank you to send for them as soon as possible, as they remain here at your risk & expense." The goods were spring goods, which had been placed by defts. in a bonded warehouse, being subject to duties. Being unseasonable at the time of receipt of the notice, pltf. refused to take them :—*Held :* the goods being bonded goods, subject to duty, & defts. having conveyed them within a reasonable time to the warehouse, where they were bound by law to deliver them, they were not bound to give notice of their arrival there, & their duty as common carriers had ceased.—O'NEILL *v.* GREAT WESTERN RY. CO. (1858), 7 C. P. 203.—CAN.

36 ii. —— ——.]—F. Brothers, having sold iron to R. Co., directed pltfs. to deliver certain cars containing iron to R. Co. R. Co. refused to accept delivery on the ground that the iron was not according to their contract :—*Held :* pltfs. were not liable either as carriers, the *transitus* having come to an end by refusal of R. Co. to receive the goods, or as warehousemen, as they could only be liable as such for gross negligence & the question of negligence had never been tried.—GRAND TRUNK RY. CO. *v.* FRANKEL (1903), 33 S. C. R. 115.—CAN.

36 iii. —— ——. *Right of sale.*]—Goods, which deft. co. had carried for pltf., having been in the co.'s possession for a long time, were handed over by the co. to auctioneers to be sold to pay the co.'s charges. The auctioneers sold a part of the goods which, according to their statement, realised less than the amount of the charges. Pltf. alleged improper accounting & a conversion, & claimed from the co. a proper account of the goods sold & the value of the goods converted, or damages for the conversion : —*Held :* (1) the consignee was bound to take the goods away within twenty-four hours after arrival, & her refusal or neglect to receive the goods put an end to the transit, & the co. became warehousemen or involuntary bailees ; (2) the co.'s obligation was to take reasonable care & to deliver the goods when the consignee came for them, & the question was whether the co. was liable for the acts of their agents if those acts amounted to such negligence as would make them liable as bailee or would constitute conversion.—SWALE *v.* CANADIAN PACIFIC RY. CO. (1913), 5 O. W. N. 402 : 29 O L. R. 634.—CAN.

a. *Misdirection by consignor — Letter returned by post office.*]—Pltf., wishing to send $1,010 to his brother, procured at the office of defts. an envelope such as they use in forwarding money by express, enclosed bank notes to the amount of $1,010, & mailed the letter & registered it. The letter not being delivered, owing to its being defectively addressed, the officials of the Dead Letter Department sent it by registered mail to defts. It was delivered to defts.' cashier, who received it in a protected cage in which he performed his duties. After receiving the package the cashier laid it unopened on the chief clerk's desk, which stood open to the public & to all defts.' officials. The chief clerk was not at his desk when the package was placed there & said he never saw it & there was nothing to show what became of it afterwards :—*Held :* defts. owed no duty to pltf. to take care of the letter & pltf. could not recover.—COSENTINO *v.* DOMINION EXPRESS CO. (1906), 16 Man. L. R. 563 ; 4 W. L. R. 498.—CAN.

38 i. *Bailee must act reasonably.*] — Deft having ordered a car of apples from pltfs. cancelled the order & ordered

indorsed the order for the purpose of correcting what he believed to be an error, & returning the barley to pltfs. :—*Held :* deft., having indorsed the order without any occasion to do so, & without authority, was liable.

Pltfs. had not, by what they had done, placed the deft. in any position of difficulty, as is often the case with an involuntary bailee who has received property into his possession for a purpose which cannot, as it afterwards appears, be exactly carried into effect, & who does his best & acts in a reasonable manner for carrying into effect the purpose of the bailment. In such cases the bailee has a duty to perform in relation to the goods, & he is placed in a difficulty in the discharge of that duty by the default of the pltf., who ought not to be allowed to complain if, under that difficulty, the bailee has acted in a manner which is considered reasonable & proper (CLEASBY, B.).—HIORT *v.* BOTT (1874), L. R. 9 Exch. 86 ; 43 L. J. Ex. 81 ; 30 L. T. 25 ; 22 W. R. 414.

Annotations :—**Consd.** Jones *v.* Hough (1879), 5 Ex. D. 115, C. A. **Refd.** New York Breweries Co. *v.* A.-G., [1899] A. C. 62. H. L. ; Gordon *v.* London City & Midland Bank, Gordon *v.* Capital & Counties Bank (1900), 83 L. T. 762.

Part II.—Gratuitous Bailment.

SECT. 1.—DEPOSIT.

SUB-SECT. 1.—WHAT CONSTITUTES A DEPOSIT.

39. Goods lodged for safe custody.]—H. lodged jewels for safe custody in the hands of S., a jeweller, inclosed in a paper that was sealed & put in a bag, which was also sealed with H.'s seal, & his clerk gave the following receipt : "Which bag, I promise to take care of for H. for my master S." :—*Held :* this was a deposit of goods.—HARTOP *v.* HOARE (1743), 3 Atk. 44 ; 2 Stra. 1187 ; 1 Wils. 8 ; 26 E. R. 828.

Annotations :—**Refd.** Boyson *v.* Coles (1817), 6 M. & S. 14. **Mentd.** Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357 ; Wookey *v.* Pole (1820), 4 B. & Ald. 1 ; Clayton *v.* Le Roy, [1911] 2 K. B. 1031, C. A.

40. When bailment not gratuitous—Goods left in warehouse of carrier—No charge for storing.]—Goods were forwarded by a carrier's waggon to A. in London, & delivered by the carrier to him. A. sent them back to the carrier's warehouse, with directions that they should remain there to await his orders. They remained there for upwards of a year, when they were lost out of the warehouse. A printed bill issued by the carrier, & sent to A. with the goods, stated that "any goods that should have remained three months in the warehouse without being claimed, or on account of the non-payment of the charges thereon, would be sold to defray the carriage or other charges thereon, or the general lien, as the case might be, together with warehouse rent & expenses." The carrier had often before carried goods for A., but no goods of his had before lain in the carrier's warehouse :—*Held :* (1) the carrier was not, in the circumstances, a mere gratuitous bailee of the goods at the time of their loss ; (2) A. might recover against him the value of the goods, on a declaration in *assumpsit* alleging that they were delivered to deft. to be safely kept for pltf., for certain reasonable compensation & reward to be therefor paid by him.—CAIRNS *v.* ROBINS (1841), 8 M. & W. 258 ; 10 L. J. Ex. 452 ; 151 E. R. 1034.

Annotations :—**Consd.** Mitchell *v.* L. & Y. Ry. Co. (1875), L. R. 10 Q. B. 256. **Refd.** Indermaur *v.* Dames (1867), 16 L. T. 293, Ex. Ch.

41. —— —— ——.]—Deft., a carrier & wharfinger, received into his warehouse goods of pltf., on the terms that they should be conveyed by deft.'s barges to London when pltf. should direct, at the usual freight, & that in the meantime they should be kept by deft. without charge for warehousing. In an action for not keeping the goods safely :—*Held :* deft. was not a gratuitous bailee.—WHITE *v.* HUMPHERY (1847), 11 Q. B. 43 ; 10 L. T. O. S. 183 ; 12 Jur. 417 ; 116 E. R. 391.

42. —— Returned empties.]—A railway co. were sued as common carriers for the loss of empty packages, which had already traversed the line of railway of defts. when full, & for the return carriage of which, when empty, it was the custom not to make any further charge. The packages

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another car from R. Pltfs. & their Ontario purchasing agent were notified, but they sent a car to deft., who took in the apples & stored them, believing they came from R. A few days later the car from R. came along :—*Held :* deft. was a bailee for pltfs., & was not liable, having taken the usual & proper precautions in selling at the best price, after notifying pltfs. they were held at their risk.—PIONEER *v.* LITSCHLE (1909), 12 W. L. R. 94.—**CAN.**

b. *Goods salved — After railway accident.*]—Where effects salved after a railway accident are allowed by the consignors to remain in the co.'s possession, & are partially destroyed by rats, the co. will not be held liable for such destruction where it is not proved that the loss occurred through their fault or negligence.—ROSENBLOOM *v.* GRAND TRUNK RY CO. (1899), Q. R. 16 S. C. 360.—**CAN.**

c. —— *After robbery.*] — In the absence of the true owner, a store, in which his goods were, was broken open by thieves. In order to protect the property deft. took possession of the goods, but thereafter the Govt. commandeered them :—*Held :* deft. not liable to the true owner for the value of the goods removed.—AMOD SALIE *v.* RAGOON (1903), S. C. 100.—**S. AF.**

PART II. SECT. 1, SUB-SECT. 1.

d. *Goods sold by weight remaining in vendor's possession.*]—Where goods are sold by weight & the property remains in the possession of the vendor, the vendor becomes in law a depository, & if the goods while in his possession are damaged through his fault & negligence, he cannot bring an action for their value.—ROSS *v.* HANNAN (1891), 19 S. C. R. 227.—**CAN.**

e. *Tools left with employer — Rule that employees must leave tools in certain place.*]—A contract of deposit involving the liability of the employer, in the event of their loss, is not brought into existence by a rule whereby his employees must, while the construction work upon which they are employed lasts, leave their tools in a special place reserved for that purpose.—HEBERT *v.* MONTREAL HARBOUR COMRS. (1912), Q. R. 42 S. C. 439.—**CAN.**

f. *Money paid to solicitors on account of costs in pending action.*]—When a client advances a sum of money to a firm of attorneys on account of costs in a pending action, the contract between them is not one of *depositum*, but is a contract whereby the client indemnifies the attorneys against loss owing to the costs of the action to the extent of the advance with a right in them to use the money & no right in himself to re-claim it unless they should, on a successful issue of the suit, be reimbursed by the opposing party.—NGANGELIZWE KAMA *v.* YATES & MURRAY (1903), 17 E. D. C. 60.—**S. AF.**

40 i. *When bailment not gratuitous.*]—Defts. agreed to make for pltf. certain tools &, in consideration of being allowed to use the tools, to make also a number of hubs :—*Held :* while using the tools defts. were bailees thereof for hire, & after ceasing to use them, gratuitous bailees.—LEGGO *v.* WELLAND VALE MANUFACTURING CO. (1901), 21 C. L. T. Occ. N. 374 ; 2 O. L. R. 45.—**CAN.**

40 ii. —— *Cotton sent to screw-house—No rent paid for godown room.*]—A. sent cotton to B.'s screw-house to be screwed, & it was placed in B.'s godowns. B. provided dunnage ; no rent was paid for godown room, but on several occasions when cotton had been left by owners for some time in the godowns & removed unscrewed, rent had been paid, & it was for the mutual interest of both parties that the cotton should be so kept. The custom was that the screwing charges should be paid by the purchasers of cotton, to whom it was delivered by B. by the direction of the vendors. :—*Semble :* B. was a bailee for custody, but not a gratuitous bailee (MARKBY, J.).—MOOLCHAND *v.* ROBINSON (1868), 1 B. L. R. 68.—**IND.**

Sect. 1.—*Deposit: Sub-sects.* 1 & 2.]

were delivered to defts. at a station on their line of railway, addressed to a station on another line, to which place defts. were not carriers. The person who delivered the goods signed the two following conditions :—(1) The co. will not be answerable for the loss, or detention of, or damage to wrappers, or packages of any description charged by the co. as "empties"; (2) Nor in respect of goods destined for places beyond the limits of the co.'s railway; &, as respects the co., their responsibility will cease when such goods shall have been delivered over to another carrier in the usual course for further conveyance. Any money which may be received by the co. as payment for the conveyance of goods beyond their own limits will be so received only for the convenience of the consignors, & for the purpose of being paid to the other carrier. The goods were safely carried by defts. to the termination of their own line of railway, & there delivered to another co. They were lost on the railway of the latter co. :—*Semble:* in respect of the empty packages, defts. were not gratuitous bailees, & the first condition was not just & reasonable within Railway & Canal Traffic Act, 1854 (c. 31), s. 7.

Qu.—Whether, without the conditions, defts. as to forwarding these goods on other lines were liable as common carriers.—ALDRIDGE *v.* GREAT WESTERN RY. CO. (1864), 15 C. B. N. S. 582; 33 L. J. C. P. 161; 143 E. R. 913.

Annotation :—**Mentd.** Brown *v.* M. S. & L. Ry. Co. (1882), 52 L. J. Q. B. 132, C. A.

—— **Bankers—Securities deposited with.**]—*See* No. 54, *post*, & BANKERS & BANKING, Part II., sect. 19, *post*.

See, also, Nos. 181, 182, *post*.

See, further, Part III., sect. 1, sub-sect. 3, *post*.

Involuntary bailees.]—*See* Nos. 33—38, *ante*.

SUB-SECT. 2.—DUTIES OF BAILOR AND BAILEE.

43. Duties of bailor—To remove goods on request.]—If A. commit goods to me to keep in my house, & I require him to take them away, & he refuses to do it, I may have an action upon the case against him, for it is a trouble to me to remove them for him (LEY, C.J.).—WISEMAN & DENHAM'S CASE (1623), Godb. 329; 78 E. R. 194.

44. Duties of bailee—To allow bailor to remove goods.]—Where A. suffers B. to leave a trunk in his house, it is to be intended that B. has leave to take it away.—ANON. (1642), March, 202, Pl. 242; 82 E. R. 475.

45. —— To return goods on demand.]—Pltf. deposited with deft. for safe custody a chest of plate & jewels. Some of the jewels were the property of a third party who had pledged them to pltf. In an action by pltf. against deft. for return of the chest deft. objected that the third party ought to be added as pltf. :—*Held:* deft. was obliged to return the chest & its contents to the person depositing it.—SAVILLE *v.* TANKRED (1748), 1 Ves. Sen. 101; 3 Swan. 158; 27 E. R. 918.

46. —— ——.]—Where a bailee of goods for safe custody converts them, & subsequently refuses to deliver them up on demand to the bailor, who then first learns of conversion, the bailor may elect to sue for the detention, & against that action Stat. Limitations runs only from the time of the demand.

Deft., an incumbent, sold communion plate which was intrusted to his charge. More than six years afterwards the churchwardens demanded it of him, & then first heard of its having been sold. They brought their action in detinue, & deft. pleaded Stat. Limitations :—*Held:* a cause of action in detinue arose on deft.'s refusal to deliver up possession on demand, & the stat. afforded no defence.—WILKINSON *v.* VERITY (1871), L. R. 6 C. P. 206; 40 L. J. C. P. 141; 19 W. R. 604; *sub nom.* WILLIAMSON *v.* VERITY, 24 L. T. 32.

Annotations :—**Expld.** Miller *v.* Dell, [1891] 1 Q. B. 468, C. A. **Mentd.** Frost *v.* Knight (1872), L. R. 7 Exch. 111; Bristol & West of England Bank *v.* Mid. Ry. Co. (1891), 61 L. J. Q. B. 115, C. A.; Baker *v.* Courage (1909), 101 L. T. 854.

See, further, Part. IV., sect. 1, sub-sect. 1, *post*.

See, also, LIMITATION OF ACTIONS.

47. —— To take care of chattel—General rule.]—Where a man takes goods in his custody to keep for the use of the bailor, he is not answerable, if they are stolen without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect (LORD HOLT, C.J.).—COGGS *v.* BERNARD (1703), 2 Ld. Raym. 909; 1 Com. 133; Holt, K. B. 131; 3 Salk. 11; 92 E. R. 107.

Annotations :—**Refd.** Charitable Corpn. *v.* Sutton (1742), 2 Atk. 400; Pasley *v.* Freeman (1789), 3 Term Rep. 51; Guilliam *v.* Barnett (1804), 2 Smith, K. B. 155; Cavenagh *v.* Such (1815), 1 Price, 328; Gledstane *v.* Hewitt (1831), 1 Tyr. 445; *Ex p.* Cording (1832), 4 B. & Ad. 198; Vaughan *v.* Menlove (1837), 3 Bing. N. C. 468; G. N. Ry. Co. *v.* Shepherd (1852), 8 Exch. 30; Blakemore *v.* Bristol & Exeter Ry. Co. (1858), 8 E. & B. 1035; MacCarthy *v.* Young (1861), 6 H. & N. 329; Giblin *v.* McMullen (1868), L. R. 2 P. C. 317, P. C.; Hoare *v.* G. W. Ry. Co. (1877), De Colyar's County Ct. Cases, 192; Cutler *v.* North London Ry. Co. (1887), 56 L. T. 639; The Moorcock (1889), 14 P. D. 64, C. A.; Cheshire *v.* Bailey, [1905] 1 K. B. 237, C. A.; Clarke *v.* West Ham Corpn., [1909] 2 K. B. 858, C. A.; Banbury *v.* Bank of Montreal (1918), 87 L. J. K. B. 1158, H. L. **Mentd.** Anon. (1692), 2 Salk. 522; Buckmyr *v.* Darnall (1704), 2 Ld. Raym. 1085; Grand Opinion for the Prerogative concerning the Royal Family (1717), Fortes. Rep. 401; Robinson *v.* Green (1723), 1 Stra. 574; Shelton *v.* Osborn (1729), 1 Barn. K. B. 260; Boucher *v.* Lawson (1736), Lee *temp.* Hard. 194; Kettle *v.* Bromsall (1738), Willes, 118; Hartop *v.* Hoare (1743), 3 Atk. 44; Ryall *v.* Rowles (1750), 1 Ves. Sen. 348; Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357, Ex. Ch.; Elsee *v.* Gatward (1793), 5 Term Rep. 143; Gibson *v.* Inglis (1814), 4 Camp. 72; Pippin *v.* Sheppard (1822), 11 Price, 400; Storr *v.* Crowley (1825), M'Cle. & Yo. 129; Whitehead *v.* Greetham (1825), 2 Bing. 464; Corbett *v.* Packington (1827), 6 B. & C. 268; R. *v.* Cording (1832), 1 Nev. & M. K. B. 35; M'Kenzie *v.* M'Leod (1834), 10 Bing. 385; Boorman *v.* Brown (1842), 3 Q. B. 511, Ex. Ch.; Ross *v.* Hill (1846, 2 C. B. 877; Lewis *v.* Nicholson (1852), 21 L. J. Q. B. 311; Micklethwaite *v.* Merrill (1852), 19 L. T. O. S. 61; Shepherd *v.* G. N. Ry. Co. (1852), 19 L. T. O. S. 324; Balfe *v.* West (1853), 13 C. B. 466; Crouch *v.* L. & N. W. Ry. Co. (1854), 14 C. B. 255; Dansey *v.* Richardson (1854), 3 E. & B. 144; Baxendale *v.* Eastern Counties Ry. Co. (1858), 27 L. J. C. P. 137; Syred *v.* Carruthers (1858), E. B. & E. 469; Belfast & Ballymena Ry. Co. *v.* Keys (1861), 9 H. L. Cas. 556, H. L.; Marriott *v.* Anchor Reversionary Co. (1861), 3 De G. F. & J. 177, L.C. & L.JJ.; Martin *v.* Reid (1862), 11 C. B. N. S. 730; Taylor *v.* Caldwell (1863), 3 B. & S. 826; Pigot *v.* Cubley (1864), 15 C. B. N. S. 701; Beal *v.* South Devon Ry. Co. (1864), 11 L. T. 184, Ex. Ch.; P. & O. Steam Navigation Co. *v.* Shand (1865), 3 Moo. P. C. C. N. S. 272, P. C.; Swire *v.* Leach (1865), 5 New Rep. 314; Donald *v.* Suckling (1866), L. R. 1 Q. B. 585; Grill *v.* General Iron Screw Collier Co. (1866), 12 Jur. N. S. 727; Skelton *v.* L. & N. W. Ry. Co. (1867), L. R. 2 C. P. 631; Readhead *v.* Mid. Ry. Co. (1869), L. R. 4 Q. B. 379, Ex. Ch.; Liver Alkali Co. *v.* Johnson (1874), L. R. 9 Exch. 338, Ex. Ch.; Searle *v.* Laverick (1874), L. R. 9 Q. B. 122; Nugent *v.* Smith (1875), 1 C. P. D. 19; Cohen *v.* G. E. Ry. Co. (1876), 45 L. J. Q. B. 298; Harris *v.*

PART II. SECT. 1, SUB-SECT. 2.

47 i. *Duties of bailee — To take care of chattel.*]—Pltf., a guest at defts.' hotel, on leaving left a valise & contents in charge of the clerk to keep for him till his return. Pltf. expected to pay for the storage, but it was not shown whether defts. intended to make a charge. Upon pltf.'s return the valise could not be found, & pltf. sued for its value & the value of the contents :—*Held:* treating defts. as gratuitous bailees, their duty was to take the same care of the valise as a reasonably prudent & careful man might fairly be expected to take of his own property of the like description.—SUTHERLAND *v.* BELL & SCHIESEL (1911), 18 W. L. R. 521.—CAN.

G. W. Ry. Co. (1876), 1 Q. B. D. 515; Bergheim v. G. E. Ry. Co. (1878), 3 C. P. D. 221, C. A.; Foulkes v. Met. Dist. Ry. Co. (1880), 28 W. R. 526, C. A.; Shaw v. G. W. Ry. Co., [1894] 1 Q. B. 373; The Winkfield, [1902] P. 42, C. A.; Harris v. Perry, [1903] 2 K. B. 219, C. A.; Wallis v. G. N. Ry. Co. (Ireland) (1903), 12 Ry. & Can. Tr. Cas. 38; Shrimpton v. Hertfordshire County Council (1910), 74 J. P. 305, C. A.; Bath v. Standard Land Co., [1911] 1 Ch. 618, C. A.; Attenborough v. Solomon, [1913] A. C. 76, H. L.; Hatton v. Car Maintenance Co. (1914), 110 L. T. 765.

48. —— —— Degree of care varies with nature of bailment.]—The degree of care required by law from a bailee varies with the nature of the bailment: a gratuitous bailment imposes upon the bailee a less degree of responsibility than a bailment for reward. Whatever the nature of the bailment, it appears to have been usual to charge generally a duty to use due care, & a breach of that duty. The degree of attention to the safety of the thing with which deft. is intrusted is regulated by a reference to the character he fills (ERLE, J.).—ROSS v. HILL (1846), 2 C. B. 877; 3 Dow. & L. 788; 15 L. J. C. P. 182; 7 L. T. O. S. 112; 10 Jur. 435; 135 E. R. 1190.

Annotations:—**Refd.** Abraham v. Bullock (1901), 85 L. T. 237. **Mentd.** Talley v. G. W. Ry. Co. (1870), L. R. 6 C. P. 44.

49. —— —— ——.]—The failure to exercise reasonable care, skill and diligence is gross negligence. What is reasonable varies in the case of a gratuitous bailee & that of a bailee for hire. From the former is reasonably expected such care & diligence as persons ordinarily use in their own affairs, & such skill as he has.—BEAL v. SOUTH DEVON RY. CO. (1864), 3 H. & C. 337; 11 L. T. 184; 12 W. R. 1115; 159 E. R. 560, Ex. Ch.

Annotations:—**Consd.** Giblin v. McMullen (1868), L. R. 2 P. C. 317, P. C. **Refd.** Grill v. General Iron Screw Collier Co. (1866), L. R. 1 C. P. 600. **Mentd.** M. S. & L. Ry. Co. v. Brown (1883), 8 App. Cas. 703, H. L.; Dickson v. G. N. Ry. Co. (1886), 18 Q. B. D. 176, C. A.

50. —— —— Where bailor knows bailee's character.]—A man may, with respect to his own property, encounter risks from views of particular advantage, or from a natural disposition of rashness, which would be entirely unjustifiable in respect to the custody of goods of another person; but where property is confided to the care of a particular person by one who is or may be supposed to be acquainted with his character, the care which he would take of his own property might be considered as a reasonable criterion.—THE WILLIAM (1806), 6 Ch. Rob. 316.

Annotation:—**Mentd.** The Ostsee (1855), 2 Ecc. & Ad. 170, P. C.

51. —— Bailee must carry out terms of bailment.]—Where an order is given, previously to the delivery of goods to a bailee, to deal with them when delivered in a particular manner to which he assents, & afterwards the goods are delivered to him, a duty arises on his part on receipt of the goods to deal with them according to the order previously given & assented to, & the law infers an implied promise by him to perform such duty. —STREETER v. HORLOCK (1822), 1 Bing. 34; 7 Moore, C. P. 283; 130 E. R. 15.

52. —— Special conditions.]—If goods be delivered by A. to B. to keep safely, B. is answerable for them to A., though he be robbed of them. It is otherwise if they be delivered to B. to keep as his own goods, etc.—KETTLE v. BROMSALL (1738), Willes, 118; 125 E. R. 1087.

Annotations:—**Distd.** Ross v. Hill (1846), 2 C. B. 877. **Mentd.** Gledstane v. Hewitt (1831), 1 Cr. & J. 565; Walker v. Jones (1834), 4 Tyr. 915.

53. —— ——.]—Bills of exchange were deposited with resp. for the purpose of securing the payment of certain other bills given by C. to applts. By the terms of the agreement between the parties with respect to the deposit, resp., "constituting himself the voluntary depositary of the bills," undertook to be responsible for them to applts. "until the effectual encashment thereof, which encashment was entrusted to C." Resp. signed the agreement as "depositary only." When the bills became due, resp. delivered some of them to C. for the purpose of being cashed. C. obtained payment of & retained the money:—*Held:* (1) there was no breach of duty under the contract on the part of resp.; (2) assuming that resp. was guilty of negligence in allowing C. free access to the chest in which the bills were placed, such negligence afforded no ground of action, since it was not followed by any consequences affecting applts.' interests.—TREFFETZ v. CANELLI (1872), L. R. 4 P. C. 277; 9 Moo. P. C. C. N. S. 22; 27 L. T. 252; 20 W. R. 842, P. C.

54. —— —— Banker.]—In an action for damages against a bank as bailees for the negligent keeping of certain railway debentures placed in their care by a customer in the ordinary way of their business as bankers, it appeared that the box containing the securities (of which the customer kept the key) was kept in a strong room in the bank with the boxes of other customers & specie & other securities belonging to the bank. Access to this room was only obtained by passing through a compartment where a cashier sat by day & a messenger slept at night. The strong room had two iron doors, which were opened by separate keys, which during the day were kept by the cashier who occupied the compartment. One of the keys was kept at night by the cashier of the bank, & the other key by another officer of the bank. Beyond this strong room there were two other rooms; in the outer of the two uncoined gold & in the inner bullion & unsigned notes were kept. The manager of the bank kept the key of the outer of these rooms, & one of the directors of the bank that of the inner. The owner of the box had free access to the room where his box was deposited during banking-hours, in the presence of one of the bank clerks, when he had occasion to take out coupons from his debentures for collection. While in such custody the cashier of the bank abstracted the debentures from the box, & made away with them:—*Held:* the bank, as gratuitous bailees, were not bound to exercise more than ordinary care of the deposits intrusted to them, & the negligence for which alone they would be made liable would have been a want of that ordinary diligence which a reasonably prudent man took of his own property of the like description. The application of the term "gross negligence," in the case of gratuitous bailees, considered & commented on.—GIBLIN v. MCMULLEN (1869), L. R. 2 P. C. 317; 5 Moo. P. C. C. N. S.

g. —— *Dog show.*]—Exhibiting dogs at a dog show constitutes a bailment, &, in the absence of negligence:—*Held:* defts. not liable for the death of a dog from distemper.—COLTART v. WINNIPEG INDUSTRIAL EXHIBITION ASSOCN. (1912), 4 D. L. R. 108; 21 W. L. R. 471.—CAN.

51 i. —— *Bailee must carry out terms of bailment.*]—Deft., who had offered to take care gratuitously of pltf.'s sheep, received a telegram from him: "On no account let any one have sheep." Later he allowed a third party to remove the sheep, having seen a telegram from pltf.: "Can remove wire money sharp otherwise I must realise sheep reply." By an error the word "can" had been substituted for "can't":—*Held:* it was the duty of deft. to have communicated with pltf. & he was liable.—MARAIS v. ANDERSON (1909), E. D. C. 76.—S. AF.

52 i. —— *Special conditions.*] — A bailee, even if unpaid, must bestow upon the custody of the thing delivered to him the care of a prudent administrator, & must at least see that it does not perish through his fault. The parties can derogate from this rule by agreement; & when a bailor is warned by the bailee that the store where the goods are placed is liable to inundation from high tides, he is deemed to have assumed the risk.—FRY v. QUEBEC HARBOUR COMRS. (1896), Q. R. 5 Q. B. 340.—CAN.

Sect. 1.—*Deposit: Sub-sect.* 2.]

434; 38 L. J. P. C. 25; 21 L. T. 214; 17 W. R. 445; 16 E. R. 578, P. C.

Annotations:—**Consd.** Bullen *v.* Swan Electric Engraving Co. (1906), 22 T. L. R. 275. **Refd.** *Re* National Bank of Wales, [1899] 2 Ch. 629, C. A.; Banbury *v.* Bank of Montreal, [1917] 1 K. B. 409, C. A. **Mentd.** *Re* United Service Co., Johnston's Claim (1871), 6 Ch. App. 212, L.JJ.; Leese *v.* Martin (1873), L. R. 17 Eq. 224; Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, C. A.

See, further, BANKERS & BANKING, Part II., Sect. 19, *post*.

55. —— —— Honorary treasurer of club.]—Deft., the honorary treasurer of a club, received on a Monday night from the steward of the club £68 in a cigar box, & placed the box containing the money in an unlocked cupboard in his bedroom, covering it over with a piece of curtain. He intended to pay it into the bank on Wednesday according to his usual custom, & as much as £3,000 a year passed through his hands in this way. On Tuesday night he found that the money had been stolen. In an action by the trustees of the club to recover the money:—*Held:* the loss was not attributable to want of diligence on deft.'s part, & he was not liable.—TROKE *v.* FELTON (1897), 13 T. L. R. 252.

56. —— Bailee must not grossly neglect chattel.]—In the case of a simple deposit without a reward the law raises only a promise not grossly to neglect or abuse the deposit.—MYTTON *v.* COCK (1738), 2 Stra. 1099; 93 E. R. 1057.

57. —— Mutilation of chattel.]—A person applying to be employed in a public office deposited with the head of the office a certificate of previous good character, by way of testimonial, & on his ceasing to be so employed, such document was returned to him by the head of the office in a mutilated state:—*Held:* the head of the office was not *primâ facie* responsible for the mutilation.—TAYLOR *v.* ROWAN (1835), 7 C. & P. 70; 1 Mood. & R. 490.

Annotation:—**Mentd.** Rogers *v.* Macnamara (1853), 17 Jur. 1166.

58. —— ——.]—The proprietor of a metropolitan stage carriage, before returning to a conductor employed by him the licence granted to him under 6 & 7 Vict. c. 86, wrote on the licence words signifying that the conductor had been dismissed from his service for dishonesty. To an action brought by the conductor for thus writing on the licence, complaining that it had been thereby damaged, & rendered of no value to him:—*Held:* it was no answer for the proprietor to plead, by way of justification, the truth of what he had so written, as the declaration was not based on any libel or slander on pltf., but on the ground that deft. had wrongfully & maliciously damaged & defaced the licence.—ROGERS *v.* MACNAMARA (1853), 14 C. B. 27; 23 L. J. C. P. 1; 17 Jur. 1166; 2 W. R. 19; 2 C. L. R. 569; 139 E. R. 12.

Annotation:—**Mentd.** Norris *v.* Birch, [1895] 1 Q. B. 639.

59. —— Evidence of negligence.]—A. sent his horse, for the night, to B., who turned it out after dark into his pasture field, separated from a field of C. by a fence, which C. was bound to repair. The horse, from the bad state of the fence, fell from one field into the other, & was killed:—*Held:* (1) B. was a gratuitous bailee, & as such owed it to A. not to put the horse into a dangerous pasture, & if he did not exercise a proper degree of care he would be liable for any damage which the horse might sustain; (2) turning the horse into a pasture to which it was unused after dark was a degree of negligence sufficient to render B. liable.—ROOTH *v.* WILSON (1817), 1 B. & Ald. 59; 106 E. R. 22.

Annotations:—**Refd.** Holgate *v.* Bleazard, [1917] 1 K. B. 443. **Mentd.** Barnes *v.* Ward (1850), 9 C. B. 392; Lawrence *v.* Jenkins (1873), L. R. 8 Q. B. 274; Sneesby *v.* L. & Y. Ry. Co. (1874), L. R. 9 Q. B. 263; Claridge *v.* South Staffordshire Tram Co., [1892] 1 Q. B. 422; The Winkfield, [1902] P. 42, C. A.

60. —— ——.]—In an action of detinue against a gratuitous bailee there must be evidence of a wrongful act, or carelessness on his part, leading to the loss. The action for detention supposes that deft. has the document or has wrongfully parted with it.—ROUX *v.* WISEMAN (1857), 1 F. & F. 45.

61. —— —— Storage in place other than that agreed on.]—The captain of a ship, to avoid expense, accepted the gratuitous offer of defts. to tranship some goods temporarily on board one of their vessels. The goods were afterwards, without the consent of the captain, removed to another vessel for the greater convenience of defts., but it was unfit to hold the goods, & they were lost:—*Held:* either this was such a breach of the bailment as amounted to a trespass, taking the goods to a place to which the owners did not consent to their being taken, or defts. must be taken to have retained the character of bailees subject to the obligation to take reasonable care, which they had not fulfilled.—RONNEBERG *v.* FALKLAND ISLANDS CO. (1864), 17 C. B. N. S. 1; 4 New Rep. 243; 34 L. J. C. P. 34; 10 L. T. 530; 10 Jur. N. S. 940; 12 W. R. 914; 2 Mar. L. C. 30; 144 E. R. 1.

62. —— —— ——.]—Pltf. let his house to deft., & was allowed by deft. to leave a carriage belonging to him in the coach-house to remain there with deft.'s own carriages. Some weeks after the letting deft. discovered that pltfs.' carriage was infected with moth, & in consequence removed it from the coach-house, where his own carriages were kept, into an outbuilding in which light carts were kept. At the end of the letting pltf. found his carriage damaged by damp & mildew owing to the unsuitability of the building in which deft. had kept it. A verdict for £20 having been found for pltf.:—*Held:* there was sufficient evidence of negligence on the part of deft. to sustain the verdict.—TURNER *v.* MERRYLEES (1892), 8 T. L. R. 695.

See, also, Nos. 161—163, *post*.

63. Act of bailee to prevent injury.]—Wine, in pipe & bottles, had been deposited by C. for pltf. in deft.'s cellar, by her leave. C. became bkpt., &, his assignees claiming the wine, pltf.'s solrs. warned deft., by letter, in Dec., 1826, not to give it up to any person unauthorised by them. Deft. kept the wine, & bottled part of it at, or soon after, the end of 1826, at which time it was becoming injured by remaining in the wood. There was no evidence of any arrangement between pltf. & deft. as to the bottling:—*Semble:* in these circumstances the bottling was not an improper act by deft.—PHILPOTT *v.* KELLEY (1835), 3 Ad. & El.

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59 i. —— *Evidence of negligence.*]—Pltf., a travelling trader, used to bring goods to defts. to sell on commission. On one occasion he requested defts. to keep the purchase money until he should call for it. Defts. put the money with some of their own in a locked drawer in their premises, as they had done before to the knowledge of pltf. Three days later the money was missed, having probably been stolen by a visitor:—*Held:* defts. as gratuitous bailees had exercised due diligence & were not liable.—WONG KWAU KEE *v.* THE WOONG THING (1916), 11 Hong Kong, 89.—**HONG KONG.**

59 ii. —— ——.]—Pltf. sent a sow to be served by a boar in charge of his servant, & the sow remaining overnight (at deft.'s instance) was put by pltf.'s servant & deft. into a proper stye in a disused labourer's cottage, not belonging to deft. During the night the sow got choked between the bars of the gate of the pigstye:—*Held:* deft., who acted as a gratuitous bailee, was not guilty of such negligence as to entitle pltf. to recover.—SULLIVAN *v.* KELLEHER (1896), 30 I. L. T. Jo. 205.—**IR.**

106 ; 1 Har. & W. 134 ; 4 Nev. & M. K. B. 611 ; 4 L. J. K. B. 139 ; 111 E. R. 353.

Annotations :—**Refd.** Parry *v.* Roberts (1835), 3 Ad. & El. 118. **Mentd.** Plant *v.* Cotteril (1860), 5 H. & N. 430.

64. Onus on bailor to prove negligence.]—Pltf. deposited a picture with defts. for safe keeping, & on his asking for its return three years afterwards they were unable to find it. In an action brought by pltf., defts. gave evidence that in their belief the picture, which they had undertaken to take care of without reward, had been burnt in a fire which had occurred on their premises :—*Held :* the verdict given for pltf. must be set aside & a new trial be had, as there had been nothing more than a *primâ facie* case of negligence against defts., & to make them liable there must be direct evidence of negligence on their part.—POWELL *v.* GRAVES & Co. (1886), 2 T. L. R. 663.

Annotations :—**Apld.** Bullen *v.* Swan Electric Engraving Co. (1906), 22 T. L. R. 275. **Refd.** Bullen *v.* Swan Electric Engraving Co. (1907), 23 T. L. R. 258, C. A.

65. Onus on bailee—Loss of goods.]—Where goods are given into the sole custody of a person & accepted by him as bailee, & they are lost while in his custody, the *onus* lies upon him to show circumstances negativing negligence on his part.—PHIPPS *v.* NEW CLARIDGE'S HOTEL, LTD. (1905), 22 T. L. R. 49.

Annotation :—**Refd.** Travers *v.* Cooper, [1915] 1 K. B. 73, C. A.

66. —— —— Loss of bailee's own goods.]—A coffee-house keeper having custody of money without reward lost it. He had put it, with a larger sum of money of his own, into his cash-box, which was kept in his tap-room, which had a bar in it, & was open on a Sunday, but the rest of his house, which was inhabited, was not open on Sunday, & the cash-box, with his own & pltf.'s money, had been stolen on that day. In *assumpsit* the judge left it to the jury whether deft. was guilty of gross negligence, & he told them that the loss of deft.'s own money did not necessarily prove reasonable care. The jury having found for pltf. : —*Held :* (1) the question of gross negligence was properly left to them ; (2) there was evidence upon which they might find for pltf.—DOORMAN *v.* JENKINS (1834), 2 Ad. & El. 256 ; 4 Nev. & M. K. B. 170 ; 4 L. J. K. B. 29 ; 111 E. R. 99.

Annotations :—**Refd.** Giblin *v.* McMullen (1868), L. R. 2 P. C. 317, P. C. ; Whitehouse *v.* Pickett, [1908] A. C. 357, H. L. ; Newman *v.* Bourne & Hollingsworth (1915), 31 T. L. R. 209. **Mentd.** Balfe *v.* West (1853), 13 C. B. 466.

67. —— —— Bailee having taken reasonable care need not show how loss occurred.]—A gratuitous bailee must show that the loss occurred through no want of reasonable care on his part, but need not show that he knew how the loss happened.

Pltf. left certain engraving plates in the custody of defts., in circumstances which imposed upon them the duty of taking as much care of them as a reasonable man would take in the case of his own goods. While in defts.' custody the plates were taken away by some one & lost. There was no evidence to show how they were taken away, but defts. proved that the plates were kept in a proper place & under the charge of proper persons, & that the arrangements for their safe keeping were reasonably sufficient :—*Held :* defts. had proved that they had used such care in the custody of the plates as a reasonable man would use in the case of his own property, & they were not liable.—BULLEN *v.* SWAN ELECTRIC ENGRAVING CO. (1907), 23 T. L. R. 258, C. A.

Annotation :—**Consd.** Wiehe *v.* Dennis (1913), 29 T. L. R. 250.

68. —— Injury to goods.]—An agreement was made for the purchase of a pony by pltf. from defts., & it was arranged that the pony should be left in the custody of defts. for some days. While the pony remained in the custody of defts. it was injured, & pltf. claimed to recover damages in respect thereof. Defts. did not show how the injuries were caused, or establish that they had taken reasonable care of the pony :—*Held :* defts. were liable, inasmuch as they were, as gratuitous bailees, under an obligation to take such care of the pony as a reasonably prudent owner would take of his own property, & they had failed to show that they had taken such care of the pony.—WIEHE *v.* DENNIS BROTHERS (1913), 29 T. L. R. 250.

69. Chattel ceasing to exist.]—Where a man lends a horse to another, & the horse dies without any default or negligence of the bailee before request made by the bailor for redelivery, the bailee is discharged.—WILLIAMS *v.* LLOYD (1628) W. Jo. 179 ; 82 E. R. 95.

Annotations :—**Expld.** Touteng *v.* Hubbard (1802), 3 Bos. & P. 291. **Consd.** Taylor *v.* Caldwell (1863), 3 B. & S. 826. **Refd.** Horlock *v.* Beal, [1916] 1 A. C. 486, H. L. **Mentd.** Coggs *v.* Bernard (1703), 2 Ld. Raym. 909.

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64 i. *Onus on bailor to prove negligence.*]—Pltf. on leaving deft.'s inn, after paying his bill, was allowed to leave a box in the room of the inn used for storing luggage, etc. Pltf. did not call for the box for several weeks afterwards, when it was discovered that it was lost ; there was no other evidence of any negligence in the matter :—*Held :* pltf. could not recover.—PALIN *v.* REID (1884), 10 A. R. 63.—**CAN.**

64 ii. ——.]—Pltf. a traveller, asked permission to leave his valise with deft., a hotel-keeper. & on being allowed to do so went away & did not return to lodge in the house. On his return the next day the valise had disappeared. There being no proof of bad faith on the part of the landlord or his servants :—*Held :* pltf. had no action against the landlord for the loss, as the delivery to him was a *dépôt volontaire.*—HOLMES *v.* MOORE (1867), 17 L. C. R. 143.—**CAN.**

65 i. *Onus on bailee—Loss of goods.*]—A. sent cotton to B.'s screw-house to be screwed, & it was placed in B.'s godowns. B.'s durwan kept the key of the godowns. B. provided dunnage ; no rent was paid for godown room, but on several occasions when cotton had been left by owners for some time in the godowns & removed unscrewed, rent had been paid : & it was for the mutual interest of both parties that the cotton should be so kept. The custom was that the screwing charges should be paid by the purchasers of cotton, to whom it was delivered by B., by the direction of the vendors. In an action by A. for the non-delivery of some of his cotton :—*Held :* B. was a gratuitous bailee of the goods & he was only bound to account for the manner in which they had been kept, which he had satisfactorily done.—MOOLCHAND *v.* ROBINSON (1868), 1 B. L. R. 68.—**IND.**

65 ii. —— ——.]—Circumstances (*see supra*) in which held non-production of the valise was *primâ facie* evidence of negligence, & the *onus* was on defts. to show that the loss occurred notwithstanding they had used proper care, & as they had given no evidence to displace the presumption of negligence, pltf. entitled to recover the value of the valise & its contents.—SUTHERLAND *v.* BELL & SCHIESEL (1911), 18 W. L. R. 521.—**CAN.**

65 iii. —— ——.]—Pltf. gave to deft. money for safe keeping, & deft. agreed to so keep it for her. When pltf. requested the return of the money, deft. alleged it had been stolen from him. His own evidence of the theft was unsupported :—*Held :* deft. was a gratuitous bailee, & the *onus* which was upon him to excuse himself for the non-return of the money was not satisfied by his evidence.—SECH *v.* RODNICKE (1915), 32 W. L. R. 505 ; 9 W. W. R. 244 ; 25 D. L. R. 757 ; 25 Man. L. R. 685 —**CAN.**

67 i. —— —— *Bailee having taken reasonable care need not show how loss occurred.*]—Resps., butchers, had pigs killed by applts., as they were bound to do by city regulations, which pigs they had the right to leave, free of charge, in applts.' refrigerators during the following night & for at least twelve hours. During the night a fire consumed the abattoirs & destroyed the meat. The deposit of the meat was not a necessary deposit :—*Held :* applts. having proved that they had exercised prudent care upon the preservation of the meat, & that the fire had happened without their fault, were not responsible for the loss, & had not to show the origin of the fire.—COMPAGNIE DE L'UNION DES ABATTOIRS DE MONTREAL *v.* LEDUC (1900), Q. R. 10 Q. B. 289.—**CAN.**

Sect. 1.—*Deposit: Sub-sects.* 2, 3 & 4.]

70. Goods stolen.]—If goods are accepted to be kept as the bailee would keep his own proper goods, if the goods are stolen the bailee shall not answer for them.—SOUTHCOTE'S CASE (1601), 4 Co. Rep. 83 b; 76 E. R. 1061; *sub nom.* SOUTHCOT *v.* BENNET, Cro. Eliz. 815.

Annotations:—**Dbtd.** Coggs *v.* Barnard (1703), 1 Com. 133. **Refd.** Kettle *v.* Bromsall (1738), Willes, 118; Peek *v.* North Staffordshire Ry. Co. (1863), 10 H. L. Cas. 473, H. L. **Mentd.** Symons *v.* Darknoll (1629), Palm. 523; Paradine *v.* Jane (1647), Aleyn, 26; Nicholls *v.* More (1661), 1 Sid. 36; Lane *v.* Cotton (1700), 1 Com. 100; Hartop *v.* Hoare (1743), 3 Atk. 44; Austin *v.* M. S. & L. Ry. Co. (1852), 10 C. B. 454; Donald *v.* Suckling (1866), L. R. 1 Q. B. 585; Harris *v.* Perry, [1903] 2 K. B. 219, C. A.; Shrimpton *v* Hertfordshire County Council (1910), 74 J. P. 305, C. A.

71. ——.]—If money or goods be deposited with a person to keep generally, without any reward for so doing, & he is robbed of them, he is not answerable.—R. *v.* HERTFORD (VISCOUNT) (1681), 2 Show. 172; 89 E. R. 870.

72. ——.]—COGGS *v.* BERNARD, No. 47, *ante.*

73. ——.]—TROKE *v.* FELTON, No. 55, *ante.*

74. Bailee may act by agent.]—A bailee is not bound to keep goods always in his own hands. He is to keep them as his own, & take the same care; if a man lodged trust money with a banker, if lost in many cases the ct. has discharged the trustee, especially if lost out of the banker's hands by robbery (LORD HARDWICKE, C.).—JONES *v.* LEWIS (1751), 2 Ves. Sen. 240; 28 E. R. 155.

Annotations:—**Mentd.** Brown *v.* Sewell (1853), 11 Hare, 49; Bostock *v.* Floyer (1865), 35 L. J. Ch. 23; Job *v.* Job (1877), 6 Ch. D. 562.

Actions by & against third parties.]—*See* Part IV., sect. 2, *post.*

SUB-SECT. 3.—GOODS SENT FOR SALE OR RETURN OR FOR SALE ON COMMISSION.

See SALE OF GOODS.

SUB-SECT. 4.—GOODS FOUND.

75. Rights of finder against all but true owner—Damages—Presumption as to value.]—Pltf., being a chimney sweeper's boy, found a jewel & carried it to the shop of deft., a goldsmith, to know what it was, & delivered it into the hands of the apprentice, who, under pretence of weighing it, took out the stones, & called to the master to let him know it came to three half-pence. The master offered the boy the money, who refused to take it, & insisted to have the thing again, whereupon the apprentice delivered him back the socket without the stones. In trover against the master:—*Held:* (1) the finder of a jewel, though he did not by such finding acquire an absolute property or ownership, had such a property as would enable him to keep it against all but the rightful owner, & might maintain trover; (2) several of the trade having been examined to prove what a jewel of the finest water that would fit the socket would be worth, the jury, unless deft. produced the jewel, & showed it not to be of the finest water, should presume the strongest against him, & make the value of the best jewels the measure of their damages.—ARMORY *v.* DELAMIRIE (1722), 1 Stra. 505; 93 E. R. 664.

Annotations:—As to (1) **Apld.** Webb *v.* Fox (1797), 7 Term Rep. 391; Sutton *v.* Buck (1810), 2 Taunt. 302; Bridges *v.* Hawkesworth (1851), 21 L. J. Q. B. 75. **Consd.** Buckley *v.* Gross (1863), 3 B. & S. 566. **Apld.** Bourne *v.* Fosbrooke (1865), 18 C. B. N. S. 515. **Refd.** Burton *v.* Hughes (1824), 9 Moore, C. P. 334; Taylor *v.* Haygarth (1844), 8 Jur. 135; White *v.* Mullett (1851), 6 Exch. 713; Chowne *v.* Baylis (1862), 31 Beav. 351; R. *v.* Gardner (1862), 1 New Rep. 107; Mussamat Sundar *v.* Mussamat Parbati (1889), 5 T. L. R. 683, P. C.; The Winkfield, [1902] P. 42, C. A.; Eastern Construction Co. *v.* National Trust Co. & Schmidt, [1914] A. C. 197, P. C. As to (2) **Apld.** Lupton *v.* White (1808), 15 Ves. 432, L. C. **Folld.** Mortimer *v.* Cradock (1843), 12 L. J. C. P. 166. **Apld.** Dean *v.* Thwaite (1855), 21 Beav. 621; Gray *v.* Haig (1855), 20 Beav. 219; Williams *v.* Williams (1863), 33 Beav. 306. **Refd.** Wentworth *v.* Lloyd (1864), 10 H. L. Cas. 589, H. L.; Hammersmith & City Ry. Co. *v.* Brand (1869), L. R. 4 H. L. 171, H. L.; Wilson *v.* Northampton & Banbury Junction Ry. Co. (1874), 43 L. J. Ch. 503, C. A.; Plasycoed Collieries Co. *v.* Partridge, Jones (1912), 81 L. J. K. B. 723, D. C. **Mentd.** Whitehead *v.* Harrison (1844), 6 Q. B. 423; Broadbent *v.* Imperial Gas Co. (1857), 7 De G. M. & G. 436, L. C.; Taunton Election Petition (1869), 21 L. T. 169; Daniel *v.* Rogers, [1918] 2 K. B. 228, C. A.

76. ——.]—A finder of a chattel can successfully maintain an action against any person except the true owner, who may dispossess him of it. A person possessed of a chattel has a good title as against every stranger, & any one who takes it from the possessor having no title in himself is a wrongdoer, & cannot defend himself by showing that the real title was in some third person (LORD CAMPBELL, C.J.).

A finder in actual possession of a chattel, the property of another, can recover its value in an action of trover against a wrongdoer who takes it from him (CROMPTON, J.).—JEFFRIES *v.* GREAT WESTERN RY. CO. (1856), 5 E. & B. 802; 25 L. J. Q. B. 107; 26 L. T. O. S. 214; 2 Jur. N. S. 230; 4 W. R. 201; 119 E. R. 680.

Annotations:—**Apld.** Baggalley *v.* Davey (1857), 29 L. T. O. S. 211; The Winkfield (1901), 71 L. J. P. 21, C. A.; Eastern Construction Co. *v.* National Trust Co. & Schmidt, [1914] A. C. 197, P. C. **Refd.** Glenwood Lumber Co. *v.* Phillips, [1904] A. C. 405, P. C. **Mentd.** Freshney *v.* Wells (1857), 26 L. J. Ex. 129.

77. —— **Money found in shop.**]—A person entering a shop found on the floor a bundle of bank-notes, which had been accidentally dropped there by a stranger. The party who lost them could not be found:—*Held:* as against every one but the true owner, the property in the notes belonged to the finder & not to the owner of the shop, notwithstanding the finder had, immediately on picking up the bundle, handed it over to the latter, with a view to its being restored to the true owner if he should return, & the owner of the shop had advertised the finding in the newspaper, the finder not having intended to waive his title, & having, before he demanded the notes back, offered to repay the expense of the advertisements, & to indemnify the shopkeeper against any claim.—BRIDGES *v.* HAWKESWORTH (1851), 21 L. J. Q. B. 75; 18 L. T. O. S. 154.

Annotation:—**Distd.** South Staffordshire Water Co. *v.* Sharman, [1896] 2 Q. B. 44.

78. —— **Who is a finder.**]—Various quantities of tallow, the property of different persons, were deposited in warehouses on a bank of the Thames. A fire took place, in consequence of which the tallow melted & flowed down into the main sewers, & thence into the river, from which several portions of it were unwarrantably taken by different persons. A., one of those persons, sold some of it to B., but it was taken from him by the police, & he was charged before a police magistrate with the possession of tallow supposed to have been

70 i. *Goods stolen.*]—A depositary is held to give the thing in his charge the care of a prudent man, & when jewels are left in the care of any one, & the latter, instead of placing them in his safe, deposits them in a cash register, & they are stolen, he is answerable for their loss to the depositor.—PARENT *v.* PLANTE (1912), 19 R. L. 349.—CAN.

stolen or unlawfully obtained. The magistrate dismissed the charge, but ordered the tallow to be detained, under Metropolitan Police Cts. Act, 1839 (c. 71), s. 29, & it was sold by direction of the Comr. of Police before the twelve months limited by s. 30 of that Act had expired. C. having purchased the tallow from the police :—*Held :* A. had no property in the tallow entitling him to maintain an action against C. for its conversion.

Possession alone is sufficient to maintain trover or trespass against a wrongdoer who takes property from a person having possession of it. It is not clear that pltf., or the person from whom he purchased this tallow, was a finder of it. He is more in the position of a person who has unlawfully or feloniously, perhaps the latter, obtained possession of it, whereas the term finder means an innocent finder (CROMPTON, J.).—BUCKLEY *v.* GROSS (1863), 3 B. & S. 566 ; 1 New Rep. 357 ; 32 L. J. Q. B. 129 ; 7 L. T. 743 ; 27 J. P. 182 ; 9 Jur. N. S. 986 ; 11 W. R. 465 ; 122 E. R. 213.

Annotations :—**Distd.** Bourne *v.* Fosbrooke (1865), 18 C. B. N. S. 515. **Refd.** *Re* Lushington, *Ex p.* Otto, [1894] 1 Q. B. 420. **Mentd.** Spence *v.* Union Marine Insce. (1868), L. R. 3 C. P. 427 ; Sandeman *v.* Tyzack & Branfoot S.S. Co., [1913] A. C. 680, H. L. ; Sinclair *v.* Brougham, [1914] A. C. 398, H. L.

79. Goods found on demised property—Rights of lessor.]—In land demised to a gas co. for ninety-nine years, with a reservation to the lessor of all mines & minerals, & covenants under which the lessees were authorised to erect a gasholder & other buildings, a prehistoric boat, embedded in the soil six feet below the surface, was discovered by the lessees in the course of excavating for the foundations of the gas-works :—*Held :* the boat, whether regarded as a mineral or as part of the soil in which it was embedded when discovered, or as a chattel, did not pass to the lessees by the demise, but was the property of the lessor, though he was ignorant of its existence at the time of granting the lease.—ELWES *v.* BRIGG GAS CO. (1886), 33 Ch. D. 562 ; 55 L. J. Ch. 734 ; 55 L. T. 831 ; 35 W. R. 192 ; 2 T. L. R. 782.

Annotation :—**Refd.** South Staffordshire Waterworks Co. *v.* Sharman (1896), 74 L. T. 761.

80. Goods found on land or property—Rights of land or property owner.]—The possessor of private land is generally entitled as against the finder to chattels found on the land.

Deft., while cleaning out, under pltfs.' orders, a pool of water on their land, found two rings. He declined to deliver them to pltfs., but failed to discover the real owner. In an action of detinue :—*Held :* pltfs. were entitled to the rings.

Where a person has possession of a house or land, with a manifest intention to exercise control over it & the things which may be upon or in it, then if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locus in quo* (LORD RUSSELL OF KILLOWEN, C.J.).—SOUTH STAFFORDSHIRE WATER CO. *v.* SHARMAN, [1896] 2 Q. B. 44 ; 65 L. J. Q. B. 460 ; 74 L. T. 761 ; 44 W. R. 653 ; 12 T. L. R. 402 ; 40 Sol. Jo. 532.

Annotation :—**Apld.** Johnson *v.* Pickering & Norton, [1907] 2 K. B. 437.

81. Goods or money found in article bailed for repair—Larceny.]—A bureau was delivered for the purpose of repairs to a person, who discovered money in a secret drawer, & converted the money to his own use :—*Held :* that amounted to larceny.

This bureau being delivered to deft. for no other purpose than repair, if he broke open any part, which it was not necessary to touch for the purpose of repair, but with an intention to take & appropriate to his own use what he should find, that is a felonious taking, as not being warranted by the purpose, for which it was delivered. If a pocket book containing bank notes was left in the pocket of a coat sent to be mended, & the tailor took the pocket book out of the pocket & the notes out of the pocket book, that is a felony. So, if the pocket book was left in a hackney coach, if ten people were in the coach in the course of the day, & the coachman did not know to which of them it belonged, he acquires it by finding it, but not being intrusted with it for the purpose of opening it ; & that is a felony (LORD ELDON, C.).—CARTWRIGHT *v.* GREEN (1803), 8 Ves. 405 ; 2 Leach, 952 ; 32 E. R. 412.

Annotations :—**Folld.** Merry *v.* Green (1841), 10 L. J. M. C. 154. **Consd.** R. *v.* Ashwell (1885), 16 Q. B. D. 190, C. C. R. **Refd.** R. *v.* Kerr (1837), 8 C. & P. 176 ; Bridges *v.* Hawkesworth (1851), 21 L. J. Q. B. 75. **Mentd.** R. *v.* Reed (1842), 6 J. P. 206 ; Hill *v.* Campbell (1875), L. R. 10 C. P. 222 ; Webb *v.* East (1880), 5 Ex. D. 108, C. A.

82. Goods or money found in article bought—Larceny.]—A person purchased, at a public auction, a bureau in which he afterwards discovered, in a secret drawer, a purse containing money, which he appropriated to his own use. At the time of the sale no person knew that the bureau contained anything whatever :—*Held :* if the buyer had express notice that the bureau alone, & not its contents, if any, was sold to him, or if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, & he was guilty of larceny, in appropriating it to his own use, but if he had reasonable ground for believing that he bought the bureau with its contents, if any, he had a colourable right to the property, & it was no larceny.—MERRY *v.* GREEN (1841), 7 M. & W. 623 ; 10 L. J. M. C. 154 ; 151 E. R. 916.

Annotations :—**Consd.** R. *v.* Thurborn (1849), 18 L. J. M. C. 140, C. C. R. **Distd.** Bridges *v.* Hawkesworth (1851), 21 L. J. Q. B. 75. **Consd.** R. *v.* Ashwell (1885), 16 Q. B. D. 190, C. C. R. **Refd.** R. *v.* Reed (1842), 6 J. P. 206.

83. Duties of finder—Must not abuse goods found.]—When a man comes to goods by trover, he has liberty to take possession of them, but he cannot abuse them, kill them, or convert them to his own use, or make any profit of them, & if he do, it is great reason that he be answerable for the same, but if he lose such goods afterwards, or they be taken from him, then he shall not be charged, for he is not bound to keep them (ANDERSON, J.).

If a man finds my horse, & rides upon him, whereby he becomes lame, or otherwise by excessive travel misuseth him, so as my horse is the worse thereby, he may be ready to deliver me my horse, & yet this action will lie, for such an abusing of the horse is a conversion to his own use (WINDHAM, J.).—VANDRINK & ARCHERS CASE (1590), 1 Leon. 221 ; 74 E. R. 203.

84. —— —— Not liable for decay.]—In trover & conversion for six barrels of butter, the count was that they came to the hands of deft. & after the trover they were impaired & decayed by reason of negligent custody :—*Held :* no action, for he who found goods was not bound to preserve them, but if goods were used & by usage made worse, action would lie.—MOSGRAVE *v.* AGDEN (1591), Owen, 141 ; 74 E. R. 960 ; *sub nom.* WALGRAVE *v.* OGDEN, 1 Leon. 224 ; *sub nom.* MULGRAVE *v.* OGDEN, Cro. Eliz. 219.

85. Finder losing goods found whether liable—Tender.]—If a man finds goods & loses them again he is not liable in trover. Nor is a man liable if he tenders the goods on action being brought.—JOHNSON *v.* JONES (1626), Benl. 170 ; 73 E. R. 1032.

86. —— Negligence.]—Pltf. went to defts.' shop on a Saturday to buy a coat. She was wearing a coat fastened with a diamond brooch, & she took the coat off & put it on a glass case with the brooch

by the side of it. When leaving she forgot the brooch, & it was handed by an assistant to the shopwalker, who put it in his desk. On the following Monday morning it could not be found. By defts.' rules it ought to have been taken to their lost property office. In an action by pltf. against defts. for negligence, the judge at the trial found that defts. had not exercised proper care, & he awarded pltf. damages:—*Held:* there was evidence to support the judge's finding.—NEWMAN *v.* BOURNE & HOLLINGSWORTH (1915), 31 T. L. R. 209.

87. Finder not bound to take custody of goods found—Must deliver up to owner if he does.]—When a man finds goods, if he dispossesses himself of them, by this he shall not be discharged, for he who finds goods is bound to answer him for them who has the property; & if he deliver them over to any one, unless it be to the right owner, he shall be charged for them, for at the first it is in his election, whether he will take them or not into his custody, but when he has them one only has then right to them, & he ought to keep them safely. If a man finds goods, if he be wise, he will search out the right owner of them, & so deliver them to him; if the owner comes to him, & demands them, & he answers him, that it is not known to him whether he be the true owner of the goods, or not, & for this cause he refuses to deliver them, this refusal is no conversion, if he keeps them for him.—ISAACK *v.* CLARK (1615), 2 Bulst. 306; Moore, K. B. 841; 1 Roll. Rep. 126; 80 E. R. 1143.

Annotations:—**Mentd.** Manby *v.* Scott (1662), O. Bridg. 229, Ex. Ch.; Cooper *v.* Willomatt (1845), 1 C. B. 672; Clements *v.* Flight (1846), 16 L. J. Ex. 11; Hollins *v.* Fowler (1875), L. R. 7 H. L. 757, H. L.; Garland *v.* Carlisle (1837), 4 Scott, 587.

88. Finder must deliver up to owner—No lien for keep.]—Trover lies for a dog that was lost, & which deft. refuses to deliver, unless paid for his keeping.—BINSTEAD *v.* BUCK (1776), 2 Wm. Bl. 1117; 96 E. R. 660.

Annotation:—**Refd.** Nicholson *v.* Chapman (1793), 2 Hy. Bl. 254.

89. —— ——.]—A quantity of timber, placed in a dock on the bank of a navigable river, being accidentally loosened, was carried by the tide to a considerable distance, & left at low water upon a towing path. A. finding it in that situation, voluntarily conveyed it to a place of safety, beyond the reach of the tide at high water:—*Held:* A. had no lien on the timber for the trouble or expense to which he might have put himself in the carriage of it, but was liable to an action of trover, unless he delivered it up to the owner on demand, though nothing were tendered him by the owner by way of compensation:—*Semble:* in such a case A. might maintain an action against the owner for a compensation.

It is a case of mere finding, & taking care of the thing found for the owner. This is a good office, & meritorious, at least in the moral sense of the word, & certainly intitles the party to some reasonable recompense from the bounty, if not from the justice of the owner, & of which, if it were refused, a ct. of justice would go as far as it could go, towards enforcing the payment. So it would be in every other case of finding that can be stated, the claim to the recompense differing in degree, but not in principle (EYRE, C.J.).—NICHOLSON *v.* CHAPMAN (1793), 2 Hy. Bl. 254; 126 E. R. 536.

Annotations:—**Mentd.** Vivian *v.* Mersey Docks Board (1869), L. R. 5 C. P. 19; Hingston *v.* Wendt (1876), 1 Q. B. D. 367, D. C.; Aitchison *v.* Lohre (1879), 4 App. Cas. 755, H. L.; Peruvian Guano Co. *v.* Dreyfus (1887), [1892] A. C. 170, n.; Gwilliam *v.* Twist, [1895] 2 Q. B. 84, C. A.; The Gas Float Whitton, No. 2, [1896] P. 42, C. A.

See, further, LIEN.

90. —— Person in possession when goods lost.]—Possession under a general bailment is sufficient title for pltf. in trover.

Pltf. bought & paid for a ship stranded on the English coast, but the transfer was not regular. He tried to save her, but she went to pieces, & deft. possessed himself of parts of the wreck, which drifted on his farm:—*Held:* pltf.'s possession enabled him to recover for them in trover.—SUTTON *v.* BUCK (1810), 2 Taunt. 302; 127 E. R. 1094.

Annotations:—**Refd.** Burton *v.* Hughes (1824), 2 Bing. 173; Dunwich Corpn. *v.* Sterry (1831), 1 B. & Ad. 831; Daniel *v.* Rogers, [1918] 2 K. B. 228, C. A. **Mentd.** The Gas Float Whitton, No. 2, [1895] P. 301; The Winkfield, [1902] P. 42, C. A.

91. Finder may protect goods found.]—The finder of goods is justified in taking steps for their protection & safe custody until he finds the true owner; & it is no conversion if he *bonâ fide* removes them to a place of security (BLACKBURN, J.).—HOLLINS *v.* FOWLER (1875), L. R. 7 H. L. 757; 44 L. J. Q. B. 169; 33 L. T. 73, H. L.

Annotations:—**Refd.** Hiort *v.* Bott (1874), 30 L. T. 25; Consolidated Co. *v.* Curtis, [1892] 1 Q. B. 495. **Mentd.** England *v.* Cowley (1873), L. R. 8 Exch. 126; Arnold *v.* Cheque Bank, Arnold *v.* City Bank (1876), 1 C. P. D. 578; Lindsay *v.* Cundy (1876), 1 Q. B. D. 348; Iredale *v.* Kendall (1878), 40 L. T. 362; Cochrane *v.* Rymill (1879), 40 L. T. 744, C. A.; Glyn *v.* East & West India Dock Co. (1880), 6 Q. B. D. 475, C. A.; Turner *v.* Hockey (1887), 56 L. J. Q. B. 301, D. C.; McEntire *v.* Potter (1889), 22 Q. B. D. 438; Barker *v.* Furlong, [1891] 2 Ch. 172; New York Breweries Co. *v.* A.-G., [1899] A. C. 62, H. L.; Didisheim *v.* London & Westminster Bank, [1900] 2 Ch. 15, C. A.; Winter *v.* Bancks (1901), 84 L. T. 504; Mansell *v.* Valley Printing Co., [1908] 1 Ch. 567; Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

92. Duty of finder to seek owner—Larceny.]—A servant indicted for stealing banknotes, the property of her master, in his dwelling-house, set up, as her defence, that she found them in the passage, & not knowing to whom they belonged, kept them to see if they were advertised:—*Held:* she ought to have inquired of her master whether they were his or not, & not having done so, but having taken them away from the house, she was guilty of stealing them.—R. *v.* KERR (1837), 8 C. & P. 176.

Annotations:—**Mentd.** Bridges *v.* Hawkesworth (1851), 15 Jur. 1079; Ibrahim *v.* R., [1914] A. C. 599, P. C.

93. Appropriation by finder—When larceny.]—If a man finds goods that are actually lost, or are reasonably supposed by him to have been lost,

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PART II. SECT. 1, SUB-SECT. 4.

92 i. *Duty of finder to seek owner—Evidence of negligence.*]—R. was employed by the promoters of a political demonstration to drive B. & others to a meeting, but had not been hired by his passengers. B. had a plaid with him in the carriage & left it there. The plaid was not marked, & next day R., not knowing to whom it belonged, took it to the person who had employed him to be delivered to the owner, but it never was delivered & was lost. B. subsequently applied to R. for it, but was received with abusive language:—*Held:* R. was at most a bailee by finding, & as such was not guilty of any culpable negligence.—RAMSAY *v.* BELL (1872), 1 P. E. I. 417. —CAN.

93 i. *Appropriation by finder—When larceny.*]—Prisoner's child found six sovereigns in the street, which she brought to prisoner. The latter counted the money & told some bystanders that the child had found a sovereign & offered to treat them. Prisoner & the child then went down the street to the place where the child had found the money & found a half sovereign & a bag. Two hours afterwards the owner made hue & cry in the vicinity, & on the same evening prisoner was told that a woman had lost money. Prisoner told her informant to mind her own business & gave her a half sovereign for herself. Prisoner admitted on arrest that she had got the money from the child:—*Held:* these facts did not warrant a conviction for larceny, as there was nothing to show that at the time of finding prisoner had reason to think that the owner could be found.—R. *v.* DEAVES (1869), 11 Cox, C. C. 227.—IR.

& appropriates them with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny. Nor is it larceny if, after having so taken them, he obtains knowledge of the ownership, & then appropriates them to his own use, but if he takes goods so lost, or supposed to be lost, reasonably believing at the time of taking that the owner can be found, it is larceny.

The prisoner was indicted for stealing a bank-note. He had picked it up in the road, & meant to appropriate it to his own use, but he had not then any means of ascertaining the owner or any reason to believe that the owner knew where to find it. He afterwards was informed who the owner was, but notwithstanding he changed it & appropriated the money. The jury found that he had reason to believe it to be the prosecutor's property before he changed it:—*Held:* he was not guilty of larceny.—R. *v.* THURBORN (1849), 1 Den. 387; T. & M. 67; 18 L. J. M. C. 140; 13 J. P. 459; *sub nom.* R. *v.* WOOD, 4 New Mag. Cas. 27; 3 New Sess. Cas. 581; 13 L. T. O. S. 548; 3 Cox, C. C. 453, C. C. R.

Annotations:—**Folld.** R. *v.* Preston (1851), 2 Den. 353, C. C. R. **Distd.** R. *v.* Riley (1853), 22 L. J. M. C. 48, C. C. R.; R. *v.* West (1854), 6 Cox, C. C. 415, C. C. R. **Folld.** R. *v.* Christopher (1858), 22 J. P. 771, C. C. R. **Consd.** R. *v.* Moore (1861), 30 L. J. M. C. 77, C. C. R. **Folld.** R. *v.* Glyde (1868), L. R. 1 C. C. R. 139, C. C. R.; R. *v.* Brown Matthews (1873), 28 L. T. 645, C. C. R. **Consd.** R. *v.* Middleton (1873), 28 L. T. 777, C. C. R.; R. *v.* Ashwell (1885), 16 Q. B. D. 190, C. C. R. **Refd.** R. *v.* Dixon (1855), 25 L. J. M. C. 39, C. C. R.; R. *v.* Knight (1871), 20 W. R. 122, C. C. R.; R. *v.* Mortimer (1908), 99 L. T. 204, C. C. A.

94. ——— ———.]—If a man finds a jewel on the high road, & knows, or even has good reason to believe, who the person is to whom it belongs, & after this, he takes it & appropriates it to his own use, this is a felony. But if he does not know to whom it belongs, it is no felony, & he acquires a property in it, in respect of which he can maintain an action against all the world except the true & lawful owner (ROMILLY, M.R.).—CHOWNE *v.* BAYLIS (1862), 31 Beav. 351; 31 L. J. Ch. 757; 6 L. T. 739; 26 J. P. 579; 8 Jur. N. S. 1028; 11 W. R. 5; 54 E. R. 1174.

95. ——— ———.]—The prisoner found a sovereign on a highway, believing at the time that it had been accidentally lost. Nevertheless, with a knowledge that he was doing wrong, he at once determined to appropriate it, notwithstanding it should afterwards become known to him who the owner was. There was no evidence to show that the prisoner believed he could ascertain who the true owner was at the time he found the sovereign:—*Held:* the prisoner was not guilty of larceny.—R. *v.* GLYDE (1868), L. R. 1 C. C. R. 139; 37 L. J. M. C. 107; 18 L. T. 613; 32 J. P. 484; 16 W. R. 1174; 11 Cox, C. C. 103, C. C. R.

Annotations:—**Consd.** R. *v.* Ashwell (1885), 16 Q. B. D. 190, C. C. R. **Mentd.** R. *v.* Knight (1871), 20 W. R. 122, C. C. R.

See, further, CRIMINAL LAW & PROCEDURE.

SECT. 2.—MANDATE.

96. General principle.]—The owners trusting him [the bailee] with the goods is a sufficient consideration to oblige him to a careful management. If the agreement had been executory, to carry these brandies from the one place to the other on such a day, deft. had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this it signifies an actual entry upon the thing, & taking the trust upon himself, and if a man will do that, & miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing (LORD HOLT, C.J.).—COGGS *v.* BERNARD (1703), 2 Ld. Raym. 909; 1 Com. 133; Holt, K. B. 13; 1 Salk. 26; 3 Salk. 11; 92 E. R. 107.

Annotations:—**Consd.** Boucher *v.* Lawson (1736), Lee *temp.* Hard. 194; Elsee *v.* Gatward (1793) 5 Term Rep. 143; Ross *v.* Hill (1846), 2 C. B. 877. **Refd.** Robinson *v.* Green (1723), 1 Stra. 574; Shelton *v.* Osborn (1729), 1 Barn. K. B. 260; Charitable Corpn. *v.* Sutton (1742), 2 Atk. 400; Pasley *v.* Freeman (1789), 3 Term Rep. 51; Cavenagh *v.* Such (1815), 1 Price, 328; Pippin *v.* Sheppard (1822), 11 Price, 400; Whitehead *v.* Greetham (1825), 2 Bing. 464; Corbett *v.* Packington (1827), 6 B. & C. 268; Boorman *v.* Brown (1842), 3 Q. B. 511, Ex. Ch.; G. N. Ry. Co. *v.* Shepherd (1852), 8 Exch. 30; Balfe *v.* West (1853), 13 C. B. 466; Skelton *v.* L. & N. W. Ry. Co. (1867), L. R. 2 C. P. 631; Cheshire *v.* Bailey, [1905] 1 K. B. 237, C. A.; Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A.; Hatton *v.* Car Maintenance Co. (1914), 110 L. T. 765. **Mentd.** Anon. (1692), 2 Salk. 522; Buckmyr *v.* Darnall (1704), 2 Ld. Raym. 1085; Grand Opinion for the Prerogative concerning the Royal Family (1717), Fortes. Rep. 401; Kettle *v.* Bromsall (1738), Willes, 118; Hartop *v.* Hoare (1743), 3 Atk. 44; Ryall *v.* Rowles (1750), 1 Ves. Sen. 348; Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357, Ex. Ch.; Guilliam *v.* Barnett (1804), 2 Smith, K. B. 155; Gibson *v.* Inglis (1814), 4 Camp. 72; Storr *v.* Crowley (1825), M'Cle. & Yo. 129; Gledstane *v.* Hewitt (1831), 1 Tyr. 445; *Ex p.* Cording (1832), 4 B. & Ad. 198; R. *v.* Cording (1832), 1 Nev. & M. K. B. 35; M'Kenzie *v.* M'Leod (1834), 10 Bing. 385; Vaughan *v.* Menlove (1837), 3 Bing. N. C. 468; Lewis *v.* Nicholson (1852), 21 L. J. Q. B. 311; Micklethwaite *v.* Merrill (1852), 19 L. T. O. S. 61; Shepherd *v.* G. N. Ry. Co. (1852), 19 L. T. O. S. 324; Crouch *v.* L. & N. W. Ry. Co. (1854), 14 C. B. 255; Dansey *v.* Richardson (1854), 3 E. & B. 144; Baxendale *v.* Eastern Counties Ry. Co. (1858), 27 L. J. C. P. 137; Blakemore *v.* Bristol & Exeter Ry. Co. (1858), 8 E. & B. 1035; Syred *v.* Carruthers (1858), E. B. & E. 469; Belfast & Ballymena Ry. Co. *v.* Keys (1861), 9 H. L. Cas. 556, H. L.; MacCarthy *v.* Young (1861), 6 H. & N. 329; Marriott *v.* Anchor Reversionary Co. (1861), 3 De G. F. & J. 177, L.C. & L.JJ.; Martin *v.* Reid (1862), 11 C. B. N. S. 730; Taylor *v.* Caldwell (1863), 3 B. & S. 826; Pigot *v.* Cubley (1864), 15 C. B. N. S. 701; Beal *v.* South Devon Ry. Co. (1864), 11 L. T. 184, Ex. Ch.; P. & O. Steam Navigation Co. *v.* Shand (1865), 3 Moo. P. C. C. N. S. 272, P. C.; Swire *v.* Leach (1865), 5 New Rep. 314; Donald *v.* Suckling (1866), L. R. 1 Q. B. 585; Grill *v.* General Iron Screw Collier Co. (1866), 12 Jur. N. S. 727; Giblin *v.* McMullen (1868), L. R. 2 P. C. 317, P. C.; Readhead *v.* Mid. Ry. Co. (1869), L. R. 4 Q. B. 379, Ex. Ch.; Liver Alkali Co. *v.* Johnson (1874), L. R. 9 Exch. 338, Ex. Ch.; Searle *v.* Laverick (1874), L. R. 9 Q. B. 122; Nugent *v.* Smith (1875), 1 C. P. D. 19; Cohen *v.* G. E. Ry. Co. (1876), 45 L. J. Q. B. 298; Harris *v.* G. W. Ry. Co. (1876), 1 Q. B. D. 515; Hoare *v.* G. W. Ry. Co. (1877), De Colyar's County Ct. Cases, 192; Bergheim *v.* G. E. Ry. Co. (1878), 3 C. P. D. 221, C. A.; Foulkes *v.* Met. Dist. Ry. Co. (1880), 28 W. R. 526, C. A.; Cutler *v.* North London Ry. Co. (1887), 56 L. T. 639; The Moorcock (1889), 14 P. D. 64, C. A.; Shaw *v.* G. W. Ry. Co., [1894] 1 Q. B. 373; The Winkfield, [1902] P. 42, C. A.; Harris *v.* Perry, [1903] 2 K. B. 219, C. A.; Wallis *v.* G. N. Ry. Co. (Ireland) (1903), 12 Ry. & Can. Tr. Cas. 38; Clarke *v.* West Ham Corpn., [1909] 2 K. B. 858, C. A.; Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305, C. A.; Attenborough *v.* Solomon, [1913] A. C. 76, H. L.; Banbury *v.* Bank of Montreal (1918), 87 L. J. K. B. 1158, H. L.

97. ———.]—London Dock Co.:—*Held:* liable for the negligence of their servants in unloading goods, although the co. derived no profit from their labour.—GIBSON *v.* INGLIS (1814), 4 Camp. 72.

98. ———.]—Where an order is given, previously to the delivery of goods to a bailee, to deal with

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PART II. SECT. 2.

96 i. *General principle.*]—Deft., a general insurance agent, undertook gratuitously to have an additional $500 policy placed on the property of pltfs., &, before completion of this transaction, he also undertook, at pltfs.' request, to notify the cos. already holding policies of the additional insurance, as was required under their policies. A loss occurred, &, owing to deft. having failed to give such notice, pltfs. had to accept $1,000 less than they otherwise would have received:—*Held:* (1) the transaction was one of mandate; (2) deft. was liable for negligently performing the voluntary act in such a manner as to cause loss or injury to pltfs.—BAXTER & GALLOWAY CO. *v.* JONES (1903), 23 C. L. T. 258; 6 O. L. R. 360; 2 O. W. R. 573.—**CAN.**

them, when delivered, in a particular manner, to which he assents, & afterwards the goods are delivered to him, a duty arises on his part, on the receipt of the goods, to deal with them according to the order previously given & assented to; & the law infers an implied promise by him to perform such duty.—STREETER *v.* HORLOCK (1822), 1 Bing. 34; 7 Moore, C. P. 283; 130 E. R. 15.

99. Money received — Duty of bailee to apply as agreed.]—If a person accept money from one man to deliver over to another, the acceptance & undertaking is a sufficient consideration to maintain an *assumpsit* for his not paying it over.—WHEATLEY *v.* LOW (1623), Cro. Jac. 668; 79 E. R. 578; *sub nom.* LOE'S CASE, Palm. 281.

Annotations:—**Refd.** Coggs *v.* Barnard (1703), 1 Com. 133; Shilliber *v.* Glyn (1836), 2 M. & W. 143.

100. —— ——.]—A sum of money was delivered by pltf. to deft. to carry to a particular place, & there to pay to a certain person for pltf. Deft. took the money, but, in answer to the inquiries of pltf. on the subject, said that he had lost it:—*Held: assumpsit* for money had & received was maintainable on proof of these facts merely, though it was objected that the proper form of action was a special action for the negligence.—BARRY *v.* ROBERTS (1835), 1 Har. & W. 242.

101. Measure of diligence — Representation of special skill.]—Where a bailee undertakes to perform a gratuitous act, from which the bailor alone is to receive benefit, there the bailee is only liable for gross negligence; but if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence. — SHIELLS *v.* BLACKBURNE (1789), 1 Hy. Bl. 158; 126 E. R. 94.

Annotations:—**Follid.** Doorman *v.* Jenkins (1834), 2 Ad. & El. 256. **Refd.** Fish *v.* Kelly (1864), 17 C. B. N. S. 194. **Mentd.** Giblin *v.* McMullen (1869), 21 L. T. 214, P. C.

102. —— ——.] — The failure to exercise reasonable care, skill, & diligence [on bailments] is gross negligence. What is reasonable varies in the case of a gratuitous bailee & that of a bailee for hire. From the former is reasonably expected such care & diligence as persons ordinarily use in their own affairs, & such skill as he has; from the latter is reasonably expected care & diligence such as are usual, or, in the absence of usage, are to be expected by analogy to the ordinary & usual course of similar business, & such skill as he undertakes to have, namely, the skill usual in the business for which he receives payment (CROMPTON, J.).—BEAL *v.* SOUTH DEVON RY. CO. (1864), 3 H. & C. 337; 11 L. T. 184; 12 W. R. 1115; 159 E. R. 560, Ex. Ch.; *affg.* (1860), 5 H. & N. 875.

Annotations:—**Refd.** Grill *v.* General Iron Screw Collier Co. (1866), L. R. 1 C. P. 600; Giblin *v.* McMullen (1868). L. R. 2 P. C. 317, P. C. **Mentd.** Garton *v.* Bristol & Exeter Ry. Co. (1861), 7 Jur. N. S. 1234; Peek *v.* North Staffordshire Ry. Co. (1863), 10 H. L. Cas. 473, H. L.; M. S. & L. Ry. Co. *v.* Brown (1883), 8 App. Cas. 703, H. L.; Dickson *v.* G. N. Ry. Co. (1886), 18 Q. B. D. 176, C. A.; Sutcliffe *v.* G. W. Ry. Co., [1910] 1 K. B. 478, C. A.

See, further, AGENCY, Vol. I., pp. 435, 436, 437; NEGLIGENCE; WORK & LABOUR.

103. —— **Loss.**]—A stage coachman is responsible for the loss of a parcel which he receives to carry without reward, if it is lost through gross negligence on his part. Mere loss of the parcel is not a conversion.—BEAUCHAMP *v.* POWLEY (1831), 1 Mood. & R. 38.

Annotation:—**Mentd.** Balfe *v.* West (1853), 13 C. B. 466.

104. —— **Implied skill.**]—In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is liable for the neglect to use it.—WILSON *v.* BRETT (1843), 11 M. & W. 113; 1 L. J. Ex. 264; 152 E. R. 757.

Annotations:—**Distd.** Lygo *v.* Newbolt (1854), 22 L. T. O. S. 226. **Refd.** Phillips *v.* Clark (1859), 5 Jur. N. S. 1081; Giblin *v.* M'Mullen (1868), 5 Moo. P. C. C. N. S. 434, P. C. **Mentd.** Grill *v.* General Iron Screw Collier Co. (1866), Har. & Ruth. 654.

105. —— **Chattel handed over to prospective purchaser.**]—In an action by a bailee of a jewel for sale, against a sub-bailee for sale, for injury done to it during the sub-bailment:—*Held:* assuming there was no positive direction by the bailee to the sub-bailee not to part with it out of his possession, it would be for the jury to say whether it would be according to the usage of trade for the sub-bailee thus to part with it temporarily to an expected purchaser, or whether it would be improper & negligent to do so, in which case deft. would be liable for the diminution in

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99 i. *Money received—Duty of bailee to apply as agreed.*]—Pltf. handed deft. $450 to purchase a number of tickets of admission to the Canadian National Exhibition, which deft. agreed to do, but instead handed the money over to one of his employees so to do. The employee became intoxicated & either lost or stole the money. Only $150 was recovered from him by the police when arrested. The employee was convicted & sent to prison. Pltf. brought action to recover the $300, alleging negligence:—*Held:* (1) the labour & services were the principal objects of the parties, & the custody of the thing was merely incidental; (2) the negligence of deft.'s employee was negligence of deft., & he was liable.—WILLS *v.* BROWN (1912), 20 O. W. R. 880; 3 O. W. N. 580; 1 D. L. R. 388.—**CAN.**

103 i. *Measure of diligence — Loss.*]—A. asked B., a printer, to publish a book for A. & offered to defray the cost. B. assented, reserving power to have the proofs examined at A.'s expense by some person in B.'s behalf, who should have authority to suppress parts of the book. A. paid some money down, & delivered the manuscript to B., who lost some of it:—*Held:* B. as a gratuitous bailee was liable for the loss of the manuscript. — HEATON *v.* RICHARDS (1881), 2 N. S. W. L. R. 73.—**AUS.**

103 ii. —— ——.]—A friend, to whom a money letter has been delivered on his journey for delivery to the addressee, is a gratuitous bailee, & as such bound to take as much care of the letter as he would of his own, & if the letter is lost where he does take such care, he is not responsible.—TINDALL *v.* HAYWARD, 7 C. L. J. N. S. 243.—**CAN.**

103 iii. —— ——.]—Before maturity of two notes held by pltf. & deft. deft. undertook, with consent of pltf., who indorsed the note held by him for that purpose, to present the notes to the makers for discount, but there was no agreement expressed or implied for any commission or reward to be paid to deft. The makers declining to discount the notes, deft. left them with V., to be retained subject to order of the owners. V. deposited the notes in a sealed envelope in the C. Bank at P., but afterwards fraudulently took pltf.'s note from the envelope, got it discounted by the makers, & appropriated the proceeds to his own use. Deft. ascertaining the fact of the failure, or fearing it, went to P. & secured his own note:—*Held:* deft., being a mandatary, or bailee without reward, had not been guilty of such negligence or misfeasance in dealing with pltf.'s note as to render him liable in an action for the loss resulting from V.'s breach of trust, the evidence showing that deft. had put his own note in the same hazard with that of pltf.—HARRIS *v.* SHEFFIELD (1875), 10 N. S. R. 1.—**CAN.**

103 iv. —— ——.]—Where money in the nature of specific property is given in charge of a certain person by the owner for a definite purpose, & is lost or destroyed while in the possession of such person, in order to recover damages for the loss or destruction the owner must prove that there was negligence on the part of the custodian by failing to take the same care of the owner's property as he did of his own.—NORTHERN ELEVATOR CO. *v.* WESTERN JOBBERS' CLEARING HOUSE (1914), 29 W. L. R. 497; 7 W. W. R. 199; 20 D. L. R. 889.—**CAN.**

103 v. —— —— *Onus of proof.*]—The driver of a conveyance was in the habit of obliging the clerk to a parish council by acting gratuitously as his messenger to & from a bank in a neighbouring town. On one occasion he lost a packet containing a sum of money which had been received by him at the bank for conveyance to the clerk. In an action against him at the instance of the clerk, in which no evidence was led to establish how the loss had occurred:—*Held:* in executing his commission defender had failed to exercise reasonable care, & was liable. *Semble:* the *onus* was on defender to explain the loss or to prove that he had exercised reasonable care.—COPLAND *v.* BROGAN, [1916] S. C. 277.—**SCOT.**

value.—VON MINDEN *v.* PYKE (1865), 4 F. & F. 533.

106. Revocation by bailor.]—A bailment of money or goods to be handed over to a third party as a gift may be countermanded by the bailor at any time before the bailee has delivered over the goods to the third party.—LYTE *v.* PENY (1541), 1 Dyer, 49a; 73 E. R. 108.

Annotations:—**Refd.** Winter *v.* Foweracres (1618), 2 Roll. Rep. 39; R. *v.* Hornbee (1691), Freem. K. B. 331; Albemarle *v.* Bath (1693), Freem. Ch. 193; Atkin *v.* Barwick (1719), 1 Stra. 165. **Mentd.** Bath & Mountague's Case (1693), 3 Cas. in Ch. 96.

Actions by & against third parties.]—*See* Part IV., sect. 2, *post.*

SECT. 3.—GRATUITOUS LOAN FOR USE.

107. When contract applies.]—A railway co. carried goods on their rail, at mileage rates, stipulating that the owners should unload them at the station. The co. kept a crane at the station, the use of which they allowed gratuitously to such owners, using it themselves when they unloaded goods there. A consignee, while attempting to raise the goods by his own servants & those of the co., requested pltf., who was the servant of neither, to assist, which he was doing when the crane broke & injured him:—*Held:* the issue on defts.' plea of not guilty must be found for defts. because they had not lent the crane to pltf. at all, nor for the purpose of its being used by pltf.—BLAKEMORE *v.* BRISTOL & EXETER RY. CO. (1858), 8 E. & B. 1035; 31 L. T. O. S. 12; 120 E. R. 385; *sub nom.* BLACKMORE *v.* BRISTOL & EXETER RY. CO., 27 L. J. Q. B. 167; 4 Jur. N. S. 657; 6 W. R. 336.

Annotations:—**Consd.** Mears *v.* L. & S. W. Ry. Co. (1862), 11 C. B. N. S. 850; Heaven *v.* Pender (1883), 11 Q. B. D. 503, C. A. **Apprvd.** Coughlin *v.* Gillison, [1899] 1 Q. B. 145, C. A. **Refd.** MacCarthy *v.* Young (1861), 6 H. & N. 329; Williams *v.* Jones (1864), 3 H. & C. 256; Alton *v.* Mid. Ry. Co. (1865), 19 C. B. N. S. 213; Earl *v.* Lubbock (1904), 91 L. T. 73, C. A.

108. Duties of borrower—Measure of diligence.]—As to the second sort of bailment, viz., *commodatum* or lending gratis, the borrower is bound to the strictest care & diligence to keep the goods so as to restore them back again to the lender, because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable; as if a man should lend another a horse to go westward, or for a month, if the bailee go northward or keep the horse above a month, if any accident happen to the horse on the northward journey, or after the expiration of the month, the bailee will be chargeable, because he has made use of the horse contrary to the trust he was lent to him under. But if the bailee put the horse in his stable, & he were stolen from thence, the bailee shall not be answerable for him. But if he or his servant leave the house or stable doors open, & the thieves take the opportunity of that & steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse.—COGGS *v.* BERNARD (1703), 2 Ld. Raym. 909; 1 Com. 133; Holt, K. B. 131; 3 Salk. 11; 92 E. R. 107.

Annotations:—**Refd.** Shelton *v.* Osborn (1729), 1 Barn. K. B. 260; Kettle *v.* Bromsall (1738), Willes, 118; Pasley *v.* Freeman (1789), 3 Term Rep. 51; Cavenagh *v.* Such (1815), 1 Price, 328; Gledstane *v.* Hewitt (1831), 1 Tyr. 445; R. *v.* Cording (1832), 1 Nev. & M. K. B. 35; Vaughan *v.* Menlove (1837), 3 Bing. N. C. 468; G. N. Ry. Co. *v.* Shepherd (1852), 8 Exch. 30; Dansey *v.* Richardson (1854), 3 E. & B. 144; Blakemore *v.* Bristol & Exeter Ry. Co. (1858), 8 E. & B. 1035; MacCarthy *v.* Young (1861), 6 H. & N. 329; Skelton *v.* L. & N. W. Ry. Co. (1867), L. R. 2 C. P. 631; Giblin *v.* McMullen (1868), L. R. 2 P. C. 317, P. C.; Cutler *v.* North London Ry. Co. (1887), 56 L. T. 639; The Moorcock (1889), 14 P. D. 64, C. A.; Cheshire *v.* Bailey, [1905] 1 K. B. 237, C. A.; Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A.; Hatton *v.* Car Maintenance Co. (1914), 110 L. T. 765; Banbury *v.* Bank of Montreal (1918), 87 L. J. K. B. 1158, H. L. **Mentd.** Anon. (1692), 2 Salk. 522; Buckmyr *v.* Darnall (1704), 2 Ld. Raym. 1085; Grand Opinion for the Prerogative concerning the Royal Family (1717), Fortes. Rep. 401; Robinson *v.* Green (1723), 1 Stra. 574; Boucher *v.* Lawson (1736), Lee *temp.* Hard. 194; Charitable Corpn. *v.* Sutton (1742), 2 Atk. 400; Hartop *v.* Hoare (1743), 3 Atk. 44; Ryall *v.* Rowles (1750), 1 Ves. Sen. 348; Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357, Ex. Ch.; Elsee *v.* Gatward (1793), 5 Term Rep. 143; Guilliam *v.* Barnett (1804), 2 Smith, K. B. 155; Gibson *v.* Inglis (1814), 4 Camp. 72; Pippin *v.* Sheppard (1822), 11 Price, 400; Storr *v.* Crowley (1825), M'Cle. & Yo. 129; Whitehead *v.* Greetham (1825), 2 Bing. 464; Corbett *v.* Packington (1827), 6 B. & C. 268; *Ex p.* Cording (1832), 4 B. & Ad. 198; M'Kenzie *v.* M'Leod (1834), 10 Bing. 385; Boorman *v.* Brown (1842), 3 Q. B. 511, Ex. Ch.; Ross *v.* Hill (1846), 2 C. B. 877; Lewis *v.* Nicholson (1852), 21 L. J. Q. B. 311; Micklethwaite *v.* Merrill (1852), 19 L. T. O. S. 61; Shepherd *v.* G. N. Ry. Co. (1852), 19 L. T. O. S. 324; Balfe *v.* West (1853), 13 C. B. 466; Crouch *v.* L. & N. W. Ry. Co. (1854), 14 C. B. 255; Baxendale *v.* Eastern Counties Ry. Co. (1858), 27 L. J. C. P. 137; Syred *v.* Carruthers (1858), E. B. & E. 469; Belfast & Ballymena Ry. Co. *v.* Keys (1861), 9 H. L. Cas. 556, H. L.; Marriott *v.* Anchor Reversionary Co. (1861), 3 De G. F. & J. 177, L.C. & L.JJ.; Martin *v.* Reid (1862), 11 C. B. N. S. 730; Taylor *v.* Caldwell (1863), 3 B. & S. 826; Beal *v.* South Devon Ry. Co. (1864), 11 L. T. 184, Ex. Ch.; Pigot *v.* Cubley (1864), 15 C. B. N. S. 701; P. & O. Steam Navigation Co. *v.* Shand (1865), 3 Moo. P. C. C. N. S. 272, P. C.; Swire *v.* Leach (1865), 5 New Rep. 314; Donald *v.* Suckling (1866), L. R. 1 Q. B. 585; Grill *v.* General Iron Screw Collier Co. (1866), 12 Jur. N. S. 727; Readhead *v.* Mid. Ry. Co. (1869), L. R. 4 Q. B. 379, Ex. Ch.; Liver Alkali Co. *v.* Johnson (1874), L. R. 9 Exch. 338, Ex. Ch.; Searle *v.* Laverick (1874), L. R. 9 Q. B. 122; Nugent *v.* Smith (1875), 1 C. P. D. 19; Cohen *v.* G. E. Ry. Co. (1876), 45 L. J. Q. B. 298; Harris *v.* G. W. Ry. Co. (1876), 1 Q. B. D. 515; Hoare *v.* G. W. Ry. Co. (1877), De Colyar's County Ct. Cases, 192; Bergheim *v.* G. E. Ry. Co. (1878), 3 C. P. D. 221, C. A.; Foulkes *v.* Met. Dist. Ry. Co. (1880), 28 W. R. 526, C. A.; Shaw *v.* G. W. Ry. Co., [1894] 1 Q. B. 373; The Winkfield, 1902] P. 42, C. A.; Harris *v.* Perry, [1903] 2 K. B. 219, C. A.; Wallis *v.* G. N. Ry. Co. (Ireland) (1903), 12 Ry. & Can. Tr. Cas. 38; Clarke *v.* West Ham Corpn., [1909] 2 K. B. 858, C. A.; Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305, C. A.; Attenborough *v.* Solomon, [1913] A. C. 76, H. L.

109. —— —— To feed horse.]—The natural presumption & intendment of law is that a party who borrows a horse is bound to keep it, unless at the time something is said to the contrary.—HANDFORD *v.* PALMER (1820), 2 Brod. & Bing. 359; 5 Moore, C. P. 74; 129 E. R. 1005.

110. —— ——.]—The care taken by a prudent man has always been the rule laid down; & as to the supposed difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question (TINDAL, C.J.).—VAUGHAN *v.* MENLOVE (1837), 3 Bing. N. C. 468; 3 Hodg. 51; 4 Scott, 244; 6 L. J. C. P. 92; 1 Jur. 215; 132 E. R. 490.

Annotations:—**Refd.** Smith *v.* Kenrick (1849), 7 C. B. 515. **Mentd.** Canterbury *v.* A.-G. (1843), 1 Ph. 306; Filliter *v.* Phippard (1847), 11 Q. B. 347; Blyth *v.* Birmingham Waterworks Co. (1856), 11 Exch. 781.

111. —— —— Reasonable wear & tear.]—The borrower is not responsible for reasonable wear & tear, but he is for negligence, for misuse, for gross want of skill in the use; above all, for anything which may be qualified as legal fraud.—BLAKEMORE

PART II. SECT. 3.

107 i. *When contract applies.*]—V. having left a watch with pltf. for repair, pltf. loaned to V. a watch to be kept till the repairs were completed. The watch so loaned becoming out of repair, V. took it to deft. for repair. Pltf. learning that his watch was at deft.'s shop, demanded it, but deft. refused it, setting up a lien for repairs:—*Held:* the loan of pltf.'s watch to V. was a mere gratuitous bailment existing during the mere pleasure of the lender, passing no special property to V., & deft. could not set up any lien for the repairs.—MCDONALD *v.* STIRSKEY (1879), 12 N. S. R. 520.—CAN.

Sect. 3.—Gratuitous loan for use. Sect. 4.

v. BRISTOL & EXETER RY. CO. (1858), 8 E. & B. 1035; 31 L. T. O. S. 12; 120 E. R. 385; *sub nom.* BLACKMORE *v.* BRISTOL & EXETER RY. CO., 27 L. J. Q. B. 167; 4 Jur. N. S. 657; 6 W. R. 336.

Annotations:—**Consd.** Mears *v.* L. & S. W. Ry. Co. (1862), 11 C. B. N. S. 850. **Refd.** Williams *v.* Jones (1864), 3 H. & C. 256. **Mentd.** MacCarthy *v.* Young (1861), 6 H. & N. 329; Alton *v.* Mid. Ry. Co. (1865), 19 C. B. N. S. 213; Heaven *v.* Pender (1883), 11 Q. B. D. 503, C. A.; Coughlin *v.* Gillison, [1899] 1 Q. B. 145, C. A.; Earl *v.* Lubbock (1904), 74 L. J. K. B. 121, C. A.

112. —— To return article lent—Death of horse.]—WILLIAMS *v.* LLOYD, No. 69, *ante.*

113. —— Delegation by borrower.]—If A. lend his horse to B. to ride to a particular place, B. cannot give licence to another to ride; but if he hire the horse, he may let another ride it.—BRINGLOE *v.* MORRICE (1676), 1 Mod. Rep. 210; 86 E. R. 834.

114. —— —— Trial of horse before purchase.]—A horse being for sale, A. asked the agent of the vendor to let him have the horse for the purpose of trying it, & the agent did so:—*Held:* A. was entitled to put a competent person on the horse for the purpose of trying it, & was not limited to merely trying it himself.—CAMOYS *v.* SCURR (1840), 9 C. & P. 383.

115. Duties of lender—Defect in chattel.]—As the lender lends for beneficial use, he must be responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, & owing to which directly the borrower is injured. By the necessarily implied purpose of the loan a duty is contracted towards the borrower not to conceal from him those defects known to the lender which may make the loan perilous or unprofitable to him.—BLAKEMORE *v.* BRISTOL & EXETER RY. CO. (1858), 8 E. & B. 1035; 31 L. T. O. S. 12; 120 E. R. 385; *sub nom.* BLACKMORE *v.* BRISTOL & EXETER RY. CO., 27 L. J. Q. B. 167; 4 Jur. N. S. 657; 6 W. R. 336.

Annotations:—**Consd.** Mears *v.* L. & S. W. Ry. Co. (1862), 11 C. B. N. S. 850; Heaven *v.* Pender (1883), 11 Q. B. D. 503, C. A. **Apprvd.** Coughlin *v.* Gillison, [1899] 1 Q. B. 145, C. A. **Refd.** MacCarthy *v.* Young (1861), 6 H. & N. 329; Williams *v.* Jones (1864), 3 H. & C. 256; Alton *v.* Mid. Ry. Co. (1865), 19 C. B. N. S. 213; Earl *v.* Lubbock (1904), 91 L. T. 73, C. A.

116. —— ——.]—A gratuitous lender of an article is not liable for injury resulting to the borrower or his servant while using it, from its defective state, if the lender was not aware of it.—MACCARTHY *v.* YOUNG (1861), 6 H. & N. 329; 30 L. J. Ex. 227; 3 L. T. 785; 9 W. R. 439; 158 E. R. 136.

Annotations:—**Apprvd.** Coughlin *v.* Gillison, [1899] 1 Q. B. 145, C. A. **Refd.** Indermaur *v.* Dames (1866), L. R. 1 C. P. 274.

117. —— ——.]—In the case of a gratuitous loan of a chattel the lender is not liable to the borrower for injury caused by a defect in the chattel, unless he knew of the defect at the time of the loan, & either concealed it from the borrower or was guilty of gross negligence in not informing him of it.—COUGHLIN *v.* GILLISON, [1899] 1 Q. B. 145; 68 L. J. Q. B. 147; 79 L. T. 627; *sub nom.* GOUGHLIN *v.* GILLISON, 47 W. R. 113, C. A.

118. —— Chattel wearing out by age.]—If I lend a piece of plate, & covenant by deed that the party to whom it is lent shall have the use of it, yet if the plate be worn out by ordinary use & wearing without my fault, no action of covenant lies against me (HALE, C.B.).—POMFRET *v.* RICROFT (1671), 1 Saund. 321; 1 Sid. 429; 85 E. R. 454, Ex. Ch.

Annotations:—**Mentd.** Hodgson *v.* Field (1806), 7 East, 613; Rhodes *v.* Bullard (1806), 7 East, 116; Seddon *v.* Senate (1810), 13 East, 63; Bullard *v.* Harrison (1815), 4 M. & S. 387; Holmes *v.* Goring, Holmes *v.* Elliott (1824), 9 Moore, C. P. 166; Doe *v.* Lock (1835), 2 Ad. & El. 705; Hinchliffe *v.* Kinnoul (1838), 5 Bing. N. C. 1; Harris *v.* Ryding (1839), 5 M. & W. 60; Blakesley *v.* Whieldon (1841), 1 Hare, 176; Duncan *v.* Louch (1845), 6 Q. B. 904; Ricketts *v.* East & West India Docks & Birmingham Junction Ry. Co. (1852), 12 C. B. 160; Pinnington *v.* Galland (1853), 9 Exch. 1; M. S. & L. Ry. Co. *v.* Wallis (1854), 14 C. B. 213; Gayford *v.* Moffat (1868), 4 Ch. App. 133, L.C.; Carstairs *v.* Taylor (1871), L. R. 6 Exch. 217; Winch *v.* Thames Conservators (1872), L. R. 7 C. P. 458; Hoare *v.* Metropolitan Board of Works (1874), L. R. 9 Q. B. 296; Colebeck *v.* Girdlers Co. (1876), 1 Q. B. D. 234; London Corpn. *v.* Riggs (1880), 13 Ch. D. 798; Goodhart *v.* Hyett (1883), 25 Ch. D. 182; Serff *v.* Acton L. B. (1886), 31 Ch. D. 679; Buckley *v.* Buckley, [1898] 2 Q. B. 608, C. A.; Titchmarsh *v.* Royston Water Co. (1899), 81 L. T. 673; Jones *v.* Pritchard, [1908] 1 Ch. 630; Pwllbach Colliery Co. *v.* Woodman, [1915] A. C. 634, H. L.; Schwann *v.* Cotton, [1916] 2 Ch. 120.

Actions by or against third parties.] — *See* Part IV., sect. 2, *post.*

SECT. 4.—GRATUITOUS QUASI-BAILMENT.

119. Loan of money.]—Where a man borrows £30 on the promise to repay on demand, the meaning of the parties is that the sum of £30 should be returned, & not the same money *in specie*, & all the more so because the promise is grounded on an accommodation, which implies a use of the £30. It being agreed that deft. should have the use of the money, it is impossible for him to pay the same money in specie that he received.—GAME *v.* HARVIE (1603), Yelv. 50; 80 E. R. 36.

See, also, Nos. 1, 8—11, *ante.*

120. Intermixture of chattels—By voluntary act—Money—Unknown quantities.]—If two be at play, & one of them intermingle his money in the other's heap of money, by this his intermingling, being his own act, & of his own wrong, by the law he shall lose all, for this is so used & done by him only as a trick, thinking thereby to deceive the other, & so to gain something by this to himself, but by this his so doing he has deceived himself, & shall by this his tortious act lose all.—WARDE *v.* ÆYRE (1613), 2 Bulst. 323; Cro. Jac. 366; 80 E. R. 1157.

Annotations:—**Apld.** Leeds *v.* Amherst (1850), 20 Beav. 239. **Refd.** Spence *v.* Union Marine Insce. (1868), L. R. 3 C. P 427.

121. —— —— ——.]—If another man should blend his money with mine, by rendering my property uncertain, he loses his own.—FELLOWS *v.* MITCHELL & OWEN (1705), 2 Vern. 515; 1 P. Wms. 81; Freem. Ch. 286; 23 E. R. 929.

Annotations:—**Folld.** Leeds *v.* Amherst (1850), 20 Beav. 239. **Mentd.** R. *v.* Bray (1754), Park. 167; Sadler *v.* Hobbs (1786), 2 Bro. C. C. 114; Scurfield *v.* Howes (1790), 3 Bro. C. C. 90.

122. —— —— Property changed.]—If I pour my gold into your heap, or put my silver into your

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112 i. *Duties of borrower—To return article lent.*]—Defts. borrowed from pltfs. a rotary saw:—*Held:* as the saw was not returned on demand, pltfs. should be allowed nominal charges.—CORBIN *v.* STEPHEN (1909), 6 E. L. R. 585.—**CAN.**

112 ii. —— *Loss of chattel—Order for delivery.*]—Where an article has been lost by a person to whom it has been lent by the owner a magistrate has no power to make an order for delivery under Police Offences Act (1901, No. 5), s. 32, against the bailee, unless there is evidence that it has been lost by his negligence.—*Ex p.* DAWSON (1904), 4 S. R. N. S. W. 136.—**AUS.**

115 i. *Duties of lender—Defect in chattel.*]—When the person, for whom work is to be done, binds himself to furnish to the one doing it the appliance necessary therefor, *e.g.*, a tow line for towing, such appliance ought to be good while the work lasts; & if it is broken during the execution of the contract without the fault of the latter, the former must replace it.—JEWELL *v.* CONNOLLY (1897), Q. R. 11 S. C. 265.—**CAN.**

115 ii. —— ——.]—MACTAGUE *v.* INLAND LINES (1915), 8 O. W. N. 183.—**CAN.**

melting pot, or turn my corn into your granary, I have no right to an account or any relief against you, but on the contrary I have actually transferred the property in what was mine to the person with whose property I have mingled it (PEARSON, J.).—*Re* LESLIE, LESLIE *v.* FRENCH (1883), 23 Ch. D. 552; 52 L. J. Ch. 762; 48 L. T. 564; 31 W. R. 561.

Annotations:—**Mentd.** Leigh *v.* Dickeson (1883), 12 Q. B. D. 194; Falcke *v.* Scottish Imperial Insce. (1886), 34 Ch. D. 234, C. A.; *Re* Winchilsea's Policy Trusts (1888), 39 Ch. D. 168; Strutt *v.* Tippett (1890), 62 L. T. 475, C. A.; The Ripon City, [1898] P. 78; Kenrick *v.* Mountsteven (1899), 48 W. R. 141; *Re* Fitzgerald, Surman *v.* Fitzgerald (1904), 90 L. T. 266, C. A.; *Re* Pearce, [1909] 2 Ch. 492, C. A.; *Re* Phillips, [1914] 2 K. B. 689; *Re* Jones' Settlmt., Stunt *v.* Jones, [1915] 1 Ch. 373.

123. —— By wrongful act.]—Pltf. wrongfully mixed his hay with deft.'s hay, & brought trespass against deft. for carrying away the mixture:—*Held:* the whole mixture was deft.'s.

If a goldsmith be melting gold in a pot & I cast my gold into the pot, which is melted together with the other gold, I have no remedy for my gold, but have lost it (ANDERSON, J.).—ANON. (1594), Poph. 38; 79 E. R. 1156.

Annotation:—**Apld.** Leeds *v.* Amherst (1850), 20 Beav. 239.

124. —— —— Goods indistinguishable.] — A clerk in a bank at Chester remitted his own money with that of his employer to an agent in London to be laid out in security; by management the securities were so changed that the property could not be distinguished:—*Held:* the confusion being occasioned by him who so dealt with the property, the distinction lay upon him; &, if he could not distinguish what was his own, the whole must be considered as belonging to the other.—PANTON *v.* PANTON (undated), cited 15 Ves. at pp. 435, 440; 33 E. R. 818, 820.

Annotation:—**Folld.** Lupton *v.* White (1808), 15 Ves. 432.

125. —— —— ——.]—If a man, having undertaken to keep the property of another distinct, mixes it with his own, the whole must both at law & in equity be taken to be the property of the other, until the former puts the subject in such circumstances that it may be distinguished as satisfactorily as it might have been before that unauthorised mixture upon his part.—LUPTON *v.* WHITE (1808), 15 Ves. 432; 33 E. R. 817.

Annotations:—**Apld.** Gray *v.* Haig (1855), 20 Beav. 219, **Distd.** Walsh *v.* Secretary of State for India (1863), 10 H. L. Cas. 367, H. L. **Apld.** Cook *v.* Addison (1869), L. R. 7 Eq. 466. **Refd.** Spence *v.* Union Marine Insce. (1868), L. R. 3 C. P. 427; *Re* Oatway, Hertslet *v.* Oatway, [1903] 2 Ch. 356. **Mentd.** Skipworth *v.* Skipworth (1840), 9 L. J. Ch. 182.

126. —— —— —— Goods distinguishable.]—If A. for a fraudulent purpose mixes his goods with B.'s, still, if they can be distinguished, he retains the property in them, & he may maintain trespass against a person who, having a right to take B.'s goods, ignorantly takes these goods of A.'s as part of B.'s.

If a man puts corn into my bag, in which there is before some corn, the whole is mine, because it is impossible to distinguish what was mine from what was his. But it is impossible that articles of furniture can be blended together so as to create the same difficulty (LORD ELLENBOROUGH, C.J.).—COLWILL *v.* REEVES (1811), 2 Camp. 575.

127. —— —— Money.]—Deft., acting gratuitously in the collection of debts, etc., under a trust deed, mixed the money he received with his own money by placing it in his bankers' hands in his own name & upon his own general account. The bankers were in the habit of paying him interest of 3 per cent. upon money in their hands. He informed the trustees that the money was in bank, but did not state with whom, nor that it was mixed with his own moneys, nor that interest was to be paid upon it. The bankers having failed:—*Held:* deft. was answerable for the loss of the trust money.—MASSEY *v.* BANNER (1820), 1 Jac. & W. 241; 4 Madd. 413; 37 E. R. 367, L.C.

Annotations:—**Folld.** Macdonnell *v.* Harding (1834), 7 Sim. 178. **Refd.** Pennell *v.* Deffell (1853), 4 De G. M. & G. 372, L.JJ.; Cocks *v.* Gray (1857), 5 W. R. 749; Owen *v.* Cronk (1894), 2 Mans. 115, C. A.

See, further, AGENCY, Vol. I., p. 447.

128. —— Goods of uniform quality—Known quantities.]—If the quality of the articles that are mixed be uniform, & the original quantities known, as in the case of so many pounds of trust money mixed with so many pounds of the trustee's own money, the person by whose act the confusion took place is still entitled to claim his proper quantity, but subject to the quantity of the other proprietor being first made good out of the whole mass.—*Re* OATWAY, HERTSLET *v.* OATWAY, [1903] 2 Ch. 356; 71 L. J. Ch. 575; 88 L. T. 622.

Annotation:—**Expld.** Roscoe *v.* Winder, [1915] 1 Ch. 62.

See, further, TRUSTS & TRUSTEES.

129. —— Goods inseparably mixed by accident—Owners tenants in common in proportionate parts.]—Consignments of oil were made from Colombo to persons in England. During the voyage several of the casks leaked, & part of the oil was wholly lost, but the greater part was saved & sold in one mass by the captain:—*Held:* the consignees had a joint interest in the oil that was sold, & had become tenants in common.—JONES *v.* MOORE (1841), 4 Y. & C. Ex. 351; 10 L. J. Ex. Eq. 11; 7 L. T. 102; 5 Jur. 431; 160 E. R. 1041.

Annotations:—**Expld.** Buckley *v.* Gross (1863), 11 W. R. 465. **Folld.** Spence *v.* Union Marine Insce. (1868), L. R. 3 C. P. 427.

130. —— —— ——.]—Where the property of different persons is confused together, probably the legal effect of such a mixture would be to make the owners tenants in common in equal portions of the mass, but at all events they do not lose their property in it (BLACKBURN, J.).—BUCKLEY *v.* GROSS (1863), 3 B. & S. 566; 1 New Rep. 357; 32 L. J. Q. B. 129; 7 L. T. 743; 27 J. P. 182; 9 Jur. N. S. 986; 11 W. R. 465; 122 E. R. 213.

Annotations:—**Folld.** Spence *v.* Union Marine Insce. (1868), L. R. 3 C. P. 427. **Refd.** Sandeman *v.* Tyzack & Branfoot S.S. Co., [1913] A. C. 680, H. L.; Sinclair *v.* Brougham, [1914] A. C. 398, H. L. **Mentd.** Bourne *v.* Fosbrooke (1865), 18 C. B. N. S. 515; R. *v.* Lushington, *Ex p.* Otto, [1894] 1 Q. B. 420.

131. —— —— ——.]—Cotton belonging to different owners was shipped in bales specifically marked at Mobile for Liverpool; forty-three bales

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PART II. SECT. 4.

124 i. *Intermixture of chattels — By wrongful act—Goods indistinguishable.*]—T. & Co. delivered, subject to their order, some hogs to pltfs., with a request to notify G. & Co. T. & Co. transmitted the bills of lading to the M. Bank, who on receiving payment from G. & Co., but not till then, were to indorse them over to G. & Co. G. & Co., with knowledge of those facts, procured pltfs.' station agent on arrival of the hogs there to deliver up the hogs to them, & killed the hogs & mixed the pork & lard made therefrom with other pork & lard in their factory. Subsequently G. & Co. delivered to deft., who was aware of its not having been paid for, the pork & lard, together with other pork & lard, & so mixed as to be indistinguishable except by G. & Co. & their servants. Pltfs. claimed the pork & lard so made from the hogs obtained from pltfs., & issued writs of replevin therefor. At the time of the issue of the writs the pork continued so mixed with the other pork, & the sheriff, neither deft. nor his servants giving him any assistance in distinguishing it, in executing the writs, unavoidably took some pork not the produce of pltfs.' hogs, but left with deft. an equal quantity in amount & value of pltfs.' pork:—*Held:* neither G. & Co. nor deft. could set up G. & Co.'s wrongful mixture & confounding of the property in order to defeat pltfs.' right to recover.—GREAT WESTERN RY. CO. *v.* HODGSON (1879), 44 U. C. R. 187.—**CAN.**

Sect. 4.—Gratuitous quasi-bailment. Part III. Sect. 1: Sub-sect. 1.]

belonged to pltfs., & were insured by defts. against the usual perils. In the course of her voyage the ship was wrecked near Key West; all the cotton was more or less damaged; some of it was lost, & some was so damaged that it had to be sold at Key West. The rest of the cotton was conveyed in another vessel to Liverpool. The marks on a very large number of the bales were so obliterated by sea-water that none of the cotton lost or sold at Key West, & a portion only of that carried to Liverpool, could be identified as belonging to any particular consignee. Two only of pltfs.' forty-three bales were identified, & they were delivered to pltfs.:—*Held:* in respect of the cotton lost & that sold at Key West, there was a total loss of a part of each owner's cotton, & all the owners became tenants in common of the cotton which arrived at Liverpool, & could not be identified, the share of each owner's loss in the cotton totally lost or sold at Key West, & his share in the remainder which arrived at Liverpool, being in the proportion that the quantity shipped by him bore to the whole quantity shipped according to the rule in cases of general average, where it was not known whose goods were sacrificed.

Where goods are mixed so as to become undistinguishable by the wrongful act or default of one owner, he cannot recover, & will not be entitled to his proportion, or any part of the property, from the other owner; but no authority has been cited to show that any such principle has ever been applied, nor indeed could it be applied, to the case of an accidental mixing of the goods of two owners; & there is no authority nor sound reason for saying that the goods of several persons which are accidentally mixed together thereby absolutely cease to be the property of their several owners, & become *bona vacantia* (*per* CUR.). — SPENCE *v.* UNION MARINE INSURANCE CO., LTD. (1868), L. R. 3 C. P. 427; 37 L. J. C. P. 169; 18 L. T. 632; 16 W. R. 1010; 3 Mar. L. C. 82.

Annotations:—**Expld.** Sandeman *v.* Tyzack & Branfoot S.S. Co., [1913] A. C. 680, H. L. **Apprvd.** Sinclair *v.* Brougham, [1914] A. C. 398, H. L. **Refd.** Harris *v.* Truman (1881), 7 Q. B. D. 340; Smurthwaite *v.* Hannay, [1894] A. C. 494, H. L. **Mentd.** Rose *v.* Bank of Australasia (1894), 6 R. 121, H. L.

132. —— Mixture by default of shipowner—Shortage of cargo—Consignee's right to unidentified residue.]—Resps.' ship carried a general cargo of jute, shipped under a number of separate bills of lading. Of this cargo applts. shipped eleven parcels, the numbers & marks on which were duly recorded in the margins of the respective bills of lading. The goods shipped under nine of those bills of lading were duly delivered, but of the goods shipped under the remaining two there was a shortage of six bales. Three other consignees also complained of short delivery to the extent of four, eight, & seven bales respectively, & the number of bales delivered to those consignees fell short of the number specified in the respective bills of lading by those amounts. Upon the discharge of the ship eleven bales were found which corresponded to none of the bills of lading. The goods shipped by applts. under the bills of lading in question purported to be of at least two different qualities, & the eleven bales found on the ship did not correspond in quality with any portion of those goods, & there was no evidence to show that any of the eleven bales formed part of the parcels shipped by applts. under the two bills of lading under which there was short delivery:—*Held:* resps.' contention that where there was a residue of unidentified goods & a shortage in delivery the shipowner could compel the consignees to take the unidentified goods as a *pro tanto* fulfilment of the contract to deliver failed both in law & on the facts.

It is not a matter of difficulty to define the legal consequences of the goods of A. becoming indistinguishably & inseparably mixed with the goods of B. If the mixing has arisen from the fault of B., A. can claim the goods. He is guilty of no wrongful act, & the possession by him of his own goods cannot be interfered with, & if by the wrongful act of B. that possession necessarily implies the possession of the intruding goods of B., he is entitled to it. But if the mixing has taken place by accident or other cause, for which neither of the owners is responsible, a different state of things arises. Neither owner has done anything to forfeit his right to the possession of his own property, & if neither party is willing to abandon that right, the only equitable solution of the difficulty, & the one accepted by the law, is that A. & B. become owners in common of the mixed property. If a small portion of the goods of B. became mixed with the goods of A. by a negligent act, for which A. alone was liable, it is quite possible that the law would prefer to view it as a conversion by A. of this small amount of B.'s goods, rather than do the substantial injustice of treating B. as the owner of the whole of the mixed mass (LORD MOULTON).—SANDEMAN & SONS *v.* TYZACK & BRANFOOT S.S. CO., LTD., [1913] A. C. 680; 83 L. J. P. C. 23; 109 L. T. 580; 57 Sol. Jo. 752; 12 Asp. M. L. C. 437, H. L.

Mixture by trustees or persons in fiduciary capacity.]—*See* AGENCY, Vol. I., p. 447; TRUSTS & TRUSTEES.

Part III.—Bailment for Valuable Consideration.

SECT. 1.—HIRE OF CUSTODY.

SUB-SECT. 1.—MEASURE OF DILIGENCE.

What constitutes consideration.]—*See* Nos. 40—42, *ante*.

See, also, CONTRACT.

Bankers—Securities deposited with.]—*See* No. 54, *ante*, & BANKERS & BANKING, Part II., s. 19, *post*.

133. Bailee must take reasonable care—Not liable for theft.]—Though a bailee is to have a reward for his management, yet he is only to do

132 i. —— *Mixture must be proved.*]—Action to recover the value of wheat which was alleged to have leaked into the bin in pltf.'s elevator, in which deft.'s wheat was stored, & of which deft. obtained the benefit on sale. Counterclaim for damage to deft.'s wheat by being mixed with inferior wheat:—*Held:* there was not sufficient evidence to establish that other wheat than deft.'s got into the bin & no wheat of an inferior grade had been allowed to run into deft.'s bin & get mixed with it, & both claim & counterclaim must be dismissed.—WELWYN FARMERS' ELEVATOR CO. *v.* BYRNE (1905), 2 W. L. R. 333.—**CAN.**

h. *Liability for negligence.*] — Action by the bailor against the bailee of a horse for negligence. Although the jury were not able to agree whether the bailment was a *commodatum* or *mutuum*, the ct. refused to set aside a verdict for pltf., the injury being such as to make deft. liable in either case.—RAINSBURY *v.* ROSS (1843), 2 Kerr, 179.—**CAN.**

PART III. SECT. 1, SUB-SECT. 1.

133 i. *Bailee must take reasonable care.*]—A bailee of money for a reward is not

the best he can, & if he be robbed, etc., it is a good account.—COGGS *v.* BERNARD (1703), 2 Ld. Raym. 909; 1 Com. 133; Holt, K. B. 131; 3 Salk. 11; 92 E. R. 107.

Annotations:—**Refd.** Buckmyr *v.* Darnall (1704), 2 Ld. Raym. 1085; Kettle *v.* Bromsall (1738), Willes, 118; R. *v.* Cording (1832), 1 Nev. & M. K. B. 35; Vaughan *v.* Menlove (1837), 3 Bing. N. C. 468; Searle *v.* Laverick (1874), L. R. 9 Q. B. 122; Harris *v.* G. W. Ry. Co. (1876), 1 Q. B. D. 515; Cutler *v.* North London Ry. Co. (1887), 56 L. T. 639. **Mentd.** Anon. (1692), 2 Salk. 522; Grand Opinion for the Prerogative concerning the Royal Family (1717), Fortes. Rep. 401; Robinson *v.* Green (1723), 1 Stra. 574; Shelton *v.* Osborn (1729), 1 Barn. K. B. 260; Boucher *v.* Lawson (1736), Lee *temp.* Hard. 194; Charitable Corpn. *v.* Sutton (1742), 2 Atk. 400; Hartop *v.* Hoare (1743), 3 Atk. 44; Ryall *v.* Rowles (1750), 1 Ves. Sen. 348; Pasley *v.* Freeman (1789), 3 Term Rep. 51; Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357, Ex. Ch.; Elsee *v.* Gatward (1793), 5 Term Rep. 143; Guilliam *v.* Barnett (1804), 2 Smith, K. B. 155; Gibson *v.* Inglis (1814), 4 Camp. 72; Cavenagh *v.* Such (1815), 1 Price, 328; Pippin *v.* Sheppard (1822), 11 Price, 400; Storr *v.* Crowley (1825), M'Cle. & Yo. 129; Whitehead *v.* Greetham (1825), 2 Bing. 464; Corbett *v.* Packington (1827), 6 B. & C. 268; Gledstane *v.* Hewitt (1831), 1 Tyr. 445; *Ex p.* Cording (1832), 4 B. & Ad. 198; M'Kenzie *v.* M'Leod (1834), 10 Bing. 385; Boorman *v.* Brown (1842), 3 Q. B. 511, Ex. Ch.; Ross *v.* Hill (1846), 2 C. B. 877; G. N. Ry. Co. *v.* Shepherd (1852), 8 Exch. 30; Lewis *v.* Nicholson (1852), 21 L. J. Q. B. 311; Micklethwaite *v.* Merrill (1852), 19 L. T. O. S. 61; Shepherd *v.* G. N. Ry. Co. (1852), 19 L. T. O. S. 324; Balfe *v.* West (1853), 13 C. B. 466; Crouch *v.* L. & N. W. Ry. Co. (1854), 14 C. B. 255; Dansey *v.* Richardson (1854), 3 E. & B. 144; Baxendale *v.* Eastern Counties Ry. Co. (1858), 27 L. J. C. P. 137; Blakemore *v.* Bristol & Exeter Ry. Co. (1858), 8 E. & B. 1035; Syred *v.* Carruthers (1858), E. B. & E. 469; Belfast & Ballymena Ry. Co. *v.* Keys (1861), 9 H. L. Cas. 556, H. L.; MacCarthy *v.* Young (1861), 6 H. & N. 329; Marriott *v.* Anchor Reversionary Co. (1861), 3 De G. F. & J. 177, L.C. & L.JJ.; Martin *v.* Reid (1862), 11 C. B. N. S. 730; Taylor *v.* Caldwell (1863), 3 B. & S. 826; Beal *v.* South Devon Ry. Co. (1864), 11 L. T. 184, Ex. Ch.; Pigot *v.* Cubley (1864), 15 C. B. N. S. 701; P. & O. Steam Navigation Co. *v.* Shand (1865), 3 Moo. P. C. C. N. S. 272, P. C.; Swire *v.* Leach (1865), 5 New Rep. 314; Donald *v.* Suckling (1866), L. R. 1 Q. B. 585; Grill *v.* General Iron Screw Collier Co. (1866), 12 Jur. N. S. 727; Skelton *v.* L. & N. W. Ry. Co. (1867), L. R. 2 C. P. 631; Giblin *v.* McMullen (1869), L. R. 2 P. C. 317, P. C.; Readhead *v.* Mid. Ry. Co. (1869), L. R. 4 Q. B. 379, Ex. Ch.; Liver Alkali Co. *v.* Johnson (1874), L. R. 9 Exch. 338, Ex. Ch.; Nugent *v.* Smith (1875), 1 C. P. D. 19; Cohen *v.* G. E. Ry. Co. (1876), 45 L. J. Q. B. 298; Hoare *v.* G. W. Ry. Co. (1877), De Colyar's County Ct. Cases, 192; Bergheim *v.* G. E. Ry. Co. (1878), 3 C. P. D. 221, C. A.; Foulkes *v.* Met. Dist. Ry. Co. (1880), 28 W. R. 526, C. A.; The Moorcock (1889), 14 P. D. 64, C. A.; Shaw *v.* G. W. Ry. Co., [1894] 1 Q. B. 373; The Winkfield, [1902] P. 42, C. A.; Harris *v.* Perry, [1903] 2 K. B. 219, C. A.; Wallis *v.* G. N. Ry. Co. (Ireland) (1903), 12 Ry. & Can. Tr. Cas. 38; Cheshire *v.* Bailey, [1905] 1 K. B. 237, C. A.; Clarke *v.* West Ham Corpn., [1909] 2 K. B. 858, C. A.; Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305, C. A.; Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A.; Attenborough *v.* Solomon, [1913] A. C. 76, H. L.; Hatton *v.* Car Maintenance Co. (1914), 110 L. T. 765; Banbury *v.* Bank of Montreal (1918), 87 L. J. K. B. 1158, H. L.

134. —— ——.]—Where goods are bailed to be kept for hire, the bailee is bound to take the same care of them as he would of his own; & if they are stolen by the bailee's servants without gross negligence on his part, the bailee is not liable.—FINUCANE *v.* SMALL (1795), 1 Esp. 315.

Annotations:—**Refd.** Butt *v.* G. W. Ry. Co. (1851), 11 C. B. 140; Dansey *v.* Richardson (1854), 3 E. & B. 144; Coupé Co. *v.* Maddick, [1891] 2 Q. B. 413, D. C. **Mentd.** Holder *v.* Soulby (1860), 8 C. B. N. S. 254; Giblin *v.* McMullen (1868), L. R. 2 P. C. 317, P. C.

135. —— —— **Unless due to his negligence.**]—Pltf. went to deft.'s restaurant to dine. A waiter took pltf.'s coat without being requested, & hung it up behind pltf. While pltf. was dining the coat was stolen. Pltf. sued deft. for damages for loss of the coat by his servant's negligence:—*Held:* there was evidence to support a verdict in pltf.'s favour on the grounds; (1) there was evidence from which a jury might find that deft. was bailee of the coat, & that he had been negligent; (2) bailment must be assumed as the point was not taken at the trial, & there was evidence of negligence.—ULTZEN *v.* NICOLS, [1894] 1 Q. B. 92; 63 L. J. Q. B. 289; 70 L. T. 140; 58 J. P. 103; 42 W. R. 58; 10 T. L. R. 25; 38 Sol. Jo. 26; 10 R. 13, D. C.

Annotation:—**Distd.** Orchard *v.* Bush, [1898] 2 Q. B. 284, D. C.

136. —— **Damage by defect in premises—Livery stable keeper.**]—Where a livery stable keeper undertakes for reward to receive a carriage & lodge it in a coach-house, the case comes within the second class of the fifth sort of bailment mentioned by Lord Holt, C.J., in *Coggs* v. *Bernard*, No. 1, *ante*, viz., a delivery to carry or otherwise manage for reward to a private person, not exercising a public employment, & he is bound to take reasonable care.

The obligation, to take reasonable care of the thing intrusted to a bailee of this class, involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state, so that the thing deposited may be reasonably safe in it, but no warranty or obligation is to be implied by law on his part that the building is absolutely safe.—SEARLE *v.* LAVERICK (1874), L. R. 9 Q. B. 122; 43 L. J. Q. B. 43; 30 L. T. 89; 38 J. P. 278; 22 W. R. 367.

Annotations:—**Distd.** Maclenan *v.* Segar, [1917] 2 K. B. 325. **Refd.** Hyman *v.* Nye (1881), 6 Q. B. D. 685. **Mentd.** Thorn *v.* London Corpn. (1874), 43 L. J. Ex. 115; Wilson *v.* Finch Hatton (1877), 2 Ex. D. 336.

137. —— ——.]—A govt., being bailees for hire, stored B.'s explosive goods in sheds near to the water edge:—*Held:* (1) the selection of such a

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liable for the money if it is lost through no negligence of his.—NORTHERN ELEVATOR CO. *v.* WESTERN JOBBERS' CLEARING HOUSE (1915), 32 W. L. R. 630; 9 W. W. R. 343; 25 Man. L. R. 705.—**CAN.**

j. —— *Hairdresser.*]—A hairdresser is not liable for the loss of a customer's coat, which was hung up in the shop. The proprietor of a hairdressing establishment can refuse to be held answerable for the effects of his customers, & notices posted up in his shop are sufficient to release him from liability, particularly if they are known to claimant.—DOYLE *v.* DUMAINE (1914), 21 R. L. 44.—**CAN.**

135 i. —— *Restaurant keeper.*]—The obligations of the keeper of a café or restaurant, as regards the effects of guests, are similar to those of an innkeeper.—DUNN *v.* BEAU (1897), Q. R. 11 S. C. 538.—**CAN.**

k. —— *Implied skill.*]—An engine belonging to T. Co. had been placed on board a boat belonging to H. Co., of which deft. was president, for the purpose of testing it & exhibiting its capacity. It was agreed that the engine should remain on the boat for a time on the understanding that deft. wou d endeavour to sell the boat & engine together, in which case the sum of $350 was to go to T. Co. & the balance to H. Co. Deft. carried on business as a ship-broker, & the boat, while lying at his wharf, was damaged in a storm, & partly filled with water. Deft. had insured the boat & made a claim upon the insurance co. as for a total loss, which the co. declined to recognise, but beyond that he took no steps for the protection of the boat or the engine, both of which were eventually lost, & he gave no notice to the co. of the risk to which their property was exposed —*Held:* deft. was not a gratuitous bailee, & when the owners of the engine intrusted their property to deft.'s care they had a right to expect that he would hold it with the skill which his profession or occupation implied, &, as he had neglected to use such skill, he was responsible in damages for the consequences.—CANADIAN GAS POWER LAUNCHES *v.* CROSBY (1910), 30 C. L. T. 340; 8 E. L. R. 10.—**CAN.**

136 i. —— *Damage by defect in premises.*]—Part of a warehouse collapsed through the breaking of a beam occasioned by dry rot, & a quantity of goods stored therein was damaged. No negligence was shown in the construction of the building, or in not discovering the existence of the dry rot, & except therefor the building would have been capable of sustaining the weight put on it:—*Held:* the owner of the warehouse was not liable for damages sustained to the goods warehoused in the building.—PAGE *v.* DEFOE, BROWN *v.* DEFOE, ASHDOWN *v.* DEFOE (1894), 21 A. R. 466.—**CAN.**

136 ii. —— —— *Unusual flood.*]—By the receipt of goods, in the ordinary way, for storage, the warehouseman does not warrant the safety of his warehouse against a sudden & extraordinary flood. If the bailor interferes & directs where the goods are to be placed in the warehouse, he may thereby reduce the responsibility of the bailee.—HARPER *v.* JONES (1878), 4 V. L. R. 536.—**AUS.**

Sect. 1.—Hire of custody: Sub-sects. 1 & 2.]

site rendered it incumbent upon them to place the goods at such a level as would in all probability ensure their absolute immunity from the incursion of flood water; (2) B. was entitled to rely on the care & skill of his bailees, & could not be said to have accepted any risks of defective storage which he or his servants had had an opportunity of observing; (3) the case must be remanded for a new trial, to ascertain whether the govt. negligently stored the goods at too low a level, or whether on the advent of the floods they failed to take reasonable & proper measures for saving the goods, or part thereof.—BRABANT *v.* KING, [1895] A. C. 632; 64 L. J. P. C. 161; 72 L. T. 785; 44 W. R. 157; 11 T. L. R. 488; 11 R. 517, P. C.

Annotations:—**Distd.** Cordey *v.* Cardiff Pure Ice & Cold Storage Co. (1903), 19 T. L. R. 256, C. A. **Refd.** Fowles *v.* Eastern & Australian S.S. Co., [1916] 2 A. C. 556, P. C.

138. Special contract.]—The rate table of a dock co. contained the following provisions: "Wines & spirits (rum & British spirits excepted) landed in the docks will be chargeable with the following rates. The co. will not be responsible for deficiencies on wines or spirits imported in casks not made of oak, nor on spirits exceeding 20 per cent., overproof, but are answerable for deficiencies in quantity on those contained in other casks housed with the co., beyond one gallon per cask for each year or part of a year the goods shall remain in their custody, provided such deficiencies be claimed of the co. within six months after delivery, & shall be satisfactorily established by the Customs' gauge on landing & delivery . . . Rates & charges on rum . . . When rum is imported in casks made of proper oak, the co. engages to be responsible for deficiencies in measure, which shall exceed one gallon per cask for each year," etc. In an action for loss of brandy housed with the co.:—*Held:* (1) under the above provisions, they would not be liable for a diminution in alcoholic strength, though exceeding one gallon per cask, the deficiency contemplated being a deficiency in actual bulk; (2) if such diminution was caused by their negligence, they were liable apart from contract.—LAMARE *v.* LONDON & ST. KATHERINE DOCKS CO. (1878), 39 L. T. 330.

139. —— Goods stored "at owner's risk."]—Cheese was received by defts. "to be stored at owner's risk," & defts. were not to be responsible for damage or loss caused by certain specified matters or "from any other cause whatever." The cheese was kept at too low a temperature, there being want of skill on the part of defts. The trial judge held, as the act was intentionally done, & as, although defts. did not know the consequence of their act, they ought to have known, they were liable:—*Held:* (1) there was nothing to do away with the owner's risk clause, for although the act was intentionally done that did not amount to wilful misconduct; (2) defts. were not liable.—CORDEY *v.* CARDIFF PURE ICE CO. (1903), 88 L. T. 192; 19 T. L. R. 256, C. A.

140. —— "Damage however caused which can be covered by insurance."]—Goods were loaded into a barge from a ship for delivery at the barge-owner's wharf in the Thames under a contract, which exempted the barge-owner from liability "for any damage to goods however caused which can be covered by insurance." While the barge was lying alongside the wharf with the goods on board before being unloaded, the barge-owner's lighterman, who was in charge of the barge, negligently left her unattended at night, & the barge, after taking the ground at low tide, became submerged as the tide rose, & the goods were damaged. In an action against the barge-owner to recover damages for the loss so caused there was no direct evidence as to the cause of the barge being submerged, & the evidence left it in doubt whether the submerging was or was not attributable to the negligent act of deft.'s servant in leaving the barge unattended:—*Held:* the above term of exemption in the contract relieved deft. from liability for damage caused by the negligence of his servant, & he was entitled to judgment.—TRAVERS (JOSEPH) & SONS, LTD. *v.* COOPER, [1915] 1 K. B. 73; 83 L. J. K. B. 1787; 111 L. T. 1088; 30 T. L. R. 703; 12 Asp. M. L. C. 561; 20 Com. Cas. 44, C. A.

Annotations:—**Refd.** Pyman S.S. Co. *v.* Hull & Barnsley Ry. Co., [1915] 2 K. B. 729, C. A. **Mentd.** The Adriatic (1915), 85 L. J. P. 12; The Wellington (1915), 32 T. L. R. 49.

141. Onus of proof—When bailee must disprove negligence.]—If A. place a dog with B., & the dog be received by B. to be kept by him, for reward to be paid to him by A., B. is not answerable for the loss of the dog if he took reasonable care of it; but if the dog be lost, the *onus* lies on B. to acquit himself by showing that he was not in fault with respect to the loss.—MACKENZIE *v.* COX (1840), 9 C. & P. 632.

142. —— ——.]—A person staying at deft.'s hotel purchased a dog, which was delivered at the hotel & handed by pltf. to defts.' manager, who undertook to take care of it on the premises until the evening. When the evening came the dog was missing:—*Held:* (1) as the dog was given into the sole custody of defts., & accepted by them as bailees, the *onus* was upon them to show that they had taken reasonable care of it; (2) as no evidence was adduced by defts. negativing negligence on their part, they were liable for the value of the dog.—PHIPPS *v.* NEW CLARIDGE'S HOTEL, LTD. (1905), 22 T. L. R. 49.

Annotation:—**Apld.** Travers *v.* Cooper, [1915] 1 K. B. 73, C. A.

143. —— ——.]—Deft. agreed to tow a fire float, & agreed to put the necessary men on board her for steering her & attending to her lights, but did not do so. The fire float sank while being towed in heavy weather, the reason why she sank being unknown, because there was no one on board her, as there ought to have been. The evidence was conflicting as to whether the loss could have been averted if the men had been on board:—*Held:* deft., as bailee for hire & reward, was bound to show that he took reasonable & proper care for the due security & proper delivery of the bailment, the proof of which rested upon him.

Here is a bailee, who, in violation of his contract, omits an important precaution, found to be neces-

138 i. *Special contract.*]—The owner of a yard, into which cattle were taken on fair days for payment, is liable as a bailee for hire for the safe custody of them, although he had a notice to the contrary hung up in the yard, which was not brought to the knowledge of the owner of the cattle.—WILLIAMSON *v.* GRAY (1867), 1 I. L. T. Jo. 476.—**IR.**

141 i. *Onus of proof—When bailee must disprove negligence.*]—The proprietor of a garage is a paid bailee &, as such, is answerable for the loss by fire of an automobile confided to his care, unless he proves that the loss was not due to any fault on his part.—BRUNET *v.* PAINCHAUD (1915), Q. R. 48 S. C. 59.—**CAN.**

141 ii. —— ——.]—Pltf. left his horse with deft., a livery-stable keeper, for hire, & while under his care it was shorn of its mane & tail:—*Held:* deft. responsible for such damage, &, without proof to the contrary, the damage would be presumed to have been committed by his servants, or in consequence of their neglect.—DUROCHER *v.* MEUNIER (1858), 9 L. C. R. 8.—**CAN.**

141 iii. —— ——.]—Goods were deposited with a regular warehouseman, & some of them were found to be missing when demanded. To an action brought, he pleaded that the missing goods must have been stolen, as his store had been broken into during the time that the goods were in his possession:—*Held:* in order to free himself from liability he was bound to establish the robbery.—FRASER *v.* ROCHE (1858), 7 L. C. R. 472.—**CAN.**

sary for the safety of the thing bailed to him, & which might have prevented the loss. His breach of contract has the additional effect of making it impossible to ascertain with precision, & difficult to discover at all, what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, & if he cannot satisfy the ct. that it occurred from some cause independent of his own wrong-doing he must make that loss good (LORD LOREBURN, C.).—MORISON, POLLEXFEN & BLAIR *v.* WALTON (1909), cited [1915] 1 K. B. at p. 90, H. L.

Annotation :—**Consd.** Travers *v.* Cooper, [1915] 1 K. B. 73, C. A.

144. —— ——.]—Circumstances [*see* No. 140, *ante*] in which :—*Held :* the *onus* lay on deft., who was in possession of the goods as bailee, of showing that the negligence of his servant in leaving the barge unattended did not cause the loss, & he had failed to discharge that *onus.*—TRAVERS (JOSEPH) & SONS, LTD. *v.* COOPER, [1915] 1 K. B. 73 ; 83 L. J. K. B. 1787 ; 111 L. T. 1088 ; 30 T. L. R. 703 ; 12 Asp. M. L. C. 561 ; 20 Com. Cas. 44, C. A.

Annotations :—**Refd.** Pyman S.S. Co. *v.* Hull & Barnsley Ry. Co., [1915] 2 K. B. 729, C. A. **Mentd.** The Adriatic (1915), 85 L. J. P. 12 ; The Wellington (1915), 32 T. L. R. 49.

145. Rent—Right to charge.]—A. put a phaeton into the possession of M. for him to paint it, & paid M. beforehand for the painting. M. never painted it, but placed it on the premises of B., where it stood three months :—*Held :* a person had no right to keep the property of another, & charge for the standing of it, unless there were a previous bargain between him & the owner of the property, or between him & some agent authorised by the owner.—BUXTON *v.* BAUGHAN (1834), 6 C. & P. 674.

Annotations :—**Refd.** Cassils *v.* Holden Wood Bleaching Co. (1914), 84 L. J. K. B. 834, C. A. **Mentd.** Keene *v.* Thomas, [1905] 1 K. B. 136.

146. —— ——.]—If the buyer does not carry away the goods bought within a reasonable time, the seller may charge him warehouse room.—GREAVES *v.* ASHLIN (1813), 3 Camp. 426.

Annotations :—**Mentd.** Ford *v.* Yates (1841), 2 Man. & G. 549 ; Startup *v.* Macdonald (1841), 2 Man. & G. 395 ; Spartali *v.* Benecke (1850), 10 C. B. 212 ; Harnor *v.* Groves (1855), 3 W. R. 168.

147. —— ——.]—Wharfingers in London are not entitled to wharfage for goods unloaded into lighters out of barges fastened to their wharfs.—STEPHEN *v.* COSTOR (1763), 3 Burr. 1408 ; 1 Wm. Bl. 413, 423 ; 97 E. R. 899.

Annotation :—**Refd.** Syeds *v.* Hay (1791), 4 Term Rep. 260.

148. —— ——.]—By an Act of Parliament, certain persons were incorporated as H. Dock Co., & premises, formerly the property of the Crown, were given to them for the purposes of the Act, & they were authorised to make a dock, quays, wharfs, etc., which, it was enacted, should be vested in them for the purposes of the Act ; & it was provided that " all goods, etc., which should be landed or discharged upon any of the quays or wharfs which should be erected by virtue of that Act, should be liable to pay, & should be charged & chargeable with the like rates of wharfage & payments as were usually taken or received for any goods, etc. loaded or discharged upon any quays or wharfs in the port of London " :—*Held :* as the premises were only vested in the co. for the purposes of the Act, they had no common law right to a compensation for the use of them, & the Act did not give them any right to claim wharfage for goods shipped off from their quays.—KINGSTON-UPON-HULL DOCK CO. *v.* LA MARCHE (1828), 8 B. & C. 42 ; 2 Man. & Ry. K. B. 107 ; 6 L. J. O. S. K. B. 216 ; 108 E. R. 958.

SUB-SECT. 2.—WAREHOUSEMEN, WHARFINGERS, AND DOCK COMPANIES.

See, also, Nos. 40, 41, *ante.*

149. Commencement of liability—Goods raised from waggon.]—A warehouseman is liable for goods lost or injured from the time the crane is applied to raise them into the warehouse, & it is no defence that they were injured by falling into the street from the breaking of tackle, the carman who brought the goods having refused the offer of slings for further security.—THOMAS *v.* DAY (1803), 4 Esp. 262.

150. —— **Delivery to wharfinger.**]—A delivery of goods at a wharf is not sufficient to charge the purchaser, unless the seller procures them to be booked, or takes a receipt for them, or delivers them in such a manner as to furnish a remedy over against the wharfinger.—BUCKMAN *v.* LEVI (1813), 3 Camp. 414.

151. —— **Goods delivered on wharf—Receipt signed—Course of dealing.**]—Goods were forwarded by K., a carrier, from London to Liverpool, addressed to pltf. (at the Isle of Man), " care of D. (deft.), Brunswick Street, Liverpool." The goods were landed by K. on a public wharf at Liverpool, & on the same day notice was sent to deft. of their arrival, & he signed the carrier's book, containing an acknowledgment that the goods in question had arrived for him (deft.). He caused them also to be entered in the clearance & manifest of a steam-vessel about to sail for the Isle of Man. It was proved that on former occasions, when goods had been brought by K. for deft., he had desired that they might remain at the wharf till he sent for them. Deft. never sent to the wharf for the boxes until six days after their arrival, when they were not to be found. In an action against deft. for negligence in not taking proper care of the goods :—*Held :* there was evidence for the jury of a delivery to & acceptance by him.—QUIGGIN *v.* DUFF (1836), 1 M. & W. 174 ; 1 Gale, 420 ; Tyr. & Gr. 553 ; 5 L. J. Ex. 149 ; 150 E. R. 394.

152. —— **Not liable to consignee till attornment.**]—Goods were forwarded in bales by ship to London, deliverable to B. & Co., factors, for sale, or their assigns, & were landed at defts.' wharf. B. & Co. gave defts. orders to " weigh & deliver " the goods to M., who had contracted with B. & Co. for the purchase of them. They were weighed, & an account of the weights was sent to B. & Co., who made out invoices to M. M. resold several bales of the goods, which were delivered by defts. upon his order, to his vendees ; the rest remained on defts.' wharf until they were stopped by B. & Co. as unpaid vendors. They were never transferred

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PART III. SECT. 1, SUB-SECT. 2.

150 i. *Commencement of liability — Goods raised from vessel.*] — The negligence charged against the owners of an elevator was that they had taken in grain from a ship, while rain was falling & the vessel's hatches unprotected : — *Held :* (1) defts.' liability did not begin till the grain was delivered, & they were not obliged to protect the grain while unloading ; (2) a new trial must be ordered on the question of damages.—DUNN *v.* PRESCOTT ELEVATOR CO. (1898), 26 A. R. 389 ; 30 S. C. R. 620.—**CAN.**

151 i. —— *Goods left on wharf.*] — *Held :* the co. were not wharfingers, & not responsible for goods left upon their wharves unstored.—LOGAN *v.* COBOURG HARBOUR CO. (1846), 3 U. C. R. 55.—**CAN.**

Sect. 1.—Hire of custody: Sub-sect. 2.]

in defts.' books from the names of B. & Co. to that of M., nor was any warehouse rent paid by him :—*Held :* defts. never stood in the relation of wharfingers to M., so as to be liable to an action by him for non-delivery of the goods to his order.—TANNER *v.* SCOVELL (1845), 14 M. & W. 28 ; 14 L. J. Ex. 321 ; 153 E. R. 375.

Annotations :—**Consd.** *Re* Piggott, *Ex p.* Cross (1851), 17 L. T. O. S. 160. **Expld.** *Re* McLaren, *Ex p.* Cooper (1879), 11 Ch. D. 68, C. A. **Refd.** *Re* Harcourt, Danby *v.* Tucker (1883), 31 W. R. 578. **Mentd.** Grice *v.* Richardson (1877), 37 L. T. 677, P. C.

153. —— ——.]—Goods were shipped by pltf. from abroad to England & were sent to a shipping agent of pltf.'s in London, who received them & warehoused them with a wharfinger, informing deft. of their arrival. The wharfinger handed to the shipping agent a delivery warrant, whereby the goods were made deliverable to him or his assignees by indorsement on payment of rent & charges :—*Held :* the wharfinger held the goods as the agent of the consignor (who was the vendor's agent), & his possession was that of the consignee until an assignment had taken place, & the wharfinger had attorned to the assignee, & agreed with him to hold for him, & then, but not till then, the wharfinger was the agent or bailee of the assignee, & his possession that of the assignee.—FARINA *v.* HOME (1846), 16 M. & W. 119 ; 16 L. J. Ex. 73 ; 8 L. T. O. S. 277 ; 153 E. R. 1124.

Annotations :—**Apprvd.** Saunders *v.* Topp (1849), 4 Exch. 390. **Apld.** Meredith *v.* Meigh (1853), 2 E. & B. 364 ; Dublin City Distillery *v.* Doherty, [1914] A. C. 823, H. L. **Refd.** Castle *v.* Sworder (1861), 6 H. & N. 828, Ex. Ch. **Mentd.** Knights *v.* Wiffen (1870), L. R. 5 Q. B. 660.

154. —— **Attornment—Statement that warehouseman held goods—Measure of damages.**]—The owner of goods lying at a warehouse was induced by the fraud of F. to instruct the warehouseman to transfer the goods to the order of F., & the goods were placed at F.'s disposal. F. then sold the goods to an innocent purchaser, who, before paying the price, obtained a statement from the warehouseman that he held the goods at the purchaser's order. On the discovery of F.'s fraud, the warehouseman refused to deliver the goods to the purchaser. In an action by the purchaser against the warehouseman :—*Held :* the warehouseman, having attorned to the purchaser, was estopped from impeaching his title, & the refusal to deliver was a conversion, the measure of damages being the market value of the goods at the date of the refusal.—HENDERSON & CO. *v.* WILLIAMS, [1895] 1 Q. B. 521 ; 64 L. J. Q. B. 308 ; 72 L. T. 98 ; 43 W. R. 274 ; 11 T. L. R. 148 ; 14 R. 375, C. A.

Annotations :—**Consd.** Farquharson *v.* King, [1901] 2 K. B. 697, C. A. **Distd.** Farquharson *v.* King, [1902] A. C. 325, H. L. **Refd.** Herdman *v.* Wheeler, [1902] 1 K. B. 361 ; Compania Naviera Vasconzada *v.* Churchill & Sim, Same *v.* Burton, [1906] 1 K. B. 237.

See, further, cases in Part IV., sect. 1, sub-sects. 1 & 3, *post.*

155. Termination of liability—Delivery to officer of ship.]—Where goods are to be carried coastwise, & the usage of the wharf is to deliver them on the wharf to the mate of the ship by which they are to be carried, if they are delivered to the mate, the wharfinger's responsibility is at an end, & he is not liable though the goods are lost from the wharf before they are shipped.—COBBAN *v.* DOWNE (1803), 5 Esp. 41.

Annotations :—**Refd.** Blaikie *v.* Stembridge (1859), 6 C. B. N. S. 894. **Mentd.** Leigh *v.* Smith (1825), 1 C. & P. 638.

156. —— ——.]—In order to discharge a wharfinger from his responsibility for goods left with him to be sent coastwise, a delivery by the wharfinger to the mate or some other officer of the ship by which they are to be conveyed is necessary ; if otherwise delivered & the goods are lost, the wharfinger is responsible.—LEIGH *v.* SMITH (1825), 1 C. & P. 638 ; Ry. & M. 224.

157. Measure of diligence—Reasonable care.]—A warehouseman is only bound to take reasonable & common care of any commodity intrusted to his charge.—CAILIFF *v.* DANVERS (1792), Peake, 155.

158. —— **Theft due to negligence.**]—A dock co. accepted bailment of goods, & the goods were stolen from the co.'s warehouse in consequence of the negligence of the co. in not keeping sufficient watch over the premises :—*Held :* the co. was liable to the consignee, as owner of the goods, for the loss.—LAMPSON & CO. *v.* LONDON & INDIA DOCK JOINT CO. (1901), 17 T. L. R. 663.

159. —— ——.]—A warehouseman is bound to take precautions against theft, & if he fails to do so, he will be liable to the owners if the goods are stolen (LORD FINLAY, C.).—LONDON JOINT STOCK BANK, LTD. *v.* MACMILLAN & ARTHUR, [1918] A. C. 777 ; 119 L. T. 387 ; 34 T. L. R. 509 ; 62 Sol. Jo. 650, H. L.

160. Liability for negligence—Not taking out sufferance.]—In an action against a wharfinger,

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155 i. *Termination of liability—Delivery to officer of ship.*]—A warehouseman receiving goods to forward discharges himself by delivering them properly directed to the master of a vessel, on board of his vessel.—BECKETT *v.* URQUHART (1844), 1 U. C. R. 188.—**CAN.**

157 i. *Measure of diligence—Reasonable care.*]—Assuming a Harbour Board constituted under Harbours Act, 1878, to have power to undertake the duty of receiving goods unshipped at its wharves on behalf of consignees, & of keeping them pending delivery being taken by the consignees, then, if it does undertake such duty & charges consignees for its performance, it becomes subject to all the responsibilities of a bailee for reward. It must take ordinary care of the goods whilst they are in its custody, & provide appliances & labour to enable it to do so.—OTAGO HARBOUR BOARD *v.* LYSAGHT (JOHN), LTD. (1901), 20 N. Z. L. R. 541.—**N.Z.**

157 ii. —— —— *Limitation of liability by notice.*]—A warehouseman is bound, as a depositary, to apply, in the keeping of goods warehoused with him, the care of a prudent administrator. The proviso, in a warehouse receipt, "but without responsibility for any loss or damage caused . . . for want of any special care or precaution," does not relieve him from that obligation ; & a warehouseman, who receives boxes of lemons during the winter & allows them to freeze, is liable for the loss.—VIPOND *v.* CANADA COLD STORAGE CO. (1908), Q. R. 35 S. C. 144.—**CAN.**

157 iii. —— *Risk made known to bailor at time of bailment.*]—A warehouseman is not liable for a loss resulting from a cause the danger & risk of which was made known to the owner of the goods at the time they were warehoused.—FRY *v.* QUEBEC HARBOUR COMRS. (1896), Q. R. 9 S. C. 14 ; *affd.* Q. R. 5 Q. B. 340.—**CAN.**

160 i. *Liability for negligence—Receipt given to shipowner—That goods in apparent good order & condition.*]—Two packages of merchandise, consigned by sea to resp., were delivered from the ship to applt. as wharfinger, & a receipt was given by his clerk to the shipowners, whereby the packages were expressed to have been "received in apparent good order & condition, weight, contents, & value unknown." Resp., upon examining the packages, found that some of the goods were missing, & he refused to take delivery of either package, & sued applt. for recovery of their full value & incidental charges. The case in which the missing goods were contained was a "repack" or second-hand case, & was outwardly in good condition when received by the clerk, nor was there any evidence to show whether the interference with the package had taken place while in the possession of the shipowners or applt. :—*Held :* applt. had not been guilty of negligence affecting resp.'s rights against the shipowners by giving such receipt to the shipowners, & resp. was not entitled to recover from applt. for the goods lost.—R. *v.* WHITLOCK & CO. (1911), 13 W. A. L. R. 160.—**AUS.**

160 ii. —— *In insuring goods stored.*]—Pltfs., upon storing goods with B., requested him to insure them & keep the policies. B.'s manager effected the insurance, & the goods subsequently being burned, the insurance co. successfully resisted payment on the ground that the goods were not situate in the premises described by the policies :—*Held :* B.'s manager, who upon receiving the policies did not examine them when the error in description would have been apparent, failed to exercise that degree of care & diligence, which in the circum-

to whom goods were sent to be shipped, for neglecting to take out a sufferance, which it was part of the wharfinger's duty to obtain, & for want of which the goods were seized :—*Held :* (1) it was not necessary to aver or prove that the goods were condemned by a sentence *in rem ;* (2) it was sufficient to aver that " for want of such sufferance the goods were seized as forfeited, whereby same became wholly lost to pltf." ; (3) proof of a seizure in fact by the officer for a just cause of forfeiture was sufficient to sustain the declaration, as the injury was sustained in consequence of deft.'s negligence.—BAKER *v.* LISCOE (1797), 7 Term Rep. 171 ; 101 E. R. 916.

161. —— Goods not stored in place agreed.]—A. deposited goods in the warehouse of B., a wharfinger, & paid an annual rent for part of a particular warehouse. B. removed the goods into another warehouse, where they were burnt :—*Semble :* B. was liable to A. for the amount.—SIDAWAYS *v.* TODD (1818), 2 Stark. 400.

Annotations :—**Mentd.** Waters *v.* Monarch Life & Fire Insce. (1856), 5 E. & B. 870 ; L. & N. W. Ry. Co. *v.* Glyn (1859), 28 L. J. Q. B. 188.

162. —— ——.]—QUIGGIN *v.* DUFF, No. 151, *ante.*

163. —— ——.]—Deft. contracted to warehouse goods for pltf. at a particular place, but he warehoused part of them at another place, where, without any negligence on his part, they were destroyed. In an action to recover as damages the value of the goods :—*Held :* the damage was not too remote, & deft., by his breach of contract, had rendered himself liable for the loss of the goods.—LILLEY *v.* DOUBLEDAY (1881), 7 Q. B. D. 510 ; 51 L. J. Q. B. 310 ; 44 L. T. 814 ; 46 J. P. 708.

Annotations :—**Folld.** Roberts *v.* M'Dougall (1887), 3 T. L. R. 666 ; Lampson *v.* London & India Dock Joint Co. (1901), 17 T. L. R. 663; Morr son *v.* Shaw, Savill & Albion Co., [1916] 1 K. B. 747. **Apprvd.** Morrison (James) *v.* Shaw, Savill, & Albion Co., [1916] 2 K. B. 783, C. A. **Folld.** Shaw *v.* Symmons, [1917] 1 K. B. 799. **Distd.** The Südmark, [1918] A. C. 475, P. C. **Refd.** Lepla *v.* Rogers, [1893] 1 Q. B. 31.

See, also, Nos. 61, 62, *ante.*

164. Duty to protect bailor's title—Failure to give notice to bailor of adverse claim.]—Pltf., a married woman living apart from her husband, deposited certain goods belonging to her with deft., a warehouseman, the charge to be made by deft. for the storage of the goods being agreed between pltf. & deft. Pltf. gave her address to deft. Pltf.'s husband subsequently went to deft.'s premises & claimed to be the owner of the goods, &, upon deft. refusing to deliver them to him except under a magistrate's order, the husband & a representative of deft. attended before a magistrate. Deft.'s representative informed the magistrate that the goods had been deposited with deft. by pltf. & that deft. for his protection required an order of the magistrate that he should deliver the goods to the husband. Thereupon a summons was issued by the magistrate under Metropolitan Police Cts. Act, 1839 (c. 71), s. 40, against deft. Deft. did not give notice to pltf. of the husband's claim to the goods or of the issue of the summons. At the hearing of the summons the husband swore that he was the owner of the goods & that they were worth £10, & the magistrate thereupon made an

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stances he was bound to exercise, & pltfs. were entitled to recover from B.—WRIGHT *v.* STANDARD TRUST CO. (1916), 34 W. L. R. 654 10 W. W. R. 763.—**CAN.**

161 i. —— *Goods not stored in place agreed.*]—If a man undertakes for a consideration to take care of the goods of another as a warehouseman, & without authority places them in charge of another warehouseman, he is liable for any loss sustained, even apart from proof of actual negligence. *Semble :* liability may only be avoided, if the warehouseman can sustain the *onus* of proving that his breach of contract did not cause the loss.—GREAT WEST SUPPLY CO. *v.* GRAND TRUNK PACIFIC RY. CO. (1915), 30 W. L. R. 322 ; 7 W. W. R. 780 ; 20 D. L. R. 774 ; *affd.* 31 W. L. R. 259 ; 8 W. W. R. 720.—**CAN.**

161 ii. —— ——.] — Furniture was stored in a brick warehouse, but was afterwards removed by the warehousemen, without the owner's consent, to a frame building, part of which was used as a stable :—*Held :* (1) the warehousemen, in the absence of reasonable precaution to prevent injury therefrom, were liable for injuries caused by rats in the last named building, the existence of which the warehousemen were aware of, & for certain of the goods which were lost, & they were not protected by a condition in the warehouse receipt which relieved them from the responsibility for loss or damage caused by irresistible force, or inevitable accident, or from want of special care or precaution ; (2) they were not liable for damages caused by alleged dampness, in that it might have been due to changing temperature, which it did not appear would not have had the same effect in the original place of storage.—MIALL *v.* OLVER (1904), 24 C. L. T. 356 ; 8 O. L. R. 66 ; 3 O. W. R. 749.—**CAN.**

161 iii. —— *Evidence of negligence.*]—Pltf. landed with his goods in the night at defts.' wharf. Defts.' watchman got the key of their warehouse, & all pltf.'s goods were put into it, except a packing case, for which there was no room. Next day pltf. got all his goods except the case, which was lost. Pltf. was asked by one of defts. to go & look at a box in the town which was thought to be his, not to speak of the loss, & to furnish a list of the things contained in the case :—*Held :* there was sufficient evidence to go to the jury to charge defts.—TOWERS *v.* TALBOT (1854), 11 U. C. R. 614.—**CAN.**

161 iv. —— ——.]—Certain packages were sent from New York addressed to pltf. at Hamilton, to go on by the G. Railway from the Falls. In consequence of a telegram of which deft. knew nothing, the address to Hamilton entered on the bill was struck out, & Toronto substituted, & G. Railway was also struck out, & E. & O. R. R. put in its place, but the address on the packages was left unchanged. They were brought by the E. O. R. R. to Lewiston, & thence shipped to Toronto, where deft., a wharfinger, received them, with an abstract in which they were described as addressed to pltf. at Toronto. Deft., relying on the address to Hamilton, which still remained on the case, shipped them to that place, & they were burned on the passage :—*Held :* it was properly left to the jury to say whether deft. was guilty of negligence by not going by the address in the abstract instead of that on the packages, & they rightly decided in his favour.—HUNTER *v.* BORST (1856), 13 U. C. R. 141.—**CAN.**

161 v. —— —— *Custody of gasolene contrary to bye-law.*] — Pltf. rented from defts. stall-room in their garage for his motor-car ; the garage was destroyed by fire, & the motor-car with it. The origin of the fire was not shown. Just before the fire, a gasolene tank under the garage was being filled from a tank-waggon in the building, the gasolene being carried from the waggon to the underground tank in buckets of five-gallon measure in contravention of a municipal bye-law :—*Held :* there was no evidence of anything having been done or left undone by defts. to constitute a breach of the bye-law, &, even if there was, a contravention would not constitute negligence.—BEARS *v.* CENTRAL GARAGE CO. (1912), 21 W. L. R. 252 ; 2 W. W. R. 283 ; 22 Man. L. R. 292 ; 3 D. L. R. 387.—**CAN.**

161 vi. —— —— *Failure to examine goods periodically.*]—Defts. were keepers of an elevator, & in Apr., 1897, received from pltf. a quantity of corn for storage, & stored it in several bins. On May 22, 1897, desiring to use one of the bins for another purpose, defts. removed the corn & in so doing discovered that it had become heated, whereupon, by exposing it to the air, the corn recovered. They also notified pltf. by telegram of the discovery in the bin, but did not themselves examine the remainder of the corn, nor did pltf. ask them to do so. When, on June 3, the corn was run out to be shipped, a quantity of it was found to be in an advanced condition of fermentation :—*Held :* defts. had been guilty of negligence, & were liable to pltf. for the loss sustained by him.—DUNN & CO. *v.* PRESCOTT ELEVATOR CO. (1902), 22 C. L. T. Occ. N. 237 ; 4 O. L. R. 103 ; 1 O. W. R. 404 ; *revsd.* 26 A. R. 389 ; 30 S. C. R. 620.—**CAN.**

161 vii. —— —— ——.] — A firm of store keepers received two hundred & forty bags of flour, which they stored in three tiers & allowed to stand untouched for more than a year, so that the flour deteriorated in quality :—*Held :* such storing was improper, unless the bags were turned from time to time, & as that had not been done, the store keepers were liable in damages to the owners of the flour.—SNODGRASS *v.* RITCHIE & LAMBERTON (1890), 27 Sc. L. R. 546.—**SCOT.**

l. *Duty to provide storage.*] — It is not necessary that the proprietor of a wharf or quay upon navigable waters, used for the loading & unloading of vessels, should have a warehouse or shed or other convenience for the storage of goods & protection thereof from the weather.—SILLS *v.* BICKFORD (1879), 26 Gr. 512.—**CAN.**

m. *Duty to return goods stored.*] — *Held :* as defts. had not accounted for all the wheat they had received under a " special bin " contract, there must be judgment for pltf.—BRENTWELL *v.* WESTERN ELEVATOR CO. (1909), 11 W. L. R. 372.—**CAN.**

Sect. 1,—Hire of custody: Sub-sects. 2 & 3.]

order that deft. should deliver the goods to the husband. Deft. delivered the goods to the husband, & the next day wrote to pltf. informing her that the goods had been removed by order of a magistrate. Pltf. brought an action in the county ct. claiming from deft. the return of the goods or their value, & damages for their detention, & the county ct. judge directed the jury that deft. would be responsible for the loss of the goods if he, by his negligence, allowed the magistrate's order to be made without giving notice to pltf., whose address he knew, of her husband's claim to the goods or asking the magistrate to summon pltf. before him so that she might be heard. The jury found that there was negligence on the part of deft.:—*Held:* there had been a failure on the part of deft. to fulfil his obligations as a bailee, & he could not rely for protection upon the order made by the magistrate, & pltf. was entitled to judgment.—RANSON *v.* PLATT, [1911] 2 K. B. 291; 80 L. J. K. B. 1138; 104 L. T. 881, C. A.

165. Delivery to wrong person—Trover.]—Trover will lie for misdelivery of goods by a warehouseman, although such misdelivery has occurred by mistake only.—DEVEREUX *v.* BARCLAY (1819), 2 B. & Ald. 702; 106 E. R. 521.

Annotation:—**Refd.** Stephenson *v.* Hart (1828), 4 Bing. 476.

166. —— Delivery orders — Delivery without order.]—If goods are deposited with warehousemen to be delivered against shipowners' delivery orders, & the warehousemen deliver them without the presentation of such orders to a person not at that time entitled to delivery, they will be liable for the value of the goods to a person who obtains & presents proper delivery orders, although the title to the goods & the delivery orders was obtained by such person after the goods had been wrongfully delivered.—BRISTOL & WEST OF ENGLAND BANK *v.* MIDLAND RY. CO., [1891] 2 Q. B. 653; 61 L. J. Q. B. 115; 65 L. T. 234; 40 W. R. 148; 7 T. L. R. 627; 7 Asp. M. L. C. 69, C. A.

Annotation:—**Consd.** London Joint Stock Bank *v.* British Amsterdam Maritime Agency (1910), 104 L. T. 143.

167. —— —— Fraudulently filled up.]—Where a signed form of order for delivery of goods, in which the number of parcels to be delivered is left blank, has been intrusted by those entitled to them to a third person, who is at the same time authorised to fill it up by inserting a given number of parcels, warehouse-keepers are justified in delivering the whole number of parcels appearing on the face of the order, & are not liable in trover, notwithstanding that such third person's authority was limited to a less number of parcels than the actual number he inserted, & that he had fraudulently exceeded his authority by inserting a greater number. It is otherwise where the signed form of order was duly filled up with a certain number of parcels to be delivered before it was intrusted to such person, & he, fraudulently taking advantage of a blank space in the form immediately above the signature of those who intrusted him, has inserted an additional number of parcels.—UNION CREDIT BANK, LTD. *v.* MERSEY DOCKS & HARBOUR BOARD, SAME *v.* MERSEY DOCKS & HARBOUR BOARD & NORTH & SOUTH WALES BANK, LTD., [1899] 2 Q. B. 205; 68 L. J. Q. B. 842; 81 L. T. 44; 4 Com. Cas. 227.

Annotations:—**Consd.** Macmillan *v.* London Joint Stock Bank, [1917] 2 K. B. 439, C. A. **Refd.** Colonial Bank of Australasia *v.* Marshall, [1906] A. C. 559, P. C.; Macmillan *v.* London Joint Stock Bank, [1917] 1 K. B. 363; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L.

168. —— —— Redelivery to bailor—Measure of damages.]—Defts. were in possession of pltfs.' goods as bailees, under orders not to part with them except upon delivery orders signed by pltfs. Defts. parted with the goods upon the order of G., who was pltfs.' agent for the sale but not for the delivery of the goods. Shortly afterwards pltfs. sent a delivery order for the same goods to T., who indorsed it to G., who lodged it with defts. to cover the previous delivery. Afterwards pltfs. being unable to obtain the price of the goods from T., sued defts. for the conversion of the goods, & claimed the full value:—*Held:* (1) there had been a conversion in respect of which pltfs. were entitled to recover; (2) what had occurred with respect to the delivery order was equivalent to a return of the goods by defts. to pltfs.; (3) (BRAMWELL & THESIGER, L.JJ.) in the circumstances the damages could only be nominal; (4) (BAGGALLAY, L.J.) pltfs. were not entitled even to nominal damages.—HIORT *v.* LONDON & NORTH WESTERN RY. CO. (1879), 4 Ex. D. 188; 48 L. J. Q. B. 545; 40 L. T. 674; 27 W. R. 778, C. A.

169. Undertaking to transport goods—Not liable as insurer.]—Defts. were wharfingers, & goods

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165 i. *Delivery to wrong person.*]—The contract between a distiller who sends spirits to a bonded warehouse, & the keeper of the warehouse, is a contract of deposit, & the keeper of the warehouse holds the goods for the distiller, not for the purchaser; & he is not entitled to deliver them either to the purchaser, or to anyone else, without authority from the distiller.—SMITH *v.* ALLAN & PAYNTER (1859), 32 Sc. Jur. 85.—**SCOT.**

166 i. —— *Delivery orders—Delivery without order.*]—Pltf. deposited goods in deft.'s warehouse (which was also a bonding warehouse), with directions not to deliver them except to his order. F., for whom the goods were intended, but to whom deft. was directed not to deliver them without payment, paid the duty at the custom house, & obtained a permit to release the goods from the public warehouse, & then got possession of them from deft.'s clerk:—*Held:* deft. was liable to pltf. for the goods.—GUNNISON *v.* THOMAS (1861), 5 All. 148. —**CAN.**

168 i. —— —— *Redelivery to bailor.*]—Pltf. declared that G. had deposited with deft. certain wheat, & obtained from him a warehouse receipt therefor, that by the course of trade such receipt was transferable by indorsement, & the property in the wheat would pass to an indorsee, that G. sold the wheat to pltf., & indorsed to him the receipt, but that, when he presented it to deft., the latter refused to deliver to him the wheat. Deft. pleaded that, before he had any notice or knowledge of such transfer or sale, the wheat was taken out of his warehouse by G.:—*Held:* a good defence.—GLASS *v.* WHITNEY (1863), 22 U. C. R. 290.—**CAN.**

n. *Special contract — "Specially binned"—Manitoba Grain Act.*]—Pltf. delivered wheat to deft.'s elevators, receiving receipts therefor in the form of storage tickets mentioned in Manitoba Grain Act. The agent marked the words "specially binned" on the tickets, but it was shown he had express instructions not to accept any wheat to be specially binned. The amount of wheat shipped from the bins in which pltf.'s wheat was stored was greater than that mentioned in the tickets, & he claimed such wheat:—*Held:* (1) pltf. was entitled only to delivery in accordance with the Act, when the grain was stored under storage tickets; (2) the indorsement of the words "specially binned" on the ordinary storage receipts would not give any greater privilege than those to which pltf. was entitled under storage tickets.—CASWELL *v.* WESTERN ELEVATOR CO. (1909) 2 Sask. L. R. 153; 10 W. L. R. 52.—**CAN.**

169 i. *Undertaking to transport goods—Liability for non-delivery.*]—On Apr. 3, 1871, defts. received at M. a case of hats to be carried to T., consigned to pltfs. The goods arrived in due course at T. & were placed in defts.' warehouse, but were not delivered to pltfs. until June 15 following, whereby the sale of the goods was lost, & their value very considerably deteriorated. The goods were carried under the following special condition: "The co. will not be responsible for any goods left until called for or to order, warehoused for the convenience of the parties to whom they belong, or by or to whom they are consigned, & the delivery of the goods will be considered complete & the responsibilities of the co. will be considered to terminate when placed in the co.'s shed or warehouse." It was the custom of defts. to deliver to the consignees goods brought by them & warehoused, & to charge for the cartage in the freight:—*Held:* the condition would only relieve defts. from liability as common carriers, but not as warehousemen, & being bound in the latter capacity to deliver the goods, they were liable for the loss sustained by the detention.—MCCROSSON *v.* GRAND TRUNK RY. CO. (1873), 23 C. P. 107. **CAN.**

belonging to pltfs. were discharged from a ship at their wharf. Pltfs. gave an order to defts. to cart & deliver the goods to various persons, & in compliance with such order defts. carted & delivered part of the goods. The remainder were destroyed by fire while still at the wharf:—*Held:* notwithstanding defts. had carried some of the goods at the order of pltfs. they held them while at the wharf as wharfingers & not as common carriers, & in the absence of negligence were not liable for the loss of the goods.—CHATTOCK & Co. *v.* BELLAMY & Co. (1895), 64 L. J. Q. B. 250; 15 R. 340.

Annotations:—**Distd.** Travers *v.* Cooper, [1915] 1 K. B. 73, C. A. **Refd.** Consolidated Tea & Lands Co. *v.* Oliver's Wharf, [1910] 2 K. B. 395.

170. —— ——.]—Wharfingers who, as incidental to their business as wharfingers, transport goods for their customers by lighter from the importing ships to their warehouses, but do not hold themselves out as ready to carry goods for any other persons, are not in respect of that transport subject to the common law liability of common carriers, but are liable only for negligence.—CONSOLIDATED TEA & LANDS Co. *v.* OLIVER'S WHARF, [1910] 2 K. B. 395; 79 L. J. K. B. 810; 102 L. T. 648; 26 T. L. R. 388; 54 Sol. Jo. 506; 15 Com. Cas. 212.

Annotation:—**Distd.** Travers *v.* Cooper, [1915] 1 K. B. 73, C. A.

171. Liability as insurers by custom.]—A wharfinger, by the custom of the city of London, or at all events by the custom of the trade, is in the same position as a common carrier. He is liable, in the absence of express stipulation, for the safe custody of the goods intrusted to his care; & if the goods are destroyed by fire, he is liable in law for breach of duty in not so carefully attending to the goods that no fire could destroy them. It is no answer on this point to say, "I was not guilty of negligence," because it is negligence not to have prevented accident, & for this purpose it is not necessary to show that he was guilty of actual negligence or actual default; he is liable for not properly taking care of the goods (JESSEL, M.R.).—NORTH BRITISH & MERCANTILE INSURANCE Co. *v.* LONDON, LIVERPOOL & GLOBE INSURANCE Co. (1876), 5 Ch. D. 569; 45 L. J. Ch. 548; 35 L. T. 231; *affd.* (1877), 5 Ch. D. 569, 578, C. A.

Annotations:—**Mentd.** Darrell *v.* Tibbitts (1880), 5 Q. B. D. 560, C. A.; Castellain *v.* Preston (1882), 8 Q. B. D. 613; West of England Fire Insce. *v.* Isaacs (1896), 66 L. J. Q. B. 36, C. A.; American Surety Co. of New York *v.* Wrightson (1910), 103 L. T. 663.

172. Limitation of liability by notice.]—A wharfinger by inserting, in his receipts for goods, a notice that he will not be responsible for loss by fire, may entirely discharge himself from such responsibility.—MAVING *v.* TODD (1815), 1 Stark. 72; 4 Camp. 225.

Annotations:—**Consd.** Consolidated Tea and Lands Co. *v.* Oliver's Wharf, [1910] 2 K. B. 395. **Mentd.** Liver Alkali Co. *v.* Johnson (1872), L. R. 7 Exch. 267; Chattock *v.* Bellamy (1895), 64 L. J. Q. B. 250.

Other cases of special contract, *see* Nos. 138—140, *ante*, 180, 190—198, *post*.

173. Receipt fraudulently signed by servant—Not liable.]—A., the servant of a wharfinger, fraudulently signed a receipt purporting to be an acknowledgment that certain wheat had been delivered at his employer's wharf to be shipped to the order of C., no such wheat having in fact been delivered, & thereby wilfully induced C. to pay the price thereof to the pretended vendor:—*Held:* the wharfinger was not liable, although it was proved that C.'s course of dealing was to pay for all wheat delivered for him at the wharf, on production by the vendor of the wharfinger's receipt, & that the latter knew it. *Semble:* it would have been otherwise, if there had been any evidence of an understanding or agreement between C. & the wharfinger to the effect above stated.—COLEMAN *v.* RICHES (1855), 16 C. B. 104; 24 L. J. C. P. 125; 1 Jur. N. S. 596; 3 W. R. 453; 3 C. L. R. 795; 139 E. R. 695.

Annotations:—**Apld.** Udell *v.* Atherton (1861), 7 H. & N. 172. **Distd.** Ludgater *v.* Love (1881), 44 L. T. 694, C. A. **Refd.** Whitechurch *v.* Cavanagh, [1902] A. C. 117, H. L.

See, further, MASTER & SERVANT.

174. Indemnity by bailor—Clean warrant issued at request of bailor.]—Pltfs., wharfingers, agreed to warehouse some wheat for defts. Defts. engaged a lighterman to lighter from the ship's side the wheat to pltfs.' warehouse. Pltfs., while the wheat was still in the lighters, at the request of defts., issued clean warrants, by means of which defts. sold the wheat as undamaged wheat to a purchaser. The wheat was damaged while in the lighters, & pltfs., having issued clean warrants, paid to the purchaser the amount of the damage done to the wheat:—*Held:* defts. had impliedly undertaken to indemnify pltfs. for any damage occasioned to pltfs. by the issue of the warrants.—GROVES & SONS *v.* WEBB & KENWARD (1916), 85 L. J. K. B. 1533; 114 L. T. 1082; 32 T. L. R. 424; 13 Asp. M. L. C. 386, C. A.

Annotation:—**Refd.** Cory *v.* Lambton & Hetton Collieries (1916), 86 L. J. K. B. 401, C. A.

Goods landed and warehoused under statutory powers.]—*See* SHIPPING & NAVIGATION.

Warehouse certificate as a document of title.]—*See* SALE OF GOODS.

Actions by third parties against warehousemen.]—*See* cases in Part IV., sect. 2, sub-sect. 4, *post*.

Liability of wharfinger for foul berth.]—*See* SHIPPING & NAVIGATION.

SUB-SECT. 3.—CARRIERS AS WAREHOUSEMEN.

See, generally, CARRIERS; *see, also*, Nos. 40, 41, *ante*.

175. Accidental fire.]—A common carrier between A. & B., employed to carry goods from A. to B. to be forwarded to C., carried them to B. & there put them in his warehouse, in which they were destroyed by an accidental fire before he had an opportunity of forwarding them:—*Held:* he

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172 i. *Limitation of liability by notice.*]—Pltf. alleged that goods were delivered to A. Co. & to B. & other cos. to be transferred to defts. for carriage. There was also an allegation of a contract by defts. for storage of the goods & delivery to pltf. when requested, & a lack of proper care whereby the goods were lost. The goods were destroyed by fire caused by the negligence of defts.' servants while stored in a building owned by defts.: — *Held:* (1) as to the goods delivered to A. Co., as the goods were received for carriage under the terms of a special contract which provided that defts. would not be liable for the loss of goods by fire, & that goods stored should be at sole risk of the owners, the cause of action failed, whether founded in tort or on contract; (2) as to the goods delivered to the cos. other than A. Co. defts. were liable under the contract for storage, & the goods were in their possession as warehousemen.—LAKE ERIE & DETROIT RIVER RY. Co. *v.* SALES (1896), 26 S. C. R. 663.—**CAN.**

PART III. SECT. 1, SUB-SECT. 3.

p. *General principle.*]—Pltf., a holder of a baggage check on defts.' railway, brought an action to recover the value of a trunk alleged to have been lost or so injured as to be of no use:—*Held:* the status of a railroad as to the custody of baggage might be changed from that of a carrier into that of a warehouseman, so as to relieve them from liability as custodians by depositing same in their custody for an undue period after it had reached its destination.—HAMEL *v.* GRAND TRUNK RY. Co. (1911), 19 O. W. R. 533; 2 O. W. N. 1286.—**CAN.**

175 i. *Accidental fire.*]—Flour was delivered to defts., warehousemen & carriers, with directions to sell as much of it as they could during the winter, & put the remainder *in transitu* for pltf.

Sect. 1.—Hire of custody: Sub-sect. 3.]

was not answerable for the loss.—GARSIDE *v.* TRENT & MERSEY NAVIGATION PROPRIETORS 1792), 4 Term Rep. 581 ; 100 E. R. 1187.

Annotations :—**Distd.** *Re* Webb (1818), 2 Moore, C. P. 500 ; Chapman *v.* G. W. Ry. Co. (1880), 5 Q. B. D. 278. **Refd.** Cairns *v.* Robins (1841), 8 M. & W. 258 ; Richards *v.* L. B. & S. C. Ry. Co. (1849), 7 C. B. 839.

176. ——.]—A., B., C., & D., in partnership as carriers, agreed with S. & Co., of F., to carry goods from London to F., where they were to be deposited in a warehouse belonging to the partnership at F., where A. resided, without any charge for warehouse-room, till it should be convenient to S. & Co. to take the goods home. Goods of S. & Co. carried by the partners from London to F. under that agreement were deposited in the warehouse at the latter place, & destroyed by accidental fire :—*Held :* the character of the partnership as carriers was suspended from the time of the arrival of the goods at F. until their delivery to S. & Co., & during such interval they were not liable for the value of the goods burnt.—*Re* WEBB (1818), 2 Moore, C. P. 500 ; 8 Taunt. 443 ; 129 E. R. 455.

Annotations :—**Apld.** Chapman *v.* G. W. Ry. Co. (1880), 5 Q. B. D. 278. **Refd.** Manchester & Northern Counties Federation of Coal Traders Assocns. *v.* L. & Y. Ry. Co. (1897), 76 L. T. 786.

177. —— **"Goods left till called for."**]—A package of goods was delivered to defts. & another to L. Ry. Co. for carriage to defts.' station at W., both packages being addressed to pltf. "to be left till called for." One of the packages arrived at W. on Mar. 24, the other on the 25th. On their arrival they were placed in the station warehouse to await their being called for. Defts. did not know the address of pltf., who travelled about the country with drapery goods. The goods had not been called for when, on the morning of Mar. 27, a fire having accidentally broken out, the warehouse was burned down & the goods were consumed by fire. Pltf. on the same day after the fire called for the goods &, not receiving them, brought actions against defts. as common carriers to recover their value :—*Held :* after the interval of time which pltf. had suffered to elapse since the arrival of the goods, the liability of defts. as common carriers in respect of the goods had ceased, & they had become mere warehousemen of them, & the actions were not maintainable in the absence of any evidence of negligence on the part of defts.—CHAPMAN *v.* GREAT WESTERN RY. CO. (1880), 5 Q. B. D. 278 ; 49 L. J. Q. B. 420 ; 42 L. T. 252 ; 44 J. P. 363 ; 28 W. R. 566.

Annotations :—**Apld.** Manchester & Northern Counties Federation of Coal Traders Assocns. *v.* L. & Y. Ry. Co. (1897), 76 L. T. 786. **Consd.** Hirschel & Meyer *v.* G. E. Ry. Co. (1906), 96 L. T. 147.

178. Warehousing without charge—Not gratuitous bailment.]—Goods were forwarded by a carrier's waggon to A. in London, & delivered by the carrier to him. A. sent them back to the carrier's warehouse, with directions that they should remain there to await his orders. They remained there for upwards of a year, when they were lost out of the warehouse. A printed bill issued by the carrier, & sent to A. with the goods, stated that "any goods that should have remained three months in the warehouse without being claimed, or on account of the non-payment of the charges thereon, would be sold to defray the

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in the spring. Some sales having been made before navigation opened in the spring, an accidental fire destroyed the remainder, without any default or negligence of defts. :—*Held :* defts. not responsible.—THIRKELL *v.* MCPHERSON (1845), 1 U. C. R. 318.—**CAN.**

175 ii. ——.] — Defts. contracted to carry goods to B., & there to deposit & keep them for pltf., for reward, etc. Pltf. frequently applied for the goods, when the answer was "not arrived." On May 9 the answer was, "burnt up." The goods arrived on May 5 or 6, & were stored in a warehouse in defts.' control, & were burnt on the 8th or 9th, & no notice of arrival was sent to the consignee :—*Held :* defts.' liability as common carriers had ceased, & that of warehousemen commenced, & they were not liable.—BOWIE *v.* BUFFALO, BRANTFORD & GODERICH RY. CO. (1858), 7 C. P. 191.—**CAN.**

175 iii. ——.]—Under a condition in a railway shipping bill the delivery of goods was to be considered complete, & the responsibility of the co. to terminate, when the goods were placed in the co.'s warehouse at their destination. The goods were carried to the station at the place of delivery & were placed in the co.'s shed there used for the purpose of storing goods, where they were subsequently destroyed by fire. The station was some five miles distant from the village where pltf.'s place of business was :—*Held :* after the goods were placed in the shed the co.'s liablity was at an end.—RICHARDSON *v.* CANADIAN PACIFIC RY. CO. (1890), 19 O. R. 369.—**CAN.**

175 iv. ——.]—Although the stat. law of Canada prevents a railway co. from relieving itself from liability for damage caused by fire arising from any negligence or omission of it or its servants, still such a condition, when the damage arises otherwise than from any negligence or omission of the co. or its servants, is valid, & there is no law in Canada requiring that such a condition shall be just & reasonable.

Goods arrived on Apr. 21, notice of their arrival was given to the owner on the same day, & they were destroyed on the 26th :—*Held :* the owner had a reasonable time within which to remove the goods, & not having done so, defts. were not liable.—MCMORRIN *v.* CANADIAN PACIFIC RY. CO. (1901), 21 C. L. T. 292 ; 1 O. L. R. 561.—**CAN.**

175 v. ——.]—Defts. between Apr. 30 & May 4 received goods from pltf. for carriage to Q. The goods arrived at Q. from day to day between the 5th & noon of May 12, & were apparently on the same days put in defts.' freight sheds ; they were destroyed by fire on May 13. Pltf.'s agent at Q. was aware each day of the arrival of the goods :—*Held :* defts.' duties as common carriers had ceased before the fire, & they were liable, if at all, only as warehousemen.—WALTERS *v.* CANADIAN PACIFIC RY. CO. (1887), 1 Terr. L. R. 88.—**CAN.**

175 vi. ——.]—When a shipper stores goods from time to time in a railway warehouse, loading a car when a carload is ready, the responsibility of the railway co. in respect of such of the goods as have not been specifically set apart for shipment is not that of carriers but of warehousemen, & in case of their accidental destruction by fire the shipper has no remedy against the co.—MILLOY *v.* GRAND TRUNK RY. CO. (1894), 21 A. R. 404.—**CAN.**

175 vii. ——.]—Goods were to be delivered from the ship's tackles as fast as the steamer could discharge, failing which the agents were to be at liberty to land the goods at their godowns. The steamer, on arrival, commenced unloading at the custom-house godowns without giving the consignees the option of landing the goods from the ship's tackle. The consignees did not object to the goods being landed at the godowns, & they paid a sum for the wharfage of a part of the goods in their godowns :—*Held :* if the goods were in the possession of the shipowners as wharfingers, they were not liable for loss of the goods by fire, as the goods were destroyed by fire without any default on their part.—CHIN HONG & CO. *v.* SENG MOH & CO. (1879), I. L. R. 4 Calc. 736 3 C. L. R. 585.—**IND.**

175 viii. —— *Goods delivered to carrier at season when carriage impossible.*]—Pltf. sent his goods to defts., common carriers, at a season when they could not be forwarded, & defts. received them into their store to be forwarded at the earliest opportunity. Before the navigation had opened, the goods were destroyed in defts.' storehouse without their default, by an accidental fire :—*Held :* it was a question for the jury whether defts. received the goods as carriers or warehousemen, & the circumstances of the navigation being closed by the ice every year at the season of the receipt of the goods, & also at the time of the fire, did not necessarily determine, as a matter of law, that defts. must be looked upon as having acted in their character of warehousemen only.—HAM *v.* MCPHERSON (1842), 6 O. S. 360.—**CAN.**

r. *Accidental destruction — Goods delivered to carrier at season when carriage impossible.*]—Pltf. loaded defts.' vessel, which was frozen in the ice, with a cargo of peas, to be carried in the vessel on the opening of navigation to K. While the goods were on board the vessel struck a sunken rock, which caused her to sink, damaging the cargo :—*Qu. :* whether defts. were responsible as carriers, or as warehousemen.—CLUXTON *v.* DICKSON (1876), 27 C. P. 170.—**CAN.**

s. —— *Before carriage commenced.*]—Pltfs. purchased tickets from a railway co. on Dec. 23, & checked their baggage through, but delayed their journey until the next day. On the morning of Dec. 25, at 9 o'clock an explosion occurred in the baggage room, caused by two sections of defts.' hot water heater or boiler giving way, & causing damage to pltfs.' trunk & contents :—*Held :* even though defts. were chargeable as warehousemen, they were not liable, as the accident was not due to negligence on their part.—CARLISLE *v.* GRAND TRUNK RY. CO. (1912), 20 O. W. R. 860 ; 25 O. L. R. 372 ; 3 O. W. N. 510 ; 1 D. L. R. 130.—**CAN.**

carriage or other charges thereon, or the general lien, as the case might be, together with warehouse rent & expenses." The carrier had often before carried goods for A., but no goods of his had before lain in the carrier's warehouse:—*Held:* the carrier was not, in these circumstances, a mere gratuitous bailee of the goods at the time of their loss; & A. might recover against him the value of the goods, on a declaration in *assumpsit* alleging that they were delivered to deft. to be safely kept for pltf. for certain reasonable compensation & reward to be therefor paid by him.

A party may have so large a compensation as a carrier as to be sufficient also to remunerate him for acting as a warehouseman, as is the case with many canal cos., & it is quite consistent with both these characters that he will for a certain time, until further orders, or for a reasonable time, keep the goods, considering the general remuneration for carrying sufficient to cover this risk also (LORD ABINGER, C. B.).—CAIRNS *v.* ROBINS (1841), 8 M. & W. 258; 10 L. J. Ex. 452; 151 E. R. 1034.

Annotations:—**Apld.** Mitchell *v.* L. & Y. Ry. Co. (1875), L. R. 10 Q. B. 256. **Refd.** Indermaur *v.* Dames (1867), 16 L. T. 293, Ex. Ch.

179. ——— ———.]—Pltf. deposited between three & four tons of hops at a warehouse at M., belonging to deft., who carried on the business of a wharfinger & carrier there, on the terms that they should be conveyed by deft.'s barges to London, when pltf. should direct, at the usual freight, & that, in the meantime, they should be kept by deft. without charge for warehousing. The hops remained in the warehouse for about thirteen months; & then, upon pltf.'s order, deft. conveyed them to London. On their arrival, it was discovered that they had been damaged by mice while in deft.'s custody: *Held:* the advantage of carrying the hops for hire might be considered as payment for the warehousing, & deft. was not a gratuitous bailee, & was liable in an action for not keeping the hops safely.—WHITE *v.* HUMPHERY (1847), 11 Q. B. 43: 10 L. T. O. S. 183; 12 Jur. 417; 116 E. R. 391.

180. Limitation of liability by notice.]—Pltf. was consignee of some flax sent by defts.' railway to N. station. On its arrival at N. station, defts. sent to pltf. an advice-note of its arrival, requiring him to remove it, & stating that they, defts., would hold it "not as common carriers, but as warehousemen, at owner's sole risk, & subject to the usual warehouse charges." Soon after the receipt of this notice, pltf. went to the station & removed two tons of the flax, but left the rest at the station for more than two months. There were no warehouses at the station, & the flax remained on open ground insufficiently covered, & became damaged by wet. In an action for the damage it was admitted that if defts. were bound to take reasonable care of the flax they had not done so:—*Held:* (1) treating the advice-note acquiesced in by pltf. as a contract, the terms of it, taken altogether, did not exempt defts. from all liability for negligence, & they were bound to take reasonable care of the goods as bailees for hire; (2) defts. were liable.—MITCHELL *v.* LANCASHIRE & YORKSHIRE RY. CO. (1875), L. R. 10 Q. B. 256; 44 L. J.

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180 i. *Limitation of liability by notice.*]—Railway cos. storing goods on their arrival, & making a charge therefor, are bailees for hire, & a notice by them to the consignees, stating that the goods have arrived & that the co. would not be responsible for any damage caused by fire, the act of God, civil commotion, vermin or deterioration in quantity or quality by storage or otherwise, will not relieve them from their responsibility as such bailees, though their responsibility had ceased as carriers.—GRAND TRUNK RY. CO. *v.* GUTMAN (1871), 3 R. L. 452.—**CAN.**

180 ii. ———.]—On the back of the request note & shipping receipt given & received by pltf. on the shipment of goods from M. to T., & the freight advice-note received by him on the arrival of the goods at T., & specially referred to on the face thereof respectively, were a number of conditions under the heading: "General notices & conditions of carriage," one of which was that the co. should not be liable for any goods left until called for or to order, or warehoused for the convenience of the parties to whom they belonged, etc., & that the warehousing of all goods would be at the owner's risk & expense. On the arrival of the goods at T. they were placed in defts.' warehouse there, & pltf., on receipt of the freight advice-note, called at the warehouse, & obtained permission to leave them there, nothing being said about storage. The goods were subsequently lost:—*Held:* pltf. could not recover.—MAYER *v.* GRAND TRUNK RY. CO. (1880), 31 C. P. 248.—**CAN.**

180 iii. ———.]—One of the conditions in a contract to carry goods to P., a place beyond the terminus of the co.'s line, provided that the co. "should not be responsible for any loss, misdelivery, damage or detention that might happen to goods sent by them, if such loss, misdelivery, damage or detention occurred after the goods arrived at the stations or places on their line nearest to the points or places which they were consigned to, or beyond their limits":—*Held:* the loss having occurred after the goods had been delivered at P., the liability of the co. as carriers had ceased, & the condition reduced the contract to one of mere bailment, & exempted the co. from liability as warehousemen.—GRAND TRUNK RY. CO. *v.* MCMILLAN (1889), 16 S. C. R. 543.—**CAN.**

180 iv. ———.]—Goods were carried on a bill of lading issued by a railway co., which contained an express provision that owners should incur all risk of loss of goods in charge of the co., as warehousemen. The goods were destroyed by fire, while stored in a warehouse belonging to the railway co.:—*Held:* such condition was a reasonable one, as the co. only undertook to warehouse goods of necessity & for convenience of shippers.—LAKE ERIE & DETROIT RIVER RY. CO. *v.* SALES (1896), 26 S. C. R. 663.—**CAN.**

180 v. ———.]—Goods sent to pltfs., were stored upon arrival in the railway station, & notice was given to pltfs. of their arrival & of the charge that would be made for their storage. The notice contained a clause that the goods would be "at owner's risk" while stored. The goods were burnt:—*Held:* the goods were at owner's risk, & pltf. could not recover their value.—ANDERSON *v.* REID (1900), 8 Nfld. L. R. 372.—**NFLD.**

180 vi. ———.]—Defts. let to the pltfs. a storage hulk, & pltfs. undertook to supply frozen sheep to be stored therein for shipment, paying a stipulated rate for the storage, etc. Defts. undertook to provide engineers, coal, etc. The contract provided that no responsibility in any way whatsoever, or claim for damage, should be recognised by defts. It was further provided that defts. should not be held responsible for any loss or damage while the hulk was in harbour. The sheep were put on board by pltfs. but the manipulation on board was done by defts., pltfs. having an inspector present who superintended the handling of the sheep. By the negligence of deft.'s servants the sheep were injured by the influx of water into the hold while the hulk was in harbour:—*Held:* (1) defts. were not common carriers; (2) the hulk must be looked upon as a store & not a ship; (3) damage to the sheep was within the conditions limiting the responsibility of the defts.—CANTERBURY FROZEN MEAT & DAIRY EXPORT CO., LTD. *v.* SHAW, SAVILL & ALBION CO., LTD. (1889), 7 N. Z. L. R. 708.—**N.Z.**

t. *Goods warehoused pending customs examination.*]—A transatlantic shipping co., which, after arrival of the ship, consents to keep a traveller's effects until they have been examined by the custom house officers, & puts them into its sheds, is liable as carrier who has become bailee by necessity.—DAVIDSON *v.* CANADA SHIPPING CO. (1890), 19 R. L. 558.—**CAN.**

v. *Goods loaded at port.*]—By the custom of the port of Bombay the master of a ship was not bound to wait fifteen days before commencing to land his cargo, but within a reasonable time after the arrival of his ship, forty-eight hours in the case of a sailing vessel, & somewhat less in the case of a steamer, he was at liberty to land goods if the consignee had not sent boats for them; & such landing of the goods & setting them apart for the consignee did not constitute a delivery of them to the consignee, but such goods, after being so landed, continued in the possession of the master:—*Qu.:* whether, in the special circumstances of the case, the goods, when so landed, remained in the custody of the master in his capacity of common carrier or as a warehouseman.—HONG KONG & SHANGHAI BANKING CORPN. *v.* BAKER (1870), 7 Bom. O. C. 186.—**IND.**

x. *Notice by carrier to remove goods.*]—Coals were consigned to a railway co. & arrived at their destination. Notice was sent to the owner that the coals had arrived & lay at the station at his risk, & requesting pltfs. to remove them from the trucks. By the direction of a servant of pltf., the coals were placed on a siding next pltf.'s yard, but after nine days were emptied by defts. out of the trucks in which they lay on to a place at the side of the railway, where they were much injured & rendered almost useless:—*Held:* the notice to pltf. to remove the goods amounted to a constructive delivery, & defts.' duty as common carriers was fully performed, &, there being no count in trover, pltf. could not recover against the co. as common bailees.—BRADSHAW *v.* IRISH NORTH WESTERN RY. CO. (1873), 7 I. L. T. Jo. 158. **IR.**

Sect. 1.—Hire of custody: Sub-sects. 3, 4 & 5.]

Q. B. 107; 33 L. T. 161; 39 J. P. 645; 23 W. R. 853.

Annotations:—**Apld.** Price *v.* Union Lighterage Co., [1903] 1 K. B. 750. **Consd.** Hirschel & Meyer *v.* G. E. Ry. Co. (1906), 96 L. T. 147.

See, also, Nos. 138—140, 172, *ante,* 190—198, *post.*

181. Railway company as warehousemen—Passenger's luggage—Placed in carriage—Loss—Negligence.]—A railway co. are not common carriers in respect of passenger's luggage placed by the passenger, or at his request, in the carriage in which he travels or intends to travel, but they are in such case bailees for hire of the luggage, & are liable for loss caused by their negligence.—BERGHEIM *v.* GREAT EASTERN RY. CO. (1878), 3 C. P. D. 221; 47 L. J. Q. B. 318; 38 L. T. 160; 42 J. P. 324; 26 W. R. 301, C. A.

Annotations:—**Consd.** Bunch *v.* G. W. Ry. Co. (1886), 17 Q. B. D. 215, C. A.; G. W. Ry. Co. *v.* Bunch (1888), 13 App. Cas. 31, H. L.

182. —— Season-ticket holder travelling to wrong station.]—A season-ticket holder on a railway between B. & K. gave his bag, which was otherwise unlabelled, at B., to a porter, & saw it labelled for K., & put on to a barrow with other luggage to be put into the train. Contrary to the terms on which he held his season ticket he travelled in the train as far as C., an intermediate station, where he got out, & he continued his journey to K. by the next train. On his arrival at K. his bag was missing, & he thereupon sued the railway co. for its value. *Qu.* whether, in the above circumstances, from the stations of C. to K., the liability of the co. was higher than that of gratuitous bailees.—CUTLER *v.* NORTH LONDON RY. CO. (1887), 19 Q. B. D. 64; 56 L. J. Q. B. 648; 56 L. T. 639; 51 J. P. 774; 35 W. R. 575.

See, further, CARRIERS.

183. Measure of damages.]—A commercial traveller deposited in defts.' waiting-room a case of patterns, which was lost. In an action against defts. as warehousemen for negligence:—*Held:* there was no undertaking on the part of warehousemen to be answerable beyond the actual value of the article, except by special contract, & pltf. could not recover damages beyond the actual value of the article lost.—ANDERSON *v.* NORTH EASTERN RY. CO. (1861), 4 L. T. 216; *sub nom.* HENDERSON *v.* NORTH EASTERN RY. CO., 9 W. R. 519.

184. Measure of diligence.]—Resps. delivered a dog to applts. for carriage on their railway. Applts. received it, not as common carriers, but as ordinary bailees. The dog was delivered with a collar on it & a strap attached thereto. During the journey there was a change of trains; for security during the interval of change applts. fastened the dog up by means of the strap, & the dog slipped through the collar, got on to the railway, & was killed:—*Held:* applts were not liable.

It is found as a fact that the co. were not common carriers of dogs, so as to have an absolute responsibility imposed on them to carry dogs. Consequently the co. were, with reference to the dog in question, in the position of ordinary bailees, & only liable for its loss in the event of negligence on their part, & would not be liable if its loss was by reason of negligence of the person who delivered the dog to the co. (WILLES, J.).—RICHARDSON *v.* NORTH EASTERN RY. CO. (1872), L. R. 7 C. P. 75; 20 W. R. 461; *sub nom.* NORTH EASTERN RY. CO. *v.* RICHARDSON, 41 L. J. C. P. 60; 26 L. T. 131.

Annotations:—**Refd.** Sutcliffe *v.* G. W. Ry. Co., [1910] 1 K. B. 478, C. A. **Mentd.** Blower *v.* G. W. Ry. Co. (1872), L. R. 7 C. P. 655.

See, also, Nos. 157—159, *ante.*

SUB-SECT. 4.—BOARDING-HOUSE KEEPERS.

185. Liability for negligence of servants.]—Declaration, that deft., being a boarding-house keeper, received pltf. with her baggage, for reward, as a guest in deft.'s house, on the terms (*inter alia*) that deft. should "take due & reasonable care" of pltf.'s baggage while in the house. Breach, that by negligence of deft. & her servants pltf.'s baggage was lost. Pleas, not guilty, & a traverse of the receipt on those terms. On the trial, it appeared that pltf. was received, with her baggage, as a guest, but nothing was expressed as to the care to be taken of the goods. The goods were stolen from the house whilst pltf. was a guest, & there was evidence that the theft was facilitated by deft.'s servant having left the front door ajar, & there was also some evidence that deft. was aware of habitual negligence of the servant in that respect. The trial judge told the jury that a boarding-house keeper was bound to take due & reasonable care about the safe-keeping of the guest's goods, which he explained to be such care as a prudent housekeeper would take of the house for the purpose of protecting her own goods, that the leaving the door ajar might be a want of such care, but that deft. was not answerable for such negligence in the servant, unless she had herself been guilty of some negligence, as in keeping such a servant with knowledge of his habits. A verdict was given for deft. on the plea of not guilty, & for pltf. on the other plea:—*Held:* (1) a boarding-house keeper was not bound to keep a guest's baggage safely, to the same extent as an innkeeper, but she undertook, by implication of law although nothing was expressed, to take due & proper care of a guest's baggage, & neglecting to take due care of the outer door might be a breach of such duty, & so far the direction was right; (2) (ERLE & WIGHTMAN, JJ.) unless deft. herself was guilty of negligence, the act of the servant, in leaving the door ajar, was not one for which deft. was responsible, it not being a neglect of any public duty which was owing to pltf., & not being a breach of a contract between pltf. & deft., but merely negligence of the servant towards his mistress, & the direction was right; (3) (LORD CAMPBELL, C.J., & COLERIDGE, J.) the act of the servant was, in the circumstances, the act of deft., & there was no distinction between the personal negligence of deft. & that of her servant in her employment, deft. being equally answerable for both, & the direction was wrong.—DANSEY *v.* RICHARDSON (1854), 3 E. & B. 144; 23 L. J. Q. B. 217; 18 Jur. 721; 2 C. L. R. 1442; 118 E. R. 1095; *subsequent proceedings,* 3 E. & B. 722.

Annotations:—**Distd.** Holder *v.* Soulby (1860), 8 C. B. N. S. 254. **Folld.** Hollingsworth *v.* Nicholson (1904), 68 J. P. Jo. 534; Scarborough *v.* Cosgrove, [1905] 2 K. B. 805, C. A.

186. Not liable as innkeeper.]—There is no duty imposed by law upon a lodging-house keeper to

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PART. III. SECT. 1, SUB-SECT. 4.

a. *Who is boarding-house keeper.*]—J. & his wife took rooms in premises kept by deft., called the "Shandon House," partly furnishing them & agreeing to pay $50 per month for rooms & board:—*Held:* the relation between deft. & J. was that of boarding-house keeper & boarder.—NEWCOMBE *v.* ANDERSON (1886), 11 O. R. 665.—**CAN.**

186 i. *Not liable as innkeeper.*]—Where a contract is made by a hotel-keeper to take a person in as a guest for a long time paying at a weekly or monthly rate, the relationship is that of boarding-house keeper or lodging-house keeper & not of innkeeper, & while not liable as an insurer because of that distinction, the hotel-keeper must take reasonable

take care of the goods of his lodger. It is otherwise in the case of an innkeeper. Neither is there any liability in the lodging-house keeper where he has admitted, by licence of the lodger (who was about to quit), a stranger to view the apartments who purloined some of the lodger's goods.—HOLDER *v.* SOULBY (1860), 8 C. B. N. S. 254; 29 L. J. C. P. 246; 2 L. T. 219; 25 J. P. 311; 6 Jur. N. S. 1031; 8 W. R. 438; 141 E. R. 1163.

Annotations:—**Folld.** Hollingsworth *v.* Nicholson (1904), 68 J. P. Jo. 534. **Consd.** Scarborough *v.* Cosgrove, [1905] 2 K. B. 805, C. A. **Mentd.** Sarson *v.* Roberts (1895), 43 W. R. 690, C. A.

187. Liability for theft by inmate.]—Pltfs. became boarders in a boarding-house kept by deft. They informed deft.'s manager that they had property which they wished to keep under lock & key, & asked for a key of their bedroom door. They were told by the manager that a second key could not be supplied, & that they must not remove the key from the lock, as it was required for the purpose of giving the servants access to the room, & that the room would be quite safe as the people in the house were all known. On a subsequent occasion pltfs. again became boarders in deft.'s boarding-house, & occupied the same bedroom, in which a chest of drawers had in the meantime been placed. They asked the manager for a key of the chest of drawers, but none was supplied. The female pltf. having left some jewellery in a locked handbag in one of the drawers, it was stolen by another inmate of the house, who had been admitted as a boarder without references, or introduction, or inquiry concerning him, & who turned out to have been previously convicted of theft. In an action by pltfs. against deft. for the loss of the jewellery:—*Held:* (1) (COLLINS, M.R., & MATHEW, L.J.) there was a duty on the part of a boarding-house keeper to take reasonable care for the safety of property brought by a guest into his house & evidence for the jury of a breach of that duty; (2) (ROMER, L.J.) there was a duty on the part of a boarding-house keeper to carry on his business with reasonable care, having regard to the nature & normal conduct of the business, as known to the guest, or as represented to the guest by him, & evidence of a breach of that duty whereby pltfs.' property was lost.—SCARBOROUGH *v.* COSGROVE, [1905] 2 K. B. 805; 74 L. J. K. B. 892; 93 L. T. 530; 54 W. R. 100; 21 T. L. R. 754, C. A.

188. Not a guarantor.]—It is the duty of a boarding-house keeper to take reasonable care that the door of the premises should be kept shut, in order to prevent the entry of thieves, but such duty does not amount to a guarantee that the door will be kept shut (COLERIDGE, J.).—PATERSON *v.* NORRIS (1914), 30 T. L. R. 393.

SUB-SECT. 5.—RAILWAY CLOAK-ROOMS AND RECEIVING OFFICES.

Custody of goods during carriage on railway.]—*See* CARRIERS.

189. Company must deliver on reasonable demand.]—A passenger arrived at the up terminus of a railway station on Saturday, & deposited his luggage in the cloak-room. On Sunday he proceeded to the cloak-room for his luggage, but found no one in attendance, & in consequence of delay in obtaining his luggage he missed the train by which he intended to leave the station:—*Held:* the luggage was not deposited with the co. as ordinary warehousemen, but the contract on the part of the co. was to deliver the luggage at a reasonable time on a reasonable request, & pltf. was entitled to a verdict.—STALLARD *v.* GREAT WESTERN RY. CO. (1862), 2 B. & S. 419; 31 L. J. Q. B. 137; 26 J. P. 548; 8 Jur. N. S. 1076; 10 W. R. 488; *sub nom.* STANNER *v.* GREAT WESTERN RY. CO., 6 L. T. 217; 121 E. R. 1129.

190. Company not responsible for package over £10—Loss by negligence of company's servant.]—Pltf., a passenger by defts.' railway, on arriving at their terminus, deposited in the cloak-room there a bag containing wearing apparel & jewellery to a value considerably exceeding £10, receiving as a voucher a ticket, on the back of which was printed the following notice:—"The co. will not be responsible for articles left by passengers at the station, unless same be duly registered, for which a charge of 2*d.* per article will be made, & a ticket given in exchange, & no article will be given up without production of the ticket, or satisfactory evidence of the ownership being adduced. A charge of 1*d. per diem*, in addition, will be made on all articles left in the cloak-room for a longer period than twenty-four hours. The co. will not be responsible for any package exceeding the value of £10." A similar notice printed in large characters was posted up in the office, but pltf. swore that she did not see it. She was not asked whether or not she had seen the notice on the back of the ticket, but she produced it when she applied for the bag. Through the negligence of the co.'s servants, part of the contents of the bag was abstracted whilst it was in their custody:—*Held:* the co., having received the deposit, not as carriers, but as ordinary bailees, upon the terms contained in the printed notice, which pltf., having the means of ascertaining them, must be taken to have consented to be bound by, were not responsible for the loss, & the case was neither within Carriers Act, 1830 (c. 68), nor Railway & Canal Traffic Act, 1854 (c. 31).—VAN TOLL *v.* SOUTH EASTERN RY. CO. (1862), 12 C. B. N. S. 76; 31 L. J. C. P. 241; 6 L. T. 244; 8 Jur. N. S. 1213; 10 W. R. 578; 142 E. R. 1071.

Annotations:—**Distd.** Malpas *v.* L. & S. W. Ry. Co. (1866), Har. & Ruth. 227; Parker *v.* S. E. Ry. Co. (1876), 1 C. P. D. 618. **Refd.** Watkins *v.* Rymill (1883), 10 Q. B. D. 178; Pratt *v.* S. E. Ry. Co. (1897), 45 W. R. 503. **Mentd.** Lewis *v.* M'Kee (1868), L. R. 4 Exch. 58, Ex. Ch.; Parker *v.* S. E. Ry. Co., Gabell *v.* Same (1877), 2 C. P. D. 416, C. A.

191. —— Delay in delivery.]—Where an article deposited in the cloak-room of a railway co. exceeds £10 in value, a notice on the ticket given to the depositor that "the co. will not be responsible for any package exceeding the value of £10" protects the co. from liability, not only for the loss of such an article, but also for delay in delivering it, at least where the delay is caused by no wilful act or default of the co., & without their privity or knowledge.—PEPPER *v.* SOUTH EASTERN RY. CO. (1868), 17 L. T. 469.

192. —— Loss of luggage left in vestibule.]—Pltf. having been a passenger by defts.' railway, her luggage (consisting of two packages) was de-

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care for the safety of the property brought by the guests to the hotel.—MACDONELL *v.* WOODS (1914), 32 O. L. R. 283; 20 D. L. R. 366; 7 O. W. N. 342.—CAN.

PART III. SECT. 1, SUB-SECT. 5.

b. *Liability for loss.*]—A bag, containing £10 in money, was deposited in the cloak-room of a railway co.'s station. The owner paid 1*d.*, & obtained a ticket acknowledging the receipt of the bag, but not containing any conditions restrictive of the co.'s liability. He did not inform the clerk in charge of the cloak-room that the bag contained money. There was not any negligence in the manner in which the bag was fastened. The money having been abstracted while the bag was in the cloak-room:—*Held:* the railway co. were liable for the amount.—ROCHE *v.* CORK, BLACKROCK *v.* PASSAGE RY. CO. (1889). 24 L. R. Ir. 250.—IR.

192 i. "*Company not responsible for package over £5*"—*Loss of luggage left in vestibule.*]—A passenger on his arrival at a railway station in the evening left a trunk with the porter at the left

Sect. 1.—*Hire of custody: Sub-sects.* 5, 6, 7, 8, 9 & 10. *Sect.* 2: *Sub-sect.* 1.]

posited with a clerk of defts. at their cloak-room, & the person depositing it received a ticket, which was headed "Luggage & cloak office," & on the face of which was printed, in type easily legible, "left, subject to the conditions on the other side. This ticket to be given up when the luggage is taken away." On the other side, after a statement of the "sums to be paid for warehousing passengers' luggage," there was a notice that "the co. will not be responsible for loss of, or injury to, any package beyond the value of £5, unless at the time of the delivery of such package the true value & nature thereof shall have been declared, & a sum at the rate of 1*d.* per pound sterling be paid in addition to the before-mentioned ordinary warehouse charges. The co. will not be responsible for loss of, or injury to, articles except left in the cloak-room." The value of each package was more than £5, but no declaration of value or additional payment was made. The person who deposited the luggage knew that there were conditions on the back of the ticket, but did not know what those conditions were. The luggage was not put by defts.' servants into the cloak-room, but was left in a vestibule, without any other protection, & was stolen owing to that negligence of defts.' servants: —*Held:* (1) the luggage must be taken to have been deposited subject to the conditions on the back of the ticket; (2) (LUSH, J., *diss.*) the conditions were applicable to the loss, & protected defts., although the luggage was not deposited in the cloak-room.—HARRIS *v.* GREAT WESTERN RY. CO. (1876), 1 Q. B. D. 515; 45 L. J. Q. B. 729; 34 L. T. 647; 40 J. P. 628.

Annotations:—**Distd.** Parker *v.* S. E. Ry. Co., Gabell *v.* Same (1877), 2 C. P. D. 416, C. A. **Consd.** Watkins *v.* Rymill (1883), 10 Q. B. D. 178. **Distd.** Woodgate *v.* G. W. Ry. Co. (1884), 49 J. P. 196. **Consd.** Skipwith *v.* G. W. Ry. Co. (1888), 59 L. T. 520. **Distd.** Acton *v.* Castle Mail Packets Co. (1895), 73 L. T. 158. **Refd.** Burke *v.* S. E. Ry. Co. (1879), 5 C. P. D. 1.

193. —— Misdelivery to third party.]—The owner of a bag exceeding the value of £5 deposited it for safe custody in a railway station cloak-room, paying 2*d.* & receiving a ticket with the following condition, of which he had notice, upon it: "The co. are not to be answerable for loss or detention of, or injury to, any article or property exceeding the value of £5 unless at the time of its delivery to them the true value & nature thereof be declared by the person delivering same, & a sum, at the rate of 1*d.* for every 20*s.* of the declared value be paid for such article of property for each day, or part of a day, for which same shall be left, in addition to the above-mentioned charge." The bag was delivered by mistake by a servant of the co. to a wrong person & never recovered. In an action by the owner to recover from the co. the value of the bag:—*Held:* as the word "loss" in Railway & Canal Traffic Act, 1854 (c. 31), s. 7, the words of which were followed by the condition to be construed, included "misdelivery" the word "loss" in the condition must be construed as having the same meaning, & judgment must be entered for defts.—SKIPWITH *v.* GREAT WESTERN RY. CO. (1888), 59 L. T. 520; 4 T. L. R. 589.

194. —— Damage while in cloak-room.]—A condition upon a cloak-room ticket issued by a railway co., that they "will not be responsible for any package exceeding the value of £10," protects the co. from liability, not only for the loss of an article deposited in the cloak-room, but also for damage or injury thereto while in their custody.—PRATT *v.* SOUTH EASTERN RY. CO., [1897] 1 Q. B. 718; 66 L. J. Q. B. 418; 76 L. T. 465; 45 W. R. 503; 13 T. L. R. 326, D. C.

195. Receiving or booking-office—Liability for loss—Proof of negligence.]—In an action by the consignor of goods against the proprietor of a general booking-office for the transmission of parcels by coach, etc., charging negligence, whereby the consignor lost his goods, it is not sufficient to prove that they never reached their destination nor were accounted for. The office-keeper's duty is to deliver to a carrier, & some evidence must be given showing specifically a breach of that duty.

A tradesman, having made up goods by order, delivered them at a booking-office, with the customer's address, & booked them, paying a fee of 2*d.*, to be forwarded to him, not specifying any particular conveyance, & no particular mode of transmission having been pointed out by the customer:—*Qu.* whether the consignor could maintain an action against the office-keeper for a negligent loss of the goods while under his charge.—GILBART *v.* DALE (1836), 5 Ad. & El. 543; 2 Har. & W. 383; 1 Nev. & P. K. B. 22; 6 L. J. K. B. 3; 111 E. R. 1270.

Annotation:—**Folld.** Mid. Ry. Co. *v.* Bromley (1856), 17 C. B. 372.

196. Power to limit liability by notice—Receiving-house keeper.]—A keeper of a booking-house cannot set up a notice, that he will not be answerable for goods, if above a certain value, as a defence against the effect of negligence in himself or his servants.

Deft. kept a house for the purpose of receiving trunks, to be conveyed by carriers. Pltf. delivered a trunk, containing wearing apparel, to be delivered at S., & paid 2*d.* for booking fee. There was a notice at the house, stating that deft. would not be

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luggage office, & in return for it got a receipt, bearing on the face "the co. only receive the within-mentioned articles upon the condition expressed on the back of this ticket." One of the conditions was that when any "article deposited in the co.'s cloak-room or warehouse" exceeding the value of £5 was lost the co. would not be liable, unless, at the time when the package was delivered, its true value was declared, & a corresponding additional charge paid. A notice to the same effect was likewise posted inside the office. Owing to the press of traffic the trunk was left by the co.'s officials upon the station platform, immediately outside the left luggage office, & disappeared. The value exceeded £5, & had not been declared:—*Held:* the railway co. were liable for the loss, as they were not in a position to enforce the condition above specified, the article not having been "deposited in the co.'s cloak-room or warehouse."—HANDON *v.* CALEDONIAN RY. CO. (1880), 7 R. (Ct. of Sess.) 966.—**SCOT.**

192 ii. —— ——.]—A commercial traveller deposited a hamper of goods of the value of £84 at the left luggage office of a railway co., & received a left luggage ticket therefor. The ticket bore on the face of it a notice that the co. only received articles upon the conditions printed on the back of the ticket. One of the conditions was that the co. would not be responsible for the loss of any article left for custody when the value of it exceeded £5, unless, at the time of delivery, the true value was declared & a special rate paid. The value of the hamper was not declared nor was the special rate paid. The traveller was aware of the notice on the ticket, but denied that he had read the condition on the back. Owing to press of traffic the hamper was not placed by the co.'s servants in the left luggage office, but was left outside on the platform & was lost:—*Held:* (1) the hamper was deposited subject to the conditions printed on the ticket; (2) the value being over £5 & not having been declared, the railway co. were not liable for the loss.—LYONS & CO. *v.* CALEDONIAN RY. CO. [1909] S. C. 1185.—**SCOT.**

195 i. *Receiving or booking office—Liability for loss.*]—Deft. was pltf.'s agent to book & receive parcels to be forwarded by pltf.'s post carts. For this service he received remuneration. A box of specie was delivered by a bank to deft. to be forwarded by the post cart. The deft. handed the box to his servant for delivery to the post cart driver. The servant instead of so delivering the box, stole it:—*Held:* deft. was negligent, & liable to pltf. for the loss of the box. *Semble:* though deft. received remuneration he was not a mere depositary, but also a mandatary, whose duty it was to deliver parcels received to the driver of pltf.'s carts, &, as such, would be liable to make good any loss sustained through any default either of himself or of his servants, however slight.—THOMAS *v.* BENNING (1878), Buch. 16.—**S. AF.**

answerable for goods above the value of £5, unless specially paid for. The trunk was lost & pltf. sued deft., who relied on the effect of the notice:—*Held:* the notice did not assist deft., as he was not in the situation of a carrier, or of an insurer.

Notice does not protect a carrier against negligence, & deft. can only be liable for negligence. Not being bound to receive parcels at all, deft. may by contract limit his responsibility, but he must give distinct notice to that effect (BEST, C.J.).—NEWBORN *v.* JUST (1825), 2 C. & P. 76.

197. —— Railway cloak-room.]—Where a person delivers a parcel at the cloak-room of a railway co., & receives a ticket with conditions on the back limiting the co.'s liability, he is not bound if he does not know there is writing on the ticket; but if he knows there is writing containing conditions he is bound; if he knows there is writing, but does not know it contains conditions, he is bound, if, in the opinion of the jury, reasonable notice is given that it contains conditions.

Pltf. delivered a parcel of a value exceeding £10, at defts.' cloak-room, paid 2*d.*, & received a ticket, on which were the words "see back." On the back was a condition that defts. would not be responsible for packages exceeding the value of £10. The parcel was lost, & pltf. sued for its value. The jury were asked whether pltf. knew of the condition, & whether he was under any obligation in the exercise of reasonable caution to make himself aware of it. They answered in the negative, & found for pltf.:—*Held:* (1) (MELLISH & BAGGALLAY, L.JJ.) there was a misdirection, & there must be a new trial; (2) (BRAMWELL, L.J.) judgment should have been entered for defts.—PARKER *v.* SOUTH EASTERN RY. CO., GABELL *v.* SAME (1877), 2 C. P. D. 416; 46 L. J. Q. B. 768; 36 L. T. 540; 41 J. P. 644; 25 W. R. 564, C. A.

Annotations:—**Consd.** Watkins *v.* Rymill (1883), 10 Q. B. D. 178. **Distd.** Woodgate *v.* G. W. Ry. Co. (1884), 51 L. T. 826. **Apprvd.** Richardson, Spence *v.* Rowntree, [1894] A. C. 217, H. L. **Consd.** Acton *v.* Castle Mail Packets Co. (1895), 1 Com. Cas. 135; Incandescent Gas Light Co. *v.* Cantelo (1895), 12 R. P. C. 262. **Folld.** Hooper *v.* Furness Ry. Co. (1907), 23 T. L. R. 451; Marriott *v.* Yeoward, [1909] 2 K. B. 987. **Consd.** Ryan *v.* Oceanic Steam Navigation Co. [1914] 3 K. B. 731, C. A. **Apprvd.** Hood *v.* Anchor Line (Henderson), [1918] A. C. 837, H. L. **Refd.** Foreman *v.* G. W. Ry. Co. (1878), 38 L. T. 851; Burke *v.* S. E. Ry. Co. (1879), 5 C. P. D. 1; G. N. Ry. Co. *v.* Palmer (1895), 72 L. T. 287; Cooke *v.* Wilson (1915), 85 L. J. K. B. 888, C. A.; Lyons *v.* Houghton, [1915] 1 K. B. 489; Roe *v.* Naylor (1918), 87 L. J. K. B. 958, C. A.

198. —— Repository for sale.]—Where a person delivers goods for sale to the proprietor of a sale repository, & accepts without objection a receipt, containing the words "subject to the conditions as exhibited upon the premises," he is bound by these conditions, whether he reads the receipt or not.

Pltf. delivered to deft., the proprietor of a repository for sale on commission of horses, carriages, & harness, a waggonette, & received a printed receipt containing in italics the words "subject to the conditions as exhibited on the premises." The conditions set out the charges made, & contained a clause giving deft. liberty to sell by public auction, with or without notice, any property left for more than a month, unless all expenses were previously paid. Pltf. did not read the receipt, & mislaid it for some months. Deft. having sold the waggonette under the conditions, pltf. brought an action to recover its value. At the trial the jury being directed that the question was whether deft. had or had not given pltf. reasonable notice of the conditions, found for pltf.:—*Held:* (1) the case was within the rule that where a common form stating terms of a proposed contract was delivered by one contracting party to another & accepted without objection, he was bound by its contents, whether he read it or not unless (*a*) the nature of the transaction was such that he might reasonably suppose that the document contained no terms, or (*b*) there was fraud, or (*c*) the document was misleading, & did actually mislead, or (*d*) the conditions were unreasonable; (2) the jury were misdirected, the question being whether deft. took reasonable means to give notice of the conditions to pltf., & that being a question of fact, to which on the undisputed facts of the case, by law one answer only would be given, it was the same thing as a question of law, & judgment must be entered for deft.—WATKINS *v.* RYMILL (1883), 10 Q. B. D. 178; 52 L. J. Q. B. 121; 48 L. T. 426; 47 J. P. 357; 31 W. R. 337, D. C.

Annotations:—**Folld.** Woodgate *v.* G. W. Ry. Co. (1884), 51 L. T. 826; Millar *v.* Toulmin (1886), 2 T. L. R. 707. **Consd.** De Clermont & Donner *v.* General Steam Navigation Co. (1891), 7 T. L. R. 187. **Folld.** Howcraft & Watkins *v.* Perkins (1900), 16 T. L. R. 217. **Distd.** Hooper *v.* Furness Ry. Co. (1907), 23 T. L. R. 451. **Refd.** The Stella, [1900] P. 161; Marriott *v.* Yeoward, [1909] 2 K. B. 987; Cooke *v.* Wilson (1915), 85 L. J. K. B. 888, C. A.; L. & Y. Ry. Co. *v.* Swann, [1916] 1 K. B. 263.

Notice of conditions.]—*See, further,* CARRIERS.

SUB-SECT. 6.—CUSTODY OF ANIMALS.

See ANIMALS, Vol. II., pp. 255—257.

SUB-SECT. 7.—CUSTODY OF DOCUMENTS BY SOLICITORS.

See SOLICITORS.

SUB-SECT. 8.—CUSTODY BY BANKERS.

See BANKERS & BANKING, Part II., sect. 19, *post.*

SUB-SECT. 9.—LIABILITY TO DISTRESS.

See DISTRESS.

SUB-SECT. 10.—LIEN OF BAILEE.

See LIEN.

SECT. 2.—HIRE OF CHATTELS.

SUB-SECT. 1.—THE CONTRACT OF HIRING.

199. Nature of contract.]—The third sort of bailment is when goods are left with the bailee to be used by him for hire; this is called *locatio et conductio,* & the lender is called *locator* & the borrower *conductor* (LORD HOLT, C.J. at p. 913).—COGGS *v.* BERNARD (1703), 2 Ld. Raym. 909; 1 Com. 133; 92 E. R. 107.

Annotations:—**Refd.** M'Kenzie *v.* M'Leod (1834), 10 Bing. 385. **Mentd.** Anon. (1692), 2 Salk. 522; Buckmyr *v.* Darnall (1704), 2 Ld. Raym. 1085; Grand Opinion for the Prerogative concerning the Royal Family (1717), Fortes.

PART III. SECT. 2, SUB-SECT. 1.

199 i. *Nature of contract.*]—Defts. agreed to make for pltf. certain tools &, in consideration of being allowed to use the tools, to make also a number of hubs:—*Held:* while using the tools defts were bailees thereof for hire.—LEGGO *v.* WELLAND VALE MANUFACTURING CO. (1901), 21 C. L. T. Occ. N. 374; 2 O. L. R. 45.—**CAN.**

Sect. 2.—Hire of chattels: Sub-sects. 1 & 2, A.]

Rep. 401; Robinson *v.* Green (1723), 1 Stra. 574; Shelton *v.* Osborn (1729), 1 Barn. K. B. 260; Boucher *v.* Lawson (1736), Lee *temp.* Hard. 194; Kettle *v.* Bromsall (1738), Willes, 118; Charitable Corpn. *v.* Sutton (1742), 2 Atk. 400; Hartop *v.* Hoare (1743), 3 Atk. 44; Ryall *v.* Rowles (1750), 1 Ves. Sen. 348; Pasley *v.* Freeman (1789), 3 Term Rep. 51; Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357, Ex. Ch.; Elsee *v.* Gatward (1793), 5 Term Rep. 143; Guilliam *v.* Barnett (1804), 2 Smith, K. B. 155; Gibson *v.* Inglis (1814), 4 Camp. 72; Cavenagh *v.* Such (1815), 1 Price, 328; Pippin *v.* Sheppard (1822), 11 Price, 400; Storr *v.* Crowley (1825), M'Cle. & Yo. 129; Whitehead *v.* Greetham (1825), 2 Bing. 464; Corbett *v.* Packington (1827), 6 B. & C. 268; Gledstane *v.* Hewitt (1831), 1 Tyr. 445; *Ex p.* Cording (1832), 4 B. & Ad. 198; R. *v.* Cording (1832), 1 Nev. & M. K. B. 35; Vaughan *v.* Menlove (1837), 3 Bing. N. C. 468; Boorman *v.* Brown (1842), 3 Q. B. 511, Ex. Ch.; Ross *v.* Hill (1846), 2 C. B. 877; G. N. Ry. Co. *v.* Shepherd (1852), 8 Exch. 30; Lewis *v.* Nicholson (1852), 21 L. J. Q. B. 311; Micklethwaite *v.* Merrill (1852), 19 L. T. O. S. 61; Shepherd *v.* G. N. Ry. Co. (1852), 19 L. T. O. S. 324; Balfe *v.* West (1853), 13 C. B. 466; Crouch *v.* L. & N. W. Ry. Co. (1854), 14 C. B. 255; Dansey *v.* Richardson (1854), 3 E. & B. 144; Baxendale *v.* Eastern Counties Ry. Co. (1858), 27 L. J. C. P. 137; Blakemore *v.* Bristol & Exeter Ry. Co. (1858), 8 E. & B. 1035; Syred *v.* Carruthers (1858), E. B. & E. 469; Belfast & Ballymena Ry. Co. *v.* Keys (1861), 9 H. L. Cas. 556, H. L.; MacCarthy *v.* Young (1861), 6 H. & N. 329; Marriott *v.* Anchor Reversionary Co. (1861), 3 De G. F. & J. 177, L.C. & L.JJ.; Martin *v.* Reid (1862), 11 C. B. N. S. 730; Taylor *v.* Caldwell (1863), 3 B. & S. 826; Beal *v.* South Devon Ry. Co. (1864), 11 L. T. 184, Ex. Ch.; Pigot *v.* Cubley (1864), 15 C. B. N. S. 701; P. & O. Steam Navigation Co. *v.* Shand (1865), 3 Moo. P. C. C. N. S. 272, P. C.; Swire *v.* Leach (1865), 5 New Rep. 314; Donald *v.* Suckling (1866), L. R. 1 Q. B. 585; Grill *v.* General Iron Screw Collier Co. (1866), 12 Jur. N. S. 727; Skelton *v.* L. & N. W. Ry. Co. (1867), L. R. 2 C. P. 631; Giblin *v.* McMullen (1869), L. R. 2 P. C. 317, P. C.; Readhead *v.* Midland Ry. Co. (1869), L. R. 4 Q. B. 379, Ex. Ch.; Liver Alkali Co. *v.* Johnson (1874), L. R. 9 Exch. 338, Ex. Ch.; Searle *v.* Laverick (1874), L. R. 9 Q. B. 122; Nugent *v.* Smith (1875), 1 C. P. D. 19; Cohen *v.* G. E. Ry. Co. (1876), 45 L. J. Q. B. 298; Harris *v.* G. W. Ry. Co. (1876), 1 Q. B. D. 515; Hoare *v.* G. W. Ry. Co. (1877), De Colyar's County Ct. Cases, 192; Bergheim *v.* G. E. Ry. Co. (1878), 3 C. P. D. 221, C. A.; Foulkes *v.* Met. Dist. Ry. Co. (1880), 28 W. R. 526, C. A.; Cutler *v.* North London Ry. Co. (1887), 56 L. T. 639; The Moorcock (1889), 14 P. D. 64, C. A.; Shaw *v.* G. W. Ry. Co., [1894] 1 Q. B. 373; The Winkfield, [1902] P. 42, C. A.; Harris *v.* Perry, [1903] 2 K. B. 219, C. A.; Wallis *v.* G. N. Ry. Co. (Ireland) (1903), 12 Ry. & Can. Tr. Cas. 38; Cheshire *v.* Bailey, [1905] 1 K. B. 237, C. A.; Clarke *v.* West Ham Corpn., [1909] 2 K. B. 858, C. A.; Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305, C. A.; Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A.; Attenborough *v.* Solomon, [1913] A. C. 76, H. L.; Hatton *v.* Car Maintenance Co. (1914), 110 L. T. 765; Banbury *v.* Bank of Montreal (1918), 87 L. J. K. B. 1158, H. L.

200. —— Cab-driver & cab-proprietor.]—In the case of a horse-drawn cab, where the driver is given it in charge under terms whereby the driver pays for the hire of the cab a percentage of his takings, but is entirely free to ply for hire where & when he pleases, the relation between the proprietor & driver is that of bailor & bailee.—SMITH *v.* GENERAL MOTOR CAB CO., LTD., [1911] A. C. 188; 80 L. J. K. B. 839; 105 L. T. 113; 27 T. L. R. 370; *sub nom.* BATES-SMITH *v.* GENERAL MOTOR CAB CO., LTD., 55 Sol. Jo. 439; 4 B. W. C. C. 249, H. L.

Annotations:—**Refd.** R. *v.* Messer (1911), 82 L. J. K. B. 913, C. C. A.; Wilmerson *v.* Lynn & Hamburg S.S. Co., [1913] 3 K. B. 931, C. A.; Kemp *v.* Elisha, [1918] 1 K. B. 228, C. A. **Mentd.** Curtis *v.* Plumptre (1913), 6 B. W. C. C. 87, C. A.

See, further, STREET & AERIAL TRAFFIC.

201. Illegal or immoral purpose.]—One who makes a contract for hire with the knowledge that the other contracting party intends to apply the subject-matter of the contract to an immoral purpose cannot recover upon the contract; it is not necessary that he should expect to be paid out of the proceeds of the immoral act.

Deft., a prostitute, was sued by pltfs., coach-builders, for the hire of a brougham. There was no evidence that pltfs. looked expressly to the proceeds of deft.'s prostitution for payment, but the jury found that they knew her to be a prostitute, & supplied the brougham with a knowledge that it would be, as in fact it was, used by her as part of her display to attract men:—*Held:* pltfs. could not recover.—PEARCE *v.* BROOKES (1866), L. R. 1 Exch. 213; 4 H. & C. 358; 35 L. J. Ex. 134; 14 L. T. 288; 30 J. P. 295; 12 Jur. N. S. 324; 14 W. R. 614.

Annotations:—**Apprvd.** Waugh *v.* Morris (1873), L. R. 8 Q. B. 202. **Apld.** Upfill *v.* Wright (1910), 80 L. J. K. B. 254, D. C. **Refd.** Cowan *v.* Milbourn (1867), L. R. 2 Exch. 230; Taylor *v.* Chester (1869), 10 B. & S. 237; Seymour *v.* London & Provincia Marine Insce. (1872), 41 L. J. C. P. 193. **Mentd.** Begbie *v.* Phosphate Sewage Co. (1875), 33 L. T. 470; Scott *v.* Brown, Doering, McNab, Slaughter & May *v.* Brown, Doering, McNab, [1892] 2 Q. B. 724, C. A.; Saxby *v.* Fulton, [1909] 2 K. B. 208, C. A.

SUB-SECT. 2.—RIGHTS AND OBLIGATIONS OF OWNER.

A. As between Owner and Hirer.

202. Must allow bailee possession during term of hire.]—Where a chattel is hired for a given time the bailor may not disturb the bailee in his enjoyment, as for that space of time the bailee has a good special property against all the world.—LEE *v.* ATKINSON & BROOKS (1609), Cro. Jac. 236; Yelv. 172; 1 Brownl. 217; 79 E. R. 204.

Annotation:—**Consd.** Donald *v.* Suckling (1866), L. R. 1 Q. B. 585.

203. Warranty of fitness—General rule.]—If a carriage be let for hire, & it breaks down on the journey, the letter of it is liable, & not the party who hires it. So, if a party hire anything else of the nature of goods & chattels, the party furnishing the goods is bound to furnish that which is fit to be used for the purpose intended. In every point of view the nature of the contract is such, that an obligation is imposed upon the party letting for hire to furnish that which is proper for the hirer's accommodation.—SUTTON *v.* TEMPLE (1843), 12 M. & W. 52; 13 L. J. Ex. 17; 2 L. T. O. S. 102, 150; 7 Jur. 1065; 152 E. R. 1108.

Annotations:—**Apld.** Fowler *v.* Lock (1872), L. R. 7 C. P. 272. **Refd.** Hart *v.* Windsor (1843), 12 M. & W. 68; Wilson *v.* Finch Hatton (1877), 2 Ex. D. 336; Manchester Bonded Warehouse Co. *v.* Carr (1880), 5 C. P. D. 507. **Mentd.** Readhead *v.* Mid. Ry. Co. (1867), L. R. 2 Q. B. 412; Cheater *v.* Cater, [1918] 1 K. B. 247, C. A.

204. —— Hire for particular purpose.]—Where a horse is let out on hire for a particular journey, the party letting impliedly warrants that the animal is fit for such journey, & if, being then unsound & unfit, he falls lame on the journey, & is unable to proceed, the party hiring may leave him at an

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PART III. SECT. 2, SUB-SECT. 2.—A.

204 i. *Warranty of fitness—Hire for particular purpose.*]—Pltf. sued defts. for the value of an engine & boiler, which had been hired by defts., & which boiler had exploded when in their possession immediately after they had begun to use it, & while in charge of a competent engineer:—*Held:* as the lessor of a chattel for hire impliedly warranted that it was reasonably fit for the purpose for which it was let, pltf., in the absence of negligence on the part of defts., could not recover.—REYNOLDS *v.* ROXBURGH (1886), 10 O. R. 649.—**CAN.**

204 ii. —— —— *Special contract.*]—Applt. leased to resps. a machine, which he guaranteed would "properly fiberize & screen from 8 to 10 tons of No. 3 crude asbestos per day of ten hours." The machine was set up in resps.' premises by men furnished by applt. In an action of damages by resps. against applt. for breach of contract:—*Held:* under the terms of the clause of warranty, even without proof that there was any defect in the construction of the machine, resps. were entitled to recover, on evidence that the machine did not do, & was not capable of doing, the amount of work which it was guaranteed

inn, & give notice to the owner, whose duty it is to send for him.—CHEW *v.* JONES (1847), 10 L. T. O. S. 231.

Annotation :—**Refd.** Fowler *v.* Lock (1872), L. R. 7 C. P 272.

205. *S. P.* JONES *v.* CHEW (1847), 10 L. T. O. S. 268.

See, further, ANIMALS, Vol. II., pp. 255—257.

206. —— ——.]—A person letting out a carriage to hire for a specific purpose, by so doing warrants that it shall be reasonably fit for that purpose, & (if negligence is necessary to be proved) it is negligence in any one to let out to hire a carriage to convey either persons or merchandise, without previously taking care to ascertain that it is reasonably safe.

A person, who, on hiring a carriage, looks at it merely to test its capacity to hold a certain number of persons, does not by so doing select it so as thereby to relieve the party letting it to hire from liability with respect to its safety.—JONES *v.* PAGE (1867), 15 L. T. 619.

207. —— ——.]—Pltf. entered into an agreement with defts. to supply a band to perform on the sea front. It was a term of the contract that defts. should hire out five hundred chairs to pltf. for a certain period at a fixed rental. Pltf. was entitled to let the chairs to the public, & was under covenant to repair & redeliver them in good order at the end of the term. Pltf. alleged that many of the chairs as delivered were unfit for use, & that defts. had been guilty of a breach of an implied term in the contract by allowing persons to use free seats near the band. He brought an action for damages. Defts. counter-claimed for damages for non-repair of the chairs. The jury found that some of the chairs as delivered were unfit for use, that pltf. had suffered damage owing to the use of the free seats, & that pltf. had failed to repair some of the chairs :—*Held :* (1) there was an implied warranty that the chairs as delivered should be fit for use, but it was not a further implied term of the agreement that defts. should not let out free seats ; (2) it could not be laid down as a proposition of law universally applicable to every contract that whenever something was done by a grantor, which prevented or had a tendency to reduce the profits which the grantee would naturally expect to get out of the contract, there was a good cause of action, but each particular contract must be considered by itself.—DARE *v.* BOGNOR URBAN DISTRICT COUNCIL (1912), 76 J. P. 425 ; 28 T. L. R. 489 ; 10 L. G. R. 797, C. A.

208. —— **Injury to hirer from defect in chattel.**]—Where a cab-driver hires from a cab-proprietor a horse & cab at a certain sum per day, the relationship of master & servant does not exist between the proprietor & the driver so as to deprive the driver of his remedy by action for personal injuries sustained by him, by reason of the proprietor hiring out to him a horse not reasonably fit & safe to drive.—GIBBONS *v.* STANDON (1867), 16 L. T. 497.

209. —— ——.]—Pltf., a cab-driver, obtained from deft., a cab-proprietor, a horse & cab on the usual terms, which were that the driver should at the end of the day hand over to the proprietor 18*s.*, retaining for himself all the day's earnings over that sum, the day's food for the horse being supplied by the owner, & the latter having no control over the driver after leaving the yard. The horse with which the driver was furnished, which was fresh from the country & had never before been harnessed to a cab, bolted & overturned the cab & injured the driver. The horse was not reasonably fit to be driven in a cab :—*Held :* (WILLES, J., *diss.*) the relation between the parties was that of bailor & bailee, & the proprietor was responsible for the injury sustained by the driver.—FOWLER *v.* LOCK (1872), L. R. 7 C. P. 272 ; 41 L. J. C. P. 99 ; 26 L. T. 476 ; 20 W. R. 672 ; S. C. on appeal in Ex. Ch., where the court was divided on this point (1874), L. R. 9 C. P. 751, n., Ex. Ch. ; *on further proceedings :* (1874), L. R. 10 C. P. 90.

Annotations :—**Distd.** Steel *v.* Lester (1877), 3 C. P. D. 121. **Apprvd.** Venables *v.* Smith (1877), 2 Q. B. D. 279. **Consd.** Hyman *v.* Nye (1881), 6 Q. B. D. 685. **Expld.** Bates-Smith *v.* General Motor Cab Co. (1911), 4 B. W. C. C. 249, H. L. **Refd.** Robertson *v.* Amazon Tug & Lighterage Co. (1881), 7 Q. B. D. 598, C. A. ; Gates *v.* Bill, [1902] 2 K. B. 38, C. A. ; Doggett *v.* Waterloo Taxi-Cab Co., [1910] 2 K. B. 336, C. A. ; Smith *v.* General Motor Cab Co., [1911] A. C. 188, H. L. ; Kemp *v.* Elisha, [1918] 1 K. B. 228, C. A. **Mentd.** King *v.* London Improved Cab Co. (1889), 23 Q. B. D. 281, C. A.

210. —— ——.]—A *venire de novo* having been awarded, at the subsequent trial the jury found that the horse was not reasonably fit to be driven in a cab, that pltf. did not take upon himself the risk of its being reasonably fit to be so driven, that deft. did not take reasonable precautions to supply pltf. with a reasonably fit horse, & that the horse & cab were intrusted to pltf. as bailee & not as servant. A verdict having been therefore entered for pltf., the ct. refused to disturb it.—FOWLER *v.* LOCK (1874), L. R. 10 C. P. 90 ; 43 L. J. C. P. 394, n. ; 31 L. T. 844 ; 23 W. R. 415 ; *earlier proceedings :* (1872), L. R. 7 C. P. 272.

Annotations :—**Consd.** Steel *v.* Lester (1877), 3 C. P. D. 121. **Refd.** Robertson *v.* Amazon Tug & Lighterage Co. (1881), 7 Q. B. D. 598, C. A.

See Nos. 30, 31, 200, *ante.*

211. —— ——.]—Pltf. hired from deft. a job-master, for a specified journey, a carriage, a pair of horses, & a driver. During the journey a bolt in the under part of the carriage broke, the splinter bar became displaced, the horses started off, the carriage was upset, & pltf. injured. In an action against deft. for negligence, the jury were directed that, if in their opinion deft. took all reasonable care to provide a fit & proper carriage, their verdict ought to be for him. The jury found a verdict for deft., & in particular that the carriage was reasonably fit for the purpose for which it was hired, & that the defect in the bolt could not have been discovered by deft. by ordinary care & attention :—*Held :* the direction was wrong, for it was the duty of deft. to supply a carriage as fit for the purpose for which it was hired as care & skill could render it, & the evidence was not such as to show that the breakage of the bolt was, in the proper sense of the word, an accident not preventible by any care or skill, or to warrant the finding of the jury that the carriage was reasonably fit for the purpose for which it was hired.

A person who lets out carriages is not responsible for all defects discoverable or not ; he is not an insurer against all defects, nor is he bound to take more care than coach proprietors or railway cos. who provide carriages for the public to travel in, but he is bound to take as much care as they, & although not an insurer against all defects, he is an insurer against all defects which care & skill can guard against. His duty is to supply a carriage as fit for the purpose for which it is hired as care & skill can render it, & if whilst the carriage is being properly used for such purpose it breaks down, it

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to do.—COSTIGAN *v.* JOHNSON (1897), Q. R. 6 Q. B. 308.—**CAN.**

d. *Recovery of chattel—Owner cannot re-take by force.*]—An agreement in a lease of furniture, that, in default of payment of rent, the lessor shall be permitted to take it away without legal proceedings, does not authorise him when there is objection on the part of the lessee to take the matter into his own hands & carry off the furniture by force, but he must follow the ordinary legal formalities.—GAGNON *v.* VIAU (1898), Q. R. 14 S. C. 429.—**CAN.**

Sect. 2.—Hire of chattels: Sub-sect. 2, A. & B. Sub-sect. 3, A.]

becomes incumbent on the person who has let it out to show that the breakdown was in the proper sense of the word an accident not preventible by any care or skill (LINDLEY, J.).—HYMAN *v.* NYE (1881), 6 Q. B. D. 685 ; 44 L. T. 919 ; 45 J. P. 554.

Annotations :—**Distd.** Robertson *v.* Amazon Tug & Lighterage Co. (1881), 7 Q. B. D. 598, C. A. **Folld.** Vogan *v.* Oulton (1898), 79 L. T. 384. **Consd.** Maclenan *v.* Segar, [1917] 2 K. B. 325. **Refd.** Wing *v.* London General Omnibus Co., [1909] 2 K. B. 652, C. A. ; Lilly *v.* Tilling & London County Council (1912), 57 Sol. Jo. 59, C. A. Newberry *v.* Bristol Tramways & Carriage Co. (1912), 107 L. T. 801, C. A. **Mentd.** The West Cock, [1911] P. 23.

212. —— **Hire of specific thing.**]—When there is a specific thing, there is no implied contract that it shall be reasonably fit for the purpose for which it is hired or is to be used. That is the great distinction between a contract to supply a thing which is to be made & which is not specific, & a contract with regard to a specific thing. In the one case you take the thing as it is, in the other the person who undertakes to supply it is bound to supply a thing reasonably fit for the purpose for which it is made (BRETT, L.J.).—ROBERTSON *v.* AMAZON TUG & LIGHTERAGE CO. (1881), 7 Q. B. D. 598 ; 51 L. J. Q. B. 68 ; 46 L. T. 146 ; 30 W. R. 308 ; 4 Asp. M. L. C. 496, C. A.

Annotations :—**Refd.** The Westcock, [1911] P. 208, C. A. **Mentd.** The Glenmorven, [1913] P. 141.

—— **Ships.**]—*See* SHIPPING & NAVIGATION.

213. —— **Measure of damages—Money paid by hirer to third parties.**]—A. having agreed to convey a party of persons to some races & back at so much a head, hired a carriage from B. for the purpose, which broke down on the journey by reason of some defect in one of the wheels. Some of the injured passengers having recovered damages from A. in the county ct. :—*Held :* A. was entitled to recover, in an action against B. for breach of implied warranty to supply a carriage reasonably fit for the purpose, the amounts which he had been so compelled to pay to his passengers.—JONES *v.* PAGE (1867), 15 L. T. 619.

214. —— —— ——.]—Where a horse is hired for a particular journey, & it falls lame in the course of performance, the party hiring it may leave it in some place of safety & give notice thereof to the owner ; after that his responsibility ceases in respect of the animal, & if the owner omits to send for it after such notice, he is liable to an action for the keep at the suit of the party hiring, who is primarily liable to the innkeeper.—JONES *v.* CHEW (1847), 10 L. T. O. S. 268.

Annotation :—**Refd.** Fowler *v.* Lock (1872), L. R. 7 C. P. 272.

215. —— —— ——.]—Plts., a firm of stevedores, contracted to discharge a cargo from deft.'s ship, deft. agreeing to supply all necessary cranes, chains, & other gearing reasonably fit for that purpose. Deft., in breach of his agreement, supplied a defective chain, which broke while being used, & in consequence one of pltfs.' workmen was injured. Pltfs. might have discovered the defect in the chain by the exercise of reasonable care. The workman brought an action for compensation under Employers' Liability Act, 1880 (c. 42), ss. 1, 2, against pltfs., who settled the action by paying the workman £125, which sum they sought to recover from deft. as damages for breach of his contract. It was not disputed that the settlement of the action brought by the workman was a proper one :—*Held :* pltfs.' liability to pay compensation to their workman was the natural consequence of deft.'s breach of contract, & such as might reasonably be supposed to have been within the contemplation of the parties when the contract was entered into, & the damages claimed were not too remote.—MOWBRAY *v.* MERRYWEATHER, [1895] 2 Q. B. 640 ; 65 L. J. Q. B. 50 ; 73 L. T. 459 ; 59 J. P. 804 ; 44 W. R. 49 ; 40 Sol. Jo. 9 ; 14 R. 767, C. A.

Annotations :—**Apld.** Vogan *v.* Oulton (1898), 79 L. T. 384 ; Bentley *v.* Metcalfe (1906), 75 L. J. K. B. 891, C. A. **Refd.** Scott *v.* Foley, Aikman (1899), 5 Com. Cas. 53. **Mentd.** Hawkins *v.* Smith (1896), 12 T. L. R. 532, D. C.

216. —— —— ——.]—Deft. supplied sacks to pltfs. for the purpose of being used in unloading a cargo of peas from a ship. One of these sacks, while it was being hoisted full of peas from the hold of the ship, broke & fell & injured a man who was engaged in the work. The injured man recovered from pltfs. £25 damages & costs. The sack in question, when supplied by deft., was unfit for the purpose for which it was supplied :—*Held :* pltfs. were entitled to recover, as damages for breach of warranty, the damages & costs which they had incurred.—VOGAN & CO. *v.* OULTON (1899), 81 L. T. 435 ; 16 T. L. R. 37, C. A.

Annotation :—**Refd.** Scott *v.* Foley, Aikman (1899), 16 T. L. R. 55.

217. **Liability for acts of servants.**]—A manufacturing jeweller hired from a jobmaster a carriage with a horse & driver, at an agreed weekly sum, for the express purpose of sending his traveller with a stock of jewels to go round to his customers. One day while making his rounds the traveller went into an hotel & left the carriage, with a stock of jewels inside it, in the charge of the driver. Before leaving the carriage the traveller locked the door. The driver then went into a coffee-house, leaving the carriage unattended in the street. A thief drove the carriage away & stole the jewels. The jeweller brought an action against the jobmaster to recover the value of the stolen jewels :—*Held :* it was the duty of deft. to provide a driver, who should take ordinary care of the carriage during the temporary absence of the traveller, & the theft of the jewels was the natural & ordinary result of a breach of such duty, so as to make deft. liable for the loss suffered by pltf.—ABRAHAMS *v.* BULLOCK (1902), 86 L. T. 796 ; 50 W. R. 626 ; 18 T. L. R. 701, C. A.

Annotation :—**Distd.** Cheshire *v.* Bailey, [1905] 1 K. B. 237, C. A.

218. —— .]—Pltf., a wholesale silversmith, hired from deft., a jobmaster, a brougham, horse, & coachman, for the purpose of driving pltf.'s traveller about London with samples of pltf.'s wares to be shown to customers. It was known to deft. that, in the course of business, occasions would arise when the traveller would have to leave the brougham with samples in it in charge of the coachman. On one of such occasions the coachman, in pursuance of an arrangement made with confederates, drove the brougham to a place where a great portion of the samples in it was stolen by them. In an action brought by pltf. against deft. to recover the value of the goods so stolen :—*Held :* deft. was not responsible in respect of the criminal act of his servant, same not having been done within scope of his employment.—CHESHIRE *v.* BAILEY, [1905] 1 K. B. 237 ; 74 L. J. K. B. 176 ; 92 L. T. 142 ; 53 W. R. 322 ; 21 T. L. R. 130 ; 49 Sol. Jo. 134, C. A.

Annotations :—**Consd.** Malcolm, Brunker *v.* Waterhouse (1908), 24 T. L. R. 854 ; Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489, C. A. **Refd.** Lloyd *v.* Grace, Smith, [1912] A. C. 716, H. L.

See, further, MASTER & SERVANT.

Owner's rights of action against hirer for non-return.] — *See* Part IV., sect. 1, sub-sect. 1, *post.*

Assignment of payment for hire—Bankruptcy of assignor.]—*See* BANKRUPTCY & INSOLVENCY.

B. As between Owner and Third Parties.

See Part IV., sect. 2, *post.*

SUB-SECT. 3.—RIGHTS AND OBLIGATIONS OF HIRER.

A. As between Hirer and Owner.

219. Obligation to take care—General rule.]—If goods are let out for reward, the hirer is bound to use the utmost diligence, such as the most diligent father of a family uses; & if he uses that, he shall be discharged.—COGGS *v.* BERNARD (1703), 2 Ld. Raym. 909; 1 Com. 133; 92 E. R. 107.

Annotations:—**Refd.** Buckmyr *v.* Darnall (1704), 2 Ld. Raym. 1085; Vaughan *v.* Menlove (1837), 3 Bing. N. C. 468; Balfe *v.* West (1853), 13 C. B. 466; Harris *v.* G. W. Ry. Co. (1876), 1 Q. B. D. 515; Bergheim *v.* G. E. Ry. Co. (1878), 3 C. P. D. 221, C. A.; Cutler *v.* North London Ry. Co. (1887), 56 L. T. 639. **Mentd.** Anon. (1692), 2 Salk. 522; Grand Opinion for the Prerogative concerning the Royal Family (1717), Fortes. Rep. 401; Robinson *v.* Green (1723), 1 Stra. 574; Shelton *v.* Osborn (1729), 1 Barn. K. B. 260; Boucher *v.* Lawson (1736), Lee *temp.* Hard. 194; Kettle *v.* Bromsall (1738), Willes, 118; Charitable Corpn. *v.* Sutton (1742), 2 Atk. 400; Hartop *v.* Hoare (1743), 3 Atk. 44; Ryall *v.* Rowles (1750), 1 Ves. Sen. 348; Pasley *v.* Freeman (1789), 3 Term Rep. 51; Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357, Ex. Ch.; Elsee *v.* Gatward (1793), 5 Term Rep. 143; Guilliam *v.* Barnett (1804), 2 Smith, K. B. 155; Gibson *v.* Inglis (1814), 4 Camp. 72; Cavenagh *v.* Such (1815), 1 Price, 328; Pippin *v.* Sheppard (1822), 11 Price, 400; Storr *v.* Crowley (1825), M'Cle. & Yo. 129; Whitehead *v.* Greetham (1825), 2 Bing. 464; Corbett *v.* Packington (1827), 6 B. & C. 268; Gledstane *v.* Hewitt (1831), 1 Tyr. 445; *Ex p.* Cording (1832), 4 B. & Ad. 198; R. *v.* Cording (1832), 1 Nev. & M. K. B. 35; M'Kenzie *v.* M'Leod (1834), 10 Bing. 385; Boorman *v.* Brown (1842), 3 Q. B. 511, Ex. Ch.; Ross *v.* Hill (1846), 2 C. B. 877; G. N. Ry. Co. *v.* Shepherd (1852), 8 Exch. 30; Lewis *v.* Nicholson (1852), 21 L. J. Q. B. 311; Mickleth waite *v.* Merrill (1852), 19 L. T. O. S. 61; Shepherd *v.* G. N. Ry. Co. (1852), 19 L. T. O. S. 324; Crouch *v.* L. & N. W. Ry. Co. (1854), 14 C. B. 255; Dansey *v.* Richardson (1854), 3 E. & B. 144; Baxendale *v.* Eastern Counties Ry. Co. (1858), 27 L. J. C. P. 137; Blakemore *v.* Bristol & Exeter Ry. Co. (1858), 8 E. & B. 1035; Syred *v.* Carruthers (1858), E. B. & E. 469; Belfast & Ballymena Ry. Co. *v.* Keys (1861), 9 H. L. Cas. 556, H. L.; MacCarthy *v.* Young (1861), 6 H. & N. 329; Marriott *v.* Anchor Reversionary Co. (1861), 3 De G. F. & J. 177, L.C. & L.JJ.; Martin *v.* Reid (1862), 11 C. B. N. S. 730; Taylor *v.* Caldwell (1863), 3 B. & S. 826; Beal *v.* South Devon Ry. Co. (1864), 11 L. T. 184, Ex. Ch.; Pigot *v.* Cubley (1864), 15 C. B. N. S. 701; P. & O. Steam Navigation Co. *v.* Shand (1865), 3 Moo. P. C. C. N. S. 272, P. C.; Swire *v.* Leach (1865), 5 New Rep. 314; Donald *v.* Suckling (1866), L. R. 1 Q. B. 585; Grill *v.* General Iron Screw Collier Co. (1866), 12 Jur. N. S. 727; Skelton *v.* L. & N. W. Ry. Co. (1867), L. R. 2 C. P. 631; Giblin *v.* McMullen (1869), L. R. 2 P. C. 317, P. C.; Readhead *v.* Mid. Ry. Co. (1869), L. R. 4 Q. B. 379, Ex. Ch.; Liver Alkali Co. *v.* Johnson (1874), L. R. 9 Exch. 338, Ex. Ch.; Searle *v.* Laverick (1874), L. R. 9 Q. B. 122; Nugent *v.* Smith (1875), 1 C. P. D. 19; Cohen *v.* G. E. Ry. Co. (1876), 45 L. J. Q. B. 298; Hoare *v.* G. W. Ry. Co. (1877), De Colyar's County Ct. Cases, 192; Foulkes *v.* Met. Dist. Ry. Co. (1880), 28 W. R. 526, C. A.; The Moorcock (1889), 14 P. D. 54, C. A.; Shaw *v.* G. W. Ry. Co., [1894] 1 Q. B. 373; The Winkfield, [1902] P. 42, C. A.; Harris *v.* Perry, [1903] 2 K. B. 219, C. A.; Wallis *v.* G. N. Ry. Co. (Ireland) (1903), 12 Ry. & Can. Tr. Cas. 38; Cheshire *v.* Bailey, [1905] 1 K. B. 237, C. A.; Clarke *v.* West Ham Corpn., [1909] 2 K. B. 858, C. A.; Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305, C. A.; Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A.; Attenborough *v.* Solomon, [1913] A. C. 76, H. L.; Hatton *v.* Car Maintenance Co. (1914), 110 L. T. 763; Banbury *v.* Bank of Montreal (1918), 87 L. J. K. B. 1158, H. L.

220. —— ——.]—After a hired horse is exhausted & has refused its feed the hirer is bound not to use it.—BRAY *v.* MAYNE (1818), Gow, 1, N. P.

221. —— ——.]—Deft. hired a horse for the purpose of its being ridden on the stage of a theatre during the performance of a play. While being so ridden the flooring of the stage gave way, & the horse fell & was injured. Deft. had hired the theatre for a week, & there appeared to be nothing wrong with the flooring, but deft. did not examine it before the horse went on the stage. Apart from such want of examination, there was no suggestion of negligence on the part of any one:—*Held:* (1) deft. being an ordinary bailee for hire, was bound only to take such care of the horse as a prudent man would take of his own property, & he was not bound to discover the defect in the flooring before taking the horse on the stage; (2) judgment should be entered for deft.—TILLING *v.* BALMAIN (1892), 8 T. L. R. 517, D. C.

See, further, ANIMALS, Vol. II., pp. 255—257.

222. —— **Onus of proof.**]—In an action for not taking proper care of a hired horse, whereby his knees were broken, pltf. must give some positive evidence of negligence, & it is not enough to prove that the animal was returned by deft. with his knees broken, although he had often been let out to hire before without having fallen down.—COOPER *v.* BARTON (1810), 3 Camp. 5, n., N. P.

223. —— ——.]—In a contract of hiring there is an obligation upon the hirer to restore the chattel at the end of the bailment in as good condition as he received it, or, if he cannot do that, to show that he exercised reasonable care in the keeping of the chattel.

Pltf., a jobmaster, for several years let carriages & horses to deft. by the year, & let to deft. a pair of horses, which were quiet in harness & satisfactory to deft.'s coachman. The horses were kept in stables adjoining mews, & while being groomed in the mews one of them bolted & was injured. In an action by the jobmaster for damages, the jury returned a verdict for pltf.:—*Held:* (1) it was incumbent on deft. to prove that he exercised reasonable care in the keeping of the horses, & whether he had done so or not was a question of fact for the jury; (2) there were not sufficient grounds for disturbing the verdict at which the jury had arrived.—DOLLAR *v.* GREENFIELD (1905), *Times*, May 19, H. L.

224. Must keep in repair.]—Where a person hires a specific thing for the purpose of using it, there is an implied contract on the part of the hirer that he will in the meantime keep the thing in repair, *i.e.*, that he will not by want of reasonable care after the contract is made allow it to become worse

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PART III. SECT. 2, SUB-SECT. 3.—A.

222 i. *Obligation to take care—Onus of proof.*]—A bailee for hire, who returns the property bailed in a damaged condition, & who, being the only person with full knowledge of the circumstances causing the damage, fails to give any explanation of same, is presumed to have been negligent. This applies to the hirer of a horse & carriage from a livery stable keeper.—GREMLEY *v.* STUBBS (1908), 39 N. B. R. 21 6 E. L. R. 33.—**CAN.**

222 ii. —— ——.]—The lessee, always obliged to employ the thing rented properly & carefully, is, in the case of a fire, subject to a stricter rule, since there is against him in that case a presumption of negligence, *e.g.*, he is presumed not to have so acted & to have been the cause of the fire; & he can repel this presumption only by showing that, whatever may have been its cause & whether known or not it did not result from his negligence.—LABBÉ *v.* MURPHY (1896), 27 S. C. R. 126.—**CAN.**

222 iii. —— ——.]—The question of the burden of proof in cases of accidental injury to goods bailed depends upon the particular circumstances of each case. In some cases, from the nature of the accident, it lies upon the bailee to account for its occurrence, & thus to show that it has not been caused by his negligence. In such cases it is for him to give a *primâ facie* explanation in order to shift the burden of proof to the person who seeks to make him liable. If he gives an explanation which is uncontradicted by reasonable evidence of negligence, & is not *primâ facie* improbable, the ct. is bound in law to find in his favour, & the mere happening of the accident is not sufficient proof of negligence.—SHIELDS *v.* WILKINSON (1887), I. L. R. 9 All. 398.—**IND.**

222 iv. —— ——.]—A horse was delivered into the possession of a bailee under a contract of bailment, & while in the possession of the bailee met with an accident which resulted in its death:—*Held:* the death of the horse was *primâ facie* inconsistent with the exercise of reasonable care by the bailee, & the *onus* was on the bailee to prove that he had not been guilty of negligence.—OLDHAM *v.* LYONS, LTD. (1908), 27 N. Z. L. R. 535.—**N.Z.**

222 v. —— ——.]—Deft. hired a horse from pltf., & returned it with broken knees & other injuries of an unusual nature:—*Held:* a presumption of negligence on the part of deft. arose from the unusual nature of the injuries, & the *onus* was on deft. to show that the injuries were occasioned without any fault on his part.—FICK *v.* DE KLERK (1907), E. D. C. 294.—**S. AF.**

Sect. 2.—Hire of chattels: Sub-sect. 3, A.]

than it was at the time the contract was made (BRETT, L.J.)—ROBERTSON *v.* AMAZON TUG & LIGHTERAGE CO. (1881), 7 Q. B. D. 598; 51 L. J. Q. B. 68; 46 L. T. 146; 30 W. R. 308; 4 Asp. M. L. C. 496, C. A.

Annotations:—**Refd.** The West Cock, [1911] P. 208, C. A. **Mentd.** The Glenmorven, [1913] P. 141.

225. Obligation to restore—When chattel perishes without fault of hirer.]—A count in *assumpsit* alleged that pltf. had delivered a horse to deft., who promised to redeliver it on request. Breach, that, though requested to redeliver the horse he refused. Plea, that the horse was sick & died, & pltf. made the request after its death:—*Held:* the bailee was discharged from his promise by the death of the horse without default or negligence on the part of deft.

Let it be admitted that he promised to deliver it on request, if the horse die before, that is become impossible by the act of God, so the party shall be discharged as much as if an obligation were conditioned to deliver the horse on request, & he died before it (*per* CUR.).—WILLIAMS *v.* LLOYD (1628), W. Jo. 179; Palm. 548; 82 E. R. 95.

Annotations:—**Consd.** Touteng *v.* Hubbard (1802), 3 Bos. & P. 291. **Apld.** Taylor *v.* Caldwell (1863), 3 B. & S. 826. **Refd.** Coggs *v.* Bernard (1703), 2 Ld. Raym. 909; Horlock *v.* Beal, [1916] 1 A. C. 486, H. L.

226. —— ——.]—In all contracts of loan of chattels or bailments, if the performance of the promise of the borrower or bailee to return the thing lent or bailed becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel. The principle is that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance (BLACKBURN, J.).—TAYLOR *v.* CALDWELL (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L. J. Q. B. 164; 8 L. T. 356; 27 J. P. 710; 11 W. R. 726; 122 E. R. 309.

Annotations:—**Distd.** Appleby *v.* Meyers (1866), L. R. 1 C. P. 615. **Apld.** Appleby *v.* Myers (1867), L. R. 2 C. P. 651, Ex. Ch.; Boast *v.* Firth (1868), L. R. 4 C. P. 1; Robinson *v.* Davison (1871), L. R. 6 Exch. 269; Howell *v.* Coupland (1874), L. R. 9 Q. B. 462. **Consd.** *Re* Arthur, Arthur *v.* Wynne (1880), 14 Ch. D. 603. **N.F.** Marshall *v.* Schofield (1882), 52 L. J. Q. B. 58, C. A. **Distd.** Blum *v.* Ansley (1900), 64 J. P. 184. **Apld.** Nickoll & Knight *v.* Ashton, Eridge, [1901] 2 K. B. 126, C. A. **Expld. & Apld.** Blakeley *v.* Muller, Hobson *v.* Pattenden (1903), 88 L. T. 90. **Apld.** Elliott *v.* Crutchley, [1903] 2 K. B. 476. **Distd.** Herne Bay Steam Boat Co. *v.* Hutton, [1903] 2 K. B. 683, C. A. **Apld.** Clark *v.* Lindsay (1903), 88 L. T. 198; Krell *v.* Henry, [1903] 2 K. B. 740, C. A.; Associated Portland Cement Manufacturers *v.* Cory (1915), 31 T. L. R. 442; Horlock *v.* Beal, [1916] 1 A. C. 486, H. L. **Distd.** Smith, Coney & Barrett *v.* Becker, Gray, [1916] 2 Ch. 86, C. A. **Refd.** Castle *v.* Playford (1872), 26 L. T. 315, Ex. Ch.; Jackson *v.* Union Marine Insce. (1874), L. R. 10 C. P. 125; Howell *v.* Coupland (1876), 1 Q. B. D. 258, C. A.; Chapman *v.* Withers (1888), 20 Q. B. D. 824; Turner *v.* Goldsmith, [1891] 1 Q. B. 544, C. A.; *Re* Jamieson & Newcastle S.S. Freight Insce. Assocn., [1895] 1 Q. B. 510; Nickoll & Knight *v.* Ashton, Eridge, [1900] 2 Q. B. 298; Lumsden *v.* Barton (1902), 19 T. L. R. 53; Civil Service Co-operative Soc. *v.* General Steam Navigation Co., [1903] 2 K. B. 756, C. A.; Chandler *v.* Webster, [1904] 1 K. B. 493, C. A.; *Re* Hull & Meux, [1905] 1 K. B. 588, C. A.; Grimsdick *v.* Sweetman, [1909] 2 K. B. 740; The Salvador (1909), 25 T. L. R. 727, C. A.; *Re* Worthington, *Ex p.* Pathé Frères, [1914] 2 K. B. 299; *Re* Shipton, Anderson & Harrison's Arbitration, [1915] 3 K. B. 676; Leiston Gas Co. *v.* Leiston-cum-Sizewell U. C., [1916] 2 K. B. 428 C. A.; Tamplin (F. A.) S.S. Co. *v.* Anglo-Mexican Petroleum Products, [1916] 2 A. C. 397, H. L.; Lloyd Royal Belge Soc. Anon. *v.* Stathatos (1917), 33 T. L. R. 390; Metropolitan Water Board *v.* Dick, Kerr, [1917] 2 K. B. 1, C. A.; Scottish Navigation Co. *v.* Souter, Admiral Shipping Co. *v.* Weidner, Hopkins, [1917] 1 K. B. 222, C. A.; Blackburn Bobbin Co. *v.* Allen, [1918] 2 K. B. 467. **Mentd.** Scott *v.* Coulson, [1903] 2 Ch. 249, C. A.; Stephens *v.* Junior Army & Navy Stores, [1914] 2 Ch. 516, C. A.; *Re* Newman, Raphael's Claim, [1916] 2 Ch. 309, C. A.

227. —— **Robbery.**]—Every man, howsoever diligent he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, the bailee shall not be answerable in this case, if the goods are stolen.—COGGS *v.* BERNARD (1703), 2 Ld. Raym. 909; 1 Com. 133; 3 Salk. 11; 92 E. R. 107.

Annotations:—**Refd.** Buckmyr *v.* Darnall (1704), 2 Ld. Raym. 1085; Kettle *v.* Bromsall (1738), Willes, 118; R. *v.* Cording (1832), 1 Nev. & M. K. B. 35; Vaughan *v.* Menlove (1837), 3 Bing. N. C. 468. **Mentd.** Anon. (1692), 2 Salk. 522; Grand Opinion for the Prerogative concerning the Royal Family (1717), Fortes. Rep. 401; Robinson *v.* Green (1723), 1 Stra. 574; Skelton *v.* Osborn (1729), 1 Barn. K. B. 260; Boucher *v.* Lawson (1736), Lee *temp.* Hard. 194; Charitable Corpn. *v.* Sutton (1742), 2 Atk. 400; Hartop *v.* Hoare (1743), 3 Atk. 44; Ryall *v.* Rowles (1750), 1 Ves. Sen. 348; Pasley *v.* Freeman (1789), 3 Term Rep. 51; Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357, Ex. Ch.; Elsee *v.* Gatward (1793), 5 Term Rep. 143; Guilliam *v.* Barnett (1804), 2 Smith, K. B. 155; Gibson *v.* Inglis (1814), 4 Camp. 72; Cavenagh *v.* Such (1815), 1 Price, 328; Pippin *v.* Sheppard (1822), 11 Price, 400; Storr *v.* Crowley (1825), M'Cle. & Yo. 129; Whitehead *v.* Greetham (1825), 2 Bing. 464; Corbett *v.* Packington (1827), 6 B. & C. 268; Gledstane *v.* Hewitt (1831), 1 Tyr. 445; *Ex p.* Cording (1832), 4 B. & Ad. 198; M'Kenzie *v.* M'Leod (1834), 10 Bing. 385; Boorman *v.* Brown (1842), 3 Q. B. 511, Ex. Ch.; Ross *v.* Hill (1846), 2 C. B. 877; G. N. Ry. Co. *v.* Shepherd (1852), 8 Exch. 30; Lewis *v.* Nicholson (1852), 21 L. J. Q. B. 311; Shepherd *v.* G. N. Ry. Co. (1852), 19 L. T. O. S. 324; Micklethwaite *v.* Merrill (1852), 19 L. T. O. S. 61; Balfe *v.* West (1853), 13 C. B. 466; Crouch *v.* L. & N. W. Ry. Co. (1854), 14 C. B. 255; Dansey *v.* Richardson (1854), 3 E. & B. 144; Baxendale *v.* Eastern Counties Ry. Co. (1858), 27 L. J. C. P. 137; Blakemore *v.* Bristol & Exeter Ry. Co. (1858), 8 E. & B. 1035; Syred *v.* Carruthers (1858), E. B. & E. 469; Belfast & Ballymena Ry. Co. *v.* Keys (1861), 9 H. L. Cas. 556, H. L.; MacCarthy *v.* Young (1861), 6 H. & N. 329; Marriott *v.* Anchor Reversionary Co. (1861), 3 De G. F. & J. 177, L.C. & L.JJ.; Martin *v.* Reid (1862), 11 C. B. N. S. 730; Taylor *v.* Caldwell (1863), 3 B. & S. 826; Beal *v.* South Devon Ry. Co. (1864), 11 L. T. 184, Ex. Ch.; Pigot *v.* Cubley (1864), 15 C. B. N. S. 701; P. & O. Steam Navigation Co. *v.* Shand (1865), 3 Moo. P. C. C. N. S. 272, P. C.; Swire *v.* Leach (1865), 5 New Rep. 314; Donald *v.* Suckling (1866), L. R. 1 Q. B. 585; Grill *v.* General Iron Screw Collier Co. (1866), 12 Jur. N. S. 727; Skelton *v.* L. & N. W. Ry. Co. (1867), L. R. 2 C. P. 631; Giblin *v.* McMullen (1869), L. R. 2 P. C. 317, P. C.; Readhead *v.* Mid. Ry. Co. (1869), L. R. 4 Q. B. 379, Ex. Ch.; Searle *v.* Laverick (1874), L. R. 9 Q. B. 122; Liver Alkali Co. *v.* Johnson (1874), L. R. 9 Exch. 338, Ex. Ch.; Nugent *v.* Smith (1875), 1 C. P. D. 19; Cohen *v.* G. E. Ry. Co. (1876), 45 L. J. Q. B. 298; Harris *v.* G. W. Ry. Co. (1876), 1 Q. B. D. 515; Hoare *v.* G. W. Ry. Co. (1877), De Colyar's County Ct. Cases, 192; Bergheim *v.* G. E. Ry. Co. (1878), 3 C. P. D. 221, C. A.; Foulkes *v.* Met. Dist. Ry. Co. (1880), 28 W. R. 526, C. A.; Cutler *v.* North London Ry. Co. (1887), 56 L. T. 639; The Moorcock (1889), 14 P. D. 64, C. A.; Shaw *v.* G. W. Ry. Co., [1894] 1 Q. B. 373; The Winkfield, [1902] P. 42, C. A.; Harris *v.* Perry, [1903] 2 K. B. 219, C. A.; Wallis *v.* G. N. Ry. Co. (Ireland) (1903), 12 Ry. & Can. Tr. Cas. 38; Cheshire *v.* Bailey, [1905] 1 K. B. 237, C. A.; Clarke *v.* West Ham Corpn., [1909] 2 K. B. 858, C. A.; Shrimpton *v.* Hertfordshire County Council (1910), 74 J. P. 305, C. A.; Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A.; Attenborough *v.* Solomon, [1913] A. C. 76, H. L.; Hatton *v.* Car Maintenance Co. (1914), 110 L. T. 765; Banbury *v.* Bank of Montreal (1918), 87 L. J. K. B. 1158, H. L.

228. —— **Fire.**]—Instruments were hired to be used at the Opera House & were there destroyed by fire:—*Held:* the hirer was not answerable for

225 i. *Obligation to restore—When chattel perishes without fault of hirer.*]—The lessee of a thing, which is lost while being used for purposes other than those for which it was leased, is bound to pay the value thereof to the lessor, unless he establishes that the loss was not due to any fault on his part. The legal obligation of surrendering the thing at the end of the lease carries with it the duty of repelling the presumption arising from such loss, by showing that it resulted from *vis major*, fortuitous event or some cause for which he cannot be held answerable.—HUARD *v.* FEICZEWICZ (1911), Q. R. 40 S. C. 385.—CAN

228 i. —— *Fire.*]—Defts. agreed to make for pltf. certain tools, &, in consideration of being allowed to use the tools, to make also a number of hubs:—

their loss.—LONGMAN *v.* GALLINI (1790), cited in Abbot's Merchant Shipping, 14th ed., at p. 600.

229. —— ——.]—Deft. hired from pltfs. a cart, which at the end of each day he left on the quay, where it was accidentally destroyed by fire. In an action by pltfs. the jury found that, according to the terms of the agreement for the hire of the cart, it should have been taken every night to deft.'s premises & that it was a breach of such agreement to leave it on the quay, though the risk of fire was not greater, & assessed the value of the cart at £40 :—*Held :* pltfs. entitled to judgment for the value found by the jury.—ROBERTS *v.* M'DOUGALL (1887), 3 T. L. R. 666, D. C.

230. —— **Irresistible violence.**]—If the subject-matter bailed be lost by *vis major*, which we translate irresistible violence, the bailee is discharged (LORD CAMPBELL, C.J.).—WALKER *v.* BRITISH GUARANTEE ASSOCN. (1852), 18 Q. B. 277 ; 21 L. J. Q. B. 257 ; 19 L. T. O. S. 87 ; 16 J. P. 582 ; 16 Jur. 885 ; 118 E. R. 104.

231. Liability for acts of servants.]—As between the lender & hirer of horses, the latter is not liable for casual negligence of a driver employed with reasonable care.

In an action by a jobmaster against the hirer of a pair of horses the jury found that there was no custom in the trade that the hirer should be liable for injuries to the horses :—*Held :* apart from such custom, if proved, the hirer was only bound to use reasonable care to employ a competent coachman.—ARBON *v.* FUSSELL (1862), 3 F. & F. 152, N. P.

232. ——.]—Deft. hired a carriage & horse from pltfs. Deft.'s coachman, instead of taking them, as was his duty, to the stable, drove for his own purposes in another direction. While he was thus engaged, the carriage & horse were injured, owing to his negligent driving :—*Held :* there had been a breach of deft.'s contract as bailee for which he was liable. — COUPÉ CO. *v.* MADDICK, [1891] 2 Q. B. 413 ; 60 L. J. Q. B. 676 ; 65 L. T. 489 ; 56 J. P. 39, D. C.

Annotations :—**Dbtd. & Distd.** Sanderson *v.* Collins, [1904] 1 K. B. 628, C. A. **Refd.** Cheshire *v.* Bailey (1904), 74 L. J. K. B. 176, C. A.

233. ——.] — Deft. sent his carriage to be repaired by pltf., a coach-builder. Pltf. lent a carriage of his own to deft. for use while the repairs were going on. The coachman of deft., without his knowledge, took pltf.'s carriage out for his own purposes, & while he was driving the carriage it was injured through his negligence. In an action to recover the cost of repairing it :—*Held :* as the coachman at the time when the injury was done to the carriage was not acting in the course of his employment, deft. was not liable.

The obligation on deft. as bailee was only to take reasonable care, & so far as the act of his servant was to be taken as the act of the deft. he would be bound by it ; & if the servant in the course of his employment & acting within the scope of his employment did not use reasonable care in the custody of the carriage, the master would be responsible. If a burglar broke into the coach-house & took away the carriage & caused damage to it & brought it back, no liability would attach to the bailee, because the act would not be his, & he would not be responsible for the acts of a person between whom & himself there was no connection (COLLINS, M.R.). — SANDERSON *v.* COLLINS, [1904] 1 K. B. 628 ; 73 L. J. K. B. 358 ; 90 L. T. 243 ; 20 T. L. R. 249 ; 48 Sol. Jo. 259, C. A. ; *sub nom.* SAUNDERSON *v.* COLLINS, 52 W. R. 354.

Annotation :—**Refd.** Cheshire *v.* Bailey, [1905] 1 K. B. 237, C. A.

See, further, MASTER & SERVANT.

234. —— **Friend of hirer.**]—Deft. hired from pltf. a waggonette, in which she & A. were driven by an ostler in pltf.'s service. A. asked the ostler to allow him to drive, which he did on deft.'s saying she would be responsible. A. drove unskilfully, & the horse ran away, the waggonette was smashed, & the horse so injured that it had to be killed :—*Held :* it was part of the contract that the ostler should drive, & if A. was driving at deft.'s request or with her consent, & the accident happened through A.'s default, she was liable, but if the reins were taken by A. without her consent, or if a reasonable time before the accident she withdrew her consent, she was not liable.—STEAD *v.* BLIGH (1898), 62 J. P. 458.

235. Special contract—Letter to keep in perfect repair.]—The hirer of a carriage by the year, under a written agreement binding the carriage-maker "to keep same in perfect repair without any further charges whatsoever" is not liable for repairs made necessary by accident, & not by the wilful default of the hirer.—READING *v.* MENHAM (1832), 1 Mood. & R. 234.

236. —— **Hirer to pay for damage to chattel.**]—An agreement for the hire of goods, upon the terms that the bailee should return the goods after use & should pay for any damage they might sustain, does not support a count, averring that the contract was to use the goods hired in a proper & reasonable manner, & assigning a breach of that

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Held : defts., having neglected to send the tools to pltf. after repeated requests, were liable to him in nominal damages only, & pltf. could not, upon the destruction of the tools by an accidental fire while retained by defts., recover from them their value, that destruction not being damage such as might fairly & reasonably be considered as arising from the breach, or in contemplation of the parties.—LEGGO *v.* WELLAND VALE MANUFACTURING CO. (1901), 21 C. L. T. Occ. N. 374 ; 2 O. L. R. 45.—**CAN.**

228 ii. —— —— *Special condition.*]—The lessee of goods covenanted to restore them to the lessor "at the expiration of the term, in as good order as they then were, reasonable wear & tear only excepted." The goods during the term were destroyed by fire without the lessee's default :—*Held :* (1) the absolute words of the covenant were controlled by the implied condition that the goods should continue to exist, & the lessee was not liable on the covenant for not restoring them at the end of the term ; (2) the exception "reasonable wear & tear excepted," did not amount to a guarantee of the continued existence of the goods.—CHAMBERLEN *v.* TRENOUTH (1874), 23 C. P. 497.—**CAN.**

228 iii. —— *Unforeseen accident—Special contract.*]—Defts. hired pltf.'s scow & pile driver, at a named price per day, they to be responsible for damage thereto, except to the engine, & ordinary wear & tear, until returned to pltf. While in defts.' custody, by reason of a storm of unusual force, the scow & pile driver were driven from their moorings & damaged :—*Held :* defts. were liable for the damages thus sustained, & for the rent during the period of repair.—GRANT *v.* ARMOUR (1893), 25 O. R. 7.—**CAN.**

231 i. *Liability for acts of servants.*]—A. contracted with B. for the hire of boats. While being towed by a steamer, which A. had chartered according to agreement, the boats sustained great damage by reason of gross negligence on the part of C., whom A. had placed in charge :—*Held :* A. responsible to B. for the negligence of C.—GREESH CHUNDER BANNERJEE *v.* COLLINS (1862), Hyde, 79.—**IND.**

231 ii. ——.]—The servant of a bailee of a horse, while driving the horse stopped it on a road with a steep grade & close to an overhead bridge, on which cable tramcars were continually passing, & without leaving any one to hold the reins, or in charge of the horse, fastened one wheel of the conveyance, & then stood by the side thereof presumably for the purpose of obtaining a parcel from the conveyance for delivery at a neighbouring house. The passing of a cable-car frightened the horse, & it bolted, & was so injured that it had to be destroyed :—*Held :* there was sufficient evidence to support the finding of negligence.—OLDHAM *v.* LYONS, LTD. (1908), 27 N. Z. L. R. 535.—**N.Z.**

231 iii. —— *Servant of owner in control.*]—Deft. hired a tug from pltf. by a contract signed by both parties in the following words : "I agree to charter tug . . . to tow two barges from . . . for which I agree to pay . . . owner to supply engineer & captain . . ." The tug on the voyage was run on a rock through the negligence of the captain :—*Held :* deft. not liable for the damage.—THOMPSON *v.* FOWLER (1893), 23 O. R. 644.—**CAN.**

Sect. 2.—*Hire of chattels: Sub-sect.* 3, *A. & B. Sub-sects.* 4 *&* 5. *Sect.* 3: *Sub-sect.* 1.]

promise.—DANKS *v.* FARLEY (1853), 1 C. L. R. 95, N. P.

237. —— Redelivery in good working order.]—A. contracted to hire a barge of B., the contract containing a stipulation that "fair wear & tear were to be allowed by the owner," & that, when delivered up, the barge was "to be in good working order, with all her rigging, gear, & implements complete":—*Held:* not an absolute engagement on the part of the hirer to deliver up the barge (which was an old one at the time of hiring) in "good working order," without reference to her condition at the commencement of the hiring.—SCHRODER *v.* WARD (1863), as reported in 13 C. B. N. S. 410; 143 E. R. 162.

Annotations:—**Mentd.** Budenberg *v.* Roberts (1867), L. R. 2 C. P. 292; Conybeare *v.* Farries (1869), 21 L. T. 497; Richardson *v.* N. E. Ry. Co. (1872), L. R. 7 C. P. 75.

238. —— Goods to be returned "whenever demanded."]—Where goods are hired at a certain rate per month, & are to be returned "whenever demanded," the owner may demand them back in the middle of a month, &, on refusal to return, may maintain detinue. In such action, damages are only recoverable for the detention prior to the issuing of the writ.—LEADER *v.* RHYS (1861), 2 F. & F. 399, N. P.

Annotation:—**Refd.** Serrao *v.* Noel (1885), 15 Q. B. D. 549, C. A.

—— **Ship.**]—*See* SHIPPING & NAVIGATION.

239. Payment for hire—Chattel returned before expiration of term & sold by owner.]—Where a carriage is hired for a certain time, & sent back before the expiration of it, if the party of whom it was hired sell it within the time, he cannot recover his charge for the hire.—WRIGHT *v.* MELVILLE (1828), 3 C. & P. 542, N. P.

240. —— "Months."]—An agreement for the hire of furniture at a weekly rental provided that the first payment should be made on the following Monday, "the letting on hire to be for the term of twenty-six months from the date of the first payment herein mentioned":—*Held:* the word "months" meant lunar months.—HUTTON *v.* BROWN (1881), 45 L. T. 343; 29 W. R. 928.

See, generally, TIME.

B. As between Hirer and Third Parties.

See Part IV., sect. 2, *post.*

SUB-SECT. 4.—DETERMINATION OF CONTRACT.

See Part IV., sect. 1, sub-sect. 7, *post.*

SUB-SECT. 5.—REMEDIES OF OWNER AND HIRER.

See Part IV., sect. 1, sub-sect. 8; sect. 2, sub-sects. 1, 2, *post.*

SECT. 3.—HIRE PURCHASE.

SUB-SECT. 1.—NATURE OF CONTRACT.

241. When agreement to buy—Factors Act, 1889 (c. 45), ss. 2, 9.]—An agreement was entered into between H., a furniture dealer, & L., who was referred to throughout as "the hirer," for the hire & purchase of certain chattels, & it was provided that "the hirer" should pay to H. "as & by way of rent for the hire & use" of the chattels the sum of £1 on May 6, the the further sum of £96 4*s.* on Aug. 1. Other provisions forbade the hirer to remove the chattels, & it was declared that "no property or interest in the chattels should rest in the hirer until the whole of the payments of rent" should have been actually made:—*Held:* the agreement was an agreement for purchase within s. 9.—LEE *v.* BUTLER, [1893] 2 Q. B. 318; 62 L. J. Q. B. 591; 69 L. T. 370; 42 W. R. 88; 9 T. L. R. 631; 4 R. 563, C. A.

Annotations:—**Folld.** Helby *v.* Matthews, [1894] 2 Q. B. 262, C. A. **Distd.** Helby *v.* Matthews, [1895] A. C. 471, H. L. **Folld.** Hull Ropes Co. *v.* Adams (1895), 65 L. J. Q. B. 114, D. C.; Payne *v.* Wilson, [1895] 1 Q. B. 653, D. C.; Thompson & Shackell *v.* Veale (1896), 74 L. T. 130, C. A.; Wylde *v.* Legge (1901), 84 L. T. 121, D. C. **Distd.** Belsize Motor Supply Co. *v.* Cox, [1914] 1 K. B. 244; Lewis *v.* Thomas (1918), 118 L. T. 689, D. C.

242. —— ——.]—An agreement by a hirer to pay a stated sum per month till the full price of the subject-matter be paid, when it was to become his own property, is, in the absence of a provision that he might terminate the hiring by delivering up to the owner, an agreement to buy within s. 9.—HULL ROPES CO., LTD. *v.* ADAMS (1895), 65 L. J. Q. B. 114; 73 L. T. 446; 44 W. R. 108; 40 Sol. Jo. 69, D. C.

Annotations:—**Folld.** Wylde *v.* Legge (1901), 84 L. T. 121, D. C. **Refd.** Belsize Motor Supply Co. *v.* Cox, [1914] 1 K. B. 244.

PART III. SECT. 3, SUB-SECT. 1.

241 i. *When agreement to buy.*]—Under a purchase & hiring agreement relating to an organ, the hirer agreed to pay a deposit, & to pay 11*s.* every month "during the continuance of the contract," & that as soon as the hirer had paid the total sum of £27 10*s.* the organ should become his absolute property:—*Held:* an absolute contract to purchase, & the instalments could not be recovered either as use & hire, or as for goods sold & delivered, as the property in the article still remained in the vendor.—SUTTONS PROPRIETARY, LTD. *v.* RICHARDS (1904), 29 V. L. R. 743.—**AUS.**

241 ii. ——.]—A customer obtained furniture from applt. to the extent of £48 11*s.* 6*d.*, £8 deposit being paid, & the balance to be paid at the rate of 7*s.* 6*d.* per week for one hundred & eight consecutive weeks, which would have amounted to within 1*s.* 6*d.* of the purchase price. The agreement purported to be a hire-purchase agreement, but it did not contain any provision giving power to the hirer to return the goods & terminate the hiring:—*Held:* the contract was one of sale, & not a contract of hire with the option of purchase.—COMMONWEALTH FURNITURE SUPPLY CO. *v.* WATERMAN (1915), 18 W. A. L. R. 26.—**AUS.**

241 iii. ——.]—Where there is an agreement for sale, delivery of the chattels sold, & payment of part of the purchase-money, it is a sale & not a bailment of the chattel, even though the agreement provides that the property shall not pass until the entire price be paid, & that the vendor may retake possession of the chattel if the balance of the purchase-money shall remain unpaid.—*Re* CRAWFORD, *Ex p.* OFFICIAL ASSIGNEE (1887), 6 N. Z. L. R. 56.—**N.Z.**

241 iv. ——.]—M. & Co. entered into the following contract with A.:—"In consideration of M. & Co. (hereinafter called the owners) letting to the undersigned (hereinafter called the hirer) a harmonium (hereinafter called the goods) on hire, the hirer hereby agrees to pay to the owners the sum of £1 10*s.* on delivery of the goods, as deposit, & a further sum of £1 every four weeks thereafter, as hire, until the full amount of £15 15*s.* (including the deposit) shall have been paid, when the goods shall be the property of the hirer, without any further payment whatever":—*Held:* the contract was one of sale.—MURDOCH & CO., LTD. *v.* GREIG (1889), 16 R. (Ct. of Sess.) 396; 26 Sc. L. R. 323.—**SCOT.**

241 v. ——.]—A firm of piano merchants brought an action for delivery of a piano let to defender at the rate of 15*s.* a month, in respect that defender had failed to pay the monthly payments. Defender maintained that the piano was his property in virtue of a verbal contract of sale between pursuers & himself, in which payment was to be made by instalments. Pursuers intended to let out the piano on the hire-purchase system, but the words used by them were consistent with the contract being understood by defender as a sale of the piano at a price payable by monthly instalments, & they were so understood by defender, & though pursuers had printed forms for signature by parties making hire-purchase contracts, defender had not signed one, though on several subsequent occasions he had been asked to do so:—*Held:* the contract was one of sale with deferred payment & not a hire-purchase agreement, & pursuers' proper remedy was an action for the instalments of the price so far as not paid.—MUIRHEAD & TURNBULL *v.* DICKSON (1905), 42 Sc. L. R. 578.—**SCOT.**

243. —— ——.]—W. obtained possession of goods from pltfs., under an agreement by which W. agreed to hire the goods, value £23, " & to pay the sum of 12*s.* 6*d.* per month for the hire thereof commencing with the date of this agreement, & payable in advance on the seventh day of each succeeding month until the full sum of £23 be paid, at which time, & on the completion of such payments, the co. agree to give up all claim to the goods." There was a stipulation that, upon default in payment, W. would give up possession of, & that pltfs. might seize, the goods, & there was also a declaration that the goods should remain the property of pltfs. until the sum of £23 was paid, & that they were only lent on hire :—*Held :* owing to the absence of any option to the hirer to give back the goods at any time without the consent of the other party, the agreement was not a mere hiring agreement, but was an agreement to buy within s. 9.—THOMPSON & SHACKELL, LTD. *v.* VEALE (1896), 74 L. T. 130, C. A.

244. —— ——.]—By an agreement W. agreed with deft. to hire goods of a certain value " & to pay her the sum of £1 on signing this agreement & the balance in instalments of £1 per month until the full amount of the value be paid," when the goods were to become the property of W. The agreement contained a clause : " but in default being made in payment of such sums of £1 per month," W. agreed " to give up all claims to the goods, & to deliver same free from damage or injury beyond fair wear & tear " to deft. or to her agents on demand :—*Held :* W. was a person who had " agreed to buy goods " under s. 9.

It is a very artificial & inartistic agreement, but as it stands W. has a binding obligation to pay, & has power to dispose under s. 9. It is a clear agreement to buy & sell. The provision as to default does not enable the purchaser to return the goods & put an end to the agreement (PHILLIMORE, J.).—WYLDE *v.* LEGGE (1901), 84 L. T. 121, D. C.

245. When not agreement to buy—Factors Act, 1889 (c. 45), s. 9—Option only.]—The owner of a piano agreed to let it on hire, the hirer to pay a rent by monthly instalments, on the terms that the hirer might terminate the hiring by delivering up the piano to the owner, he remaining liable for all arrears of hire ; also that if the hirer should punctually pay all the monthly instalments, the piano should become his sole & absolute property, & that until such full payment the piano should continue the sole property of the owner. The hirer received the piano, paid a few of the instalments, & pledged it : — *Held :* upon the true construction of the agreement, the hirer was under no legal obligation to buy, but had an option either to return the piano or to become its owner by payment in full, & by putting it out of his power to return the piano he had not become bound to buy, & he had not " agreed to buy goods " within s. 9.—HELBY *v.* MATTHEWS, [1895] A. C. 471 ; 64 L. J. Q. B. 465 ; 72 L. T. 841 ; 60 J. P. 20 ; 43 W. R. 561 ; 11 T. L. R. 446 ; 11 R. 232, H. L. ; *revsg.* [1894] 2 Q. B. 262, C. A.

Annotations :—**Folld.** Shenstone *v.* Hilton, [1894] 2 Q. B. 452. **Distd.** Hull Ropes Co. *v.* Adams (1895) 65 L. J. Q. B. 114, D. C. **Folld.** Payne *v.* Wilson, [1895] 1 Q. B. 653, D. C. **Distd.** Thompson & Shackell *v.* Veale (1896), 74 L. T. 130, C. A. ; Horton *v.* Gibbins (1897), 13 T. L. R. 408, D. C. ; Wylde *v.* Legge (1901), 84 L. T. 121, D. C. **Folld.** Brooks *v.* Beirnstein, [1909] 1 K. B. 98. **Apld.** Grande Maison d'Automobiles *v.* Beresford (1909), 25 T. L. R. 522, C. A. **Folld.** Belsize Motor Supply Co. *v.* Cox, [1914] 1 K. B. 244. **Distd.** Lewis *v.* Thomas (1918), 118 L. T. 689, D. C. **Refd.** Hepple *v.* Brumby (1896), 60 J. P. 792, D. C. ; Marten *v.* Whale, [1917] 1 K. B. 544.

246. —— —— ——.]—Deft. sold an old motor car to pltfs., upon the terms (*inter alia*), that if & when she purchased a new car, she would do so through pltfs. Deft. afterwards acquired a new car under a hire-purchase agreement, which gave her an option to purchase it in certain events. Pltfs. brought an action claiming damages for breach by deft. of the above agreement with them : —*Held :* possession of the car under the hiring agreement did not amount to a " purchase " of the car within the agreement between pltfs. & deft. & the action failed.—GRANDE MAISON D'AUTOMOBILES, LTD. *v.* BERESFORD (1909), 25 T. L. R. 522, C. A.

See, further, SALE OF GOODS.

247. —— **Sale of Goods Act, 1893 (c. 71), s. 25 (2) —Option only.**]—By an agreement in writing the owners of a motor vehicle let it to certain hirers for twenty-four calendar months at the rate of £15 12*s.* 2*d.* per calendar month. On the signing of the agreement the hirers were to pay, & did pay, £50 on account of hire in advance, & each subsequent payment was to be made in advance on specified dates. The hirers were not to re-let, sell, or part with the vehicle without the consent in writing of the owners. If the hirers should, on or before the expiration of the twenty-four calendar months, be desirous of purchasing the vehicle, they could do so by making the amount of hire paid equal to the amount of £424 11*s.* 6*d.* If the hirers did certain things, of which parting with the possession of the vehicle without the owners' consent in writing was one, it was made lawful for the owners, & they were authorised to take possession of the vehicle & terminate the agreement :—*Held :* the effect of the agreement was that, having paid twenty-four instalments, the hirers had an option either to become purchasers of the vehicle or to return it & claim back the £50 paid in advance, & the agreement did not impose

245 i. *When not agreement to buy.*]—Defts., having contracted for the manufacture by certain cos. of locomotives, cars, etc., & being unable to furnish the funds borrowed from pltfs. the funds then necessary, as well as a sufficient sum to ensure completion of the articles under an agreement, whereby pltfs. acquired an absolute title to the articles, & agreed to lease same to defts. for three years, at a weekly sum or rental of $1,000, with a proviso, that payment of $105,500 at any time during the term should put an end to same, & that it should be lawful for defts. to hold, retain, & possess the articles as their absolute property, & that all sums by the weekly payments paid by defts. under the agreement, should be credited to them on account of the $105,500, & on payment of that sum, as in either proviso mentioned, the agreement should cease, etc. There was no express covenant therein for payment by defts. of the sum, nor any mention of a debt due by defts. :—*Held :* (1) pltfs. became absolute owners of the property in question ; (2) the intention of the parties was, that the agreement should only operate as a lease to defts.. & not as a sale & mtge. back of the property.—BANK OF UPPER CANADA *v.* GRAND TRUNK RY. CO. (1863), 13 C. P. 304.—**CAN.**

245 ii. —— *Factors Act,* (56 *Vict. No.* 8), *s.* 10—*Option only.*]—By a written agreement the owners of a piano agreed to let it on hire. The agreement contained conditions that, (1) the hirer should pay £7 10*s.* as security money for the good care & safe keeping of the instrument while in her possession, & for the delivery thereof to the owners or their agents on demand ; (2) the hirer should pay for the use of the piano 30*s.* per month for a period of thirty-two months ; (3) the hirer should not remove the piano from her then residence without the consent of the owners ; (4) if the hirer failed to make the payments or did any one of several acts which might imperil the owners' rights, she should forfeit the security money & any other moneys paid, & the owners might at once seize the instrument ; (5) the piano should be insured in the joint names of the owners & the hirer ; & (6) should the hirer at any time desire to purchase the instrument, the owners agreed to sell same to her provided she had not committed a breach of the agreement or forfeited the money already paid under clause 4, & on her paying them £55 10*s.*, including the moneys previously paid, but until such purchase the piano was to remain the absolute property of the owners :—*Held :* the hirer had an option at the end of the thirty-two months either to keep the piano, or to return it & receive back the £7 10*s.* security money, & was under no legal obligation to purchase the instrument, & was not a person who had " agreed to buy goods " within the above sect.—KAYE & SON *v.* GLASSEY (1896), 7 Q. L. J. 33.—**AUS.**

Sect. 3.—Hire purchase: Sub-sects. 1 & 2.]

upon them an obligation to purchase the vehicle. —BELSIZE MOTOR SUPPLY CO. *v.* COX, [1914] 1 K. B. 244; 83 L. J. K. B. 261; 110 L. T. 151.

Annotation:—**Distd.** Whiteley *v.* Hilt, [1918] 2 K. B. 115.

When a bill of sale.]—*See* BILLS OF SALE.

True owner.]—*See* BILLS OF SALE.

248. When property passes—Not till full payment.]—An agreement for the hire, & ultimate purchase by the hirer, of specified articles of furniture, provided that, on payment by the hirer of an agreed price, which was to be paid in a fixed number of periodical instalments, the articles should become his property, but that, until the agreed price had been fully paid, they should remain the property of the lender. It was further provided that, if default should be made in the punctual payment of the hire, the lender might immediately enter upon the dwelling-house of the hirer & take possession of, & remove & sell the goods:—*Held:* the property in the goods did not pass to the hirer until all the instalments of the price had been paid.—*Re* DAVIS & CO., *Ex p.* RAWLINGS (1888), 22 Q. B. D. 193; 37 W. R. 203; 5 T. L. R. 119, C. A.

Annotation:—**Distd.** Wilmot *v.* Alton, [1897] 1 Q. B. 17, C. A.

249. —— ——.]—By an agreement in writing the "owners & lessors" of a gas engine agreed to let, & the "lessee" agreed to hire, the engine at a rent to be paid by instalments amounting in all to £240, upon payment in full the agreement to be at an end & the engine to become the property of the lessee, but until payment in full to remain the sole & absolute property of the lessors. It was also agreed that in case of failure to pay any of the instalments, or if the lessee should become bkpt., the lessor might elect either to recover the full balance remaining due, or instead, to resume possession of the engine & sell it &, after retaining out of the purchase-money all expenses & the balance remaining due, pay the surplus (if any) to the lessee, provided that if the lessors should see fit to resume possession of the engine without selling, the loss to them occasioned by the lessee's non-performance of the agreement should be borne by him, & in case of bkpcy. the lessors should be entitled to prove against his estate for that loss as liquidated damages. The lessee paid the first instalment, & the engine was placed on his premises. While it was still there he became bkpt., some instalments being overdue. The lessors having taken no steps to recover the balance due or to sell:—*Held:* upon the true construction of the agreement the property in the engine never passed to the lessee, but remained in the lessors.

Although the words "lessors" & "hirer" are used & the word "rent" also occurs, it is perfectly plain that the agreement is one of sale & purchase, & nothing else; but it does not in the least follow that, because there is an agreement of sale & purchase, the property in the thing which is the subject-matter of the contract has passed to the purchaser. That is a question which entirely depends upon the intention of the parties (LORD WATSON). —MCENTIRE *v.* CROSSLEY BROTHERS, LTD., [1895] A. C. 457; 64 L. J. P. C. 129; 72 L. T. 731; 2 Mans. 334; 11 R. 207, H. L.

Annotation:—**Mentd.** Hobson *v.* Gorringe, [1897] 1 Ch. 182, C. A.

250. ——.]—Pltf., being desirous of borrowing money, applied to defts. for a loan of £30 on a bill of sale of his household furniture. It was arranged that in lieu of a bill of sale pltf.'s landlord, to whom rent was owing, should put in a friendly distress, & that the distress should include the tools of pltf.'s trade, that defts. should purchase the goods from the broker, & that pltf. should then enter into an engagement for hire & repurchase from defts. A distress for a quarter's rent (£25) was put in, & goods, which by agreement of the parties included the tools of pltf.'s trade, were seized. The goods were worth £68, but were appraised at £29 5*s*. Pltf. signed a memorandum requesting the broker to sell the goods to defts. at the condemned price, & they thereupon paid the broker £29 5*s*., & got a receipt from him. The next day pltf. signed a hire-purchase, agreement for the goods, by which he agreed to pay defts. monthly instalments until the total amount of £50 was paid, & that, in case of default in performance of any of the stipulations of the agreement, defts. should be entitled to enter & seize the goods. Pltf. having made default, defts. entered & seized under the bill of sale. In an action by pltf. for trespass:—*Held:* (1) the true conclusion of fact from all the circumstances was that the intention of the parties was that there should be an absolute sale to defts. in form, but that the beneficial property should not pass until a hire-purchase agreement was executed; (2) though the legal estate passed to defts., it was subject to a resulting trust in favour of pltf. until this agreement was executed, so that defts. had no complete legal & equitable title to the goods independently of the hire-purchase agreement.—BECKETT *v.* TOWER ASSETS CO., [1891] 1 Q. B. 638; 60 L. J. Q. B. 493; 64 L. T. 497; 55 J. P. 438; 39 W. R. 438; 7 T. L. R. 400, C. A.

Annotations:—**Apld.** *Re* Eastern & Midlands Ry. Co. (1891), 65 L. T. 668. **Folld.** Mellor's Trustee *v.* Maas, [1903] 1 K. B. 226, C. A. **Refd.** Johnson *v.* Rees (1915), 84 L. J. K. B. 1276. **Mentd.** Saunders *v.* White, [1902] 1 K. B. 472, C. A.

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248 i. *When property passes—Not till full payment.*]—An agreement for the hire of goods contained a provision that, on payment of a certain sum before a certain day, the goods should become the property of the hirer:—*Held:* the property did not pass to the hirer until the full purchase-money was paid.—WYLIE *v.* NISBET, KIRK, CLAIMANT (1895), 21 V. L. R. 7.—**AUS.**

248 ii. —— ——.]—By an agreement between pltfs. & M., M. was to have a piano on hire at $6 per month for three months, payable in advance, & M. might purchase it on payment of notes of $100 each at 1, 12 & 24 months with interest, but until the whole of the purchase-money was paid the piano was to remain pltfs.' property on hire by M., pltfs. to have power to retake possession without demand, on non-payment of any instalment of purchase-money or rent in advance, & although part of the purchase-money might have been paid or notes given on account thereof, the agreement for sale being conditional, & punctual payment being essential to it. Nothing was paid by M. on the piano as purchase-money or rent:—*Held:* no property in the piano passed to M., that being the intention of the parties, & the legal effect of the instrument.—STEVENSON *v.* RICE (1874), 24 C. P. 245.—**CAN.**

248 iii. —— ——.]—By agreement in writing applt. agreed with M. for the hire by M. from him of a piano at a certain monthly rental, the piano to become the property of the hirer upon the completion of a certain number of monthly payments:—*Held:* under the agreement for hire the property remained in applt. until the terms of the agreement were complied with.—JAME *v.* OWEN, 2 J. R. N. S. 111.—**N.Z.**

248 iv. —— ——.]—A. having been allowed to take possession of chattels upon a contract of location, but under an obligation to purchase them, by a certain time, at a fixed price:—*Held:* the transference of the property was suspended till payment of the price.—WIGHT *v.* FORMAN (1828), 25 Fac. Coll. 211.—**SCOT.**

248 v. —— ——.]—A. & B. entered into an agreement for the purchase of a motor-car on the hire-purchase system. A. agreed to pay £100 on delivery of the car, & for the hire of the car £612 10*s*. within six weeks of the date of delivery. By the agreement A. had the option to purchase the car at any time within the six weeks by payment of the sum of £712 10*s*., but until the purchase was effected the car was to remain the property of B. A. paid two sums of £100 each, & gave B. a cheque for the remainder of the price. The cheque was dishonoured:—*Held:* (1) the property in the car did not pass until the price was paid; (2) delivery of a cheque, subsequently dishonoured, was not payment. —M'LAREN'S TRUSTEE *v.* ARGYLLS, LTD. (1915), 53 S. L. R. 67.—**SCOT.**

SUB-SECT. 2.—RIGHTS AND OBLIGATIONS OF THE PARTIES.

251. Payment—Right of hirer to anticipate payment of instalments.]—Defts. agreed to hire forty-four waggons from pltfs., paying in respect of twenty specified waggons an annual rent of £285 for five years, & in respect of the other twenty-four an annual rent of £249 for three years. It was agreed that the waggons should, at the expiration of the respective terms of the demise, & after payment of the rents reserved during the terms respectively, become the absolute property of the lessees without any further payment, & that until full payment of the several rents respectively reserved the ownership of the waggons respectively should remain in the lessors. Defts., having paid the first two years' rent in respect of the twenty-four waggons, sent to pltfs. the whole of the remaining one year's rent, with a letter stating that this sum was paid in discharge of all rent or other payment due in respect of the twenty-four waggons. The rent in respect of the other twenty waggons was then in arrear. Pltfs.' agent declined to receive the payment upon the terms of the letter, & entered it in pltfs.' ledger as a payment in respect of the entire number of waggons :—*Held :* (1) the contracts in respect of the twenty-four waggons & the twenty were several, & the hirers were entitled to the property in the twenty-four waggons upon payment of all the instalments that remained to be paid in respect of them, notwithstanding that there were unpaid instalments in respect of the twenty ; (2) the contract being in effect one of sale, & the provision for payment by instalments a provision solely in favour of the purchaser, he was entitled to anticipate the time fixed for the transfer of the property in the waggons by anticipating the time for payment.—LANCASHIRE WAGGON CO., LTD. *v.* NUTTALL (1879), 42 L. T. 465 ; 44 J. P. 536, C. A.

252. —— Right of owner to recover instalments —Effect of impressment by War Office.]—Under a hire-purchase agreement pltfs. delivered to defts. a motor chassis, one of the terms of the agreement being that the property in the chassis remained in pltfs. until payment was made in full. Subsequently, one instalment remaining outstanding, the machine was impressed by the War Office, who paid compensation therefor to defts. :—*Held :* pltfs. were entitled in an action for money had & received to an amount equal to that of the last instalment with interest.—BRITISH BERNA MOTOR LORRIES, LTD. *v.* INTER-TRANSPORT CO., LTD. (1915), 31 T. L. R. 200.

253. Liability of owner to repair—Accidental injury.]—Under a hire-purchase agreement for a carriage the owner undertook to keep it in repair until all the instalments were paid. During that period the carriage was injured by accident :—*Held :* the owner was liable to repair the injury so caused, his liability not being limited to doing repairs to remedy the result of fair wear & tear.—HART *v.* WRIGHT (1885), 1 T. L. R. 538.

254. Hirer to keep in repair—Authority to order repairs.]—By a hire-purchase agreement pltf. let a dog-cart to a person, who in the course of time sent the cart to be repaired to deft., a coach-builder. The hire-purchase agreement contained a clause by which the hirer undertook "to keep & preserve the dog-cart from injury." Some instalments under the agreement being unpaid, pltf. sought to recover the cart, but deft. claimed a lien upon it for the cost of the repairs :—*Held :* in the circumstances the hirer had authority to send the cart to be repaired, & deft.'s lien was good, not only against the hirer, but also against pltf.—KEENE *v.* THOMAS, [1905] 1 K. B. 136 ; 74 L. J. K. B. 21 ; 92 L. T. 19 ; 53 W. R. 336 ; 21 T. L. R. 2 ; 48 Sol. Jo. 815, D. C.

Annotations :—**Consd.** Jowitt *v.* Union Cold Storage Co., [1913] 3 K. B. 1 ; Cassils *v.* Holden Wood Bleaching Co. (1914), 84 L. J. K. B. 834, C. A. **Apld.** Green *v.* All Motors, [1917] 1 K. B. 625, C. A.

255. —— ——.]—By a hire-purchase agreement pltf. let a motor car to a person, who agreed to "keep the car in good repair & working condition," & the car was to be the property of pltf. until all the instalments were paid. During the currency of the agreement the car was injured by an accident, & the hirer sent it to defts. to be repaired. Defts. were informed that the car was held on a hire-purchase agreement. After the car was sent to defts., & before the contract for the repairs was made, default was made in the payment of an instalment under the hire-purchase agreement. Pltf. did not terminate the agreement until after the repairs had been commenced, when he demanded the car from defts. but did not tender the amount then due for the cost of the repairs. Defts. refused to deliver it up, claiming a lien on the car for the costs of the repairs ; & the repairs were subsequently completed :—*Held :* the hirer was entitled to have the car repaired, without any express authority from the owner, so as to enable him to use it, & defts. had a lien on the car as against pltf. for the cost of the repairs.—GREEN *v.* ALL MOTORS, LTD., [1917] 1 K. B. 625 ; 86 L. J. K. B. 590 ; 116 L. T. 189, C. A.

256. Right of owner to possession—Default—Whether subsequent tender too late.]—A piano was let on the three years' hire system, under an agreement, providing that "in case of default in the punctual payment of any instalment, the instalments previously paid shall be forfeited to the owner, who shall thereupon be entitled to

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PART III. SECT. 3, SUB-SECT. 2.

251 i. *Payment—Right of hirer to anticipate payment of instalments.*]—An agreement for the hire-purchase of furniture had endorsed on it an inventory of the furniture with cash prices annexed, amounting to £7,543. The agreement stipulated for payment by the hirer of annual sums of varying amount, the total of which was £8,649, & further provided that the hirer might at any time become the purchaser of the furniture "by payment in cash of the hereon endorsed price, under deduction of the whole sums previously paid by the hirer to the owners." The hirer, who had paid sums amounting to £4,966, desiring to become the purchaser of the furniture, tendered to the owners the sum of £2,577, being the difference between the sums so paid & £7,543, the "endorsed price" :—*Held :* as in a contract of hire-purchase the instalments were calculated so as to provide for interest on so much of the capital as remained unpaid, the expression "whole sums previously paid" referred to the portion of the sums paid attributable to capital, to the exclusion of the portion attributable to interest, & pursuer not entitled to become the purchaser of the furniture on payment of the sum tendered.—TAYLOR & WYLIE *v.* LOCHHEAD, LTD., [1912] S. C. 978.—**SCOT.**

256 i. *Right of owner to possession—Default.*]—Deft. rented to pltf. a harmonium for twenty-one months for $5 cash, & afterwards $15 every three months, on condition that if the payments were made regularly, immediately upon the expiration of the twenty-one months, pltf. should become owner of the harmonium, but that if pltf. neglected to pay, deft. should have the right without notice or demand, to take & carry away the instrument, & for those ends, to enter any room of pltf.'s where the instrument might be, without being arrested for having committed an illegal act, &, upon such taking of possession, the term of pltf.'s right to retain the instrument should cease, without prejudice to the rights of deft. for arrearages of rent. The twenty-one months expired, & pltf. still owed deft. a balance of $25 :— *Held :* (1) deft. had not the right to use violence or to enter at undue hours pltf.'s house in order to take the instrument, or to take it away in circumstances where there would result, needlessly, an injury for pltf. ; (2) deft. had the right to enter in the daytime pltf.'s house, & there in presence of his family, pltf. being absent, after having demanded the payment of the $25, remaining due, & that not being paid, & no one objecting thereto, to take & carry away the harmonium, after having read the agreement, & leaving there, in the house, the promissory note fallen due for such balance.—LUCAS *v.* BERNARD (1894), Q. R. 5 S. C. 529.—**CAN.**

256 ii. ——————.]—*Semble :* in a hire-purchase agreement, where default has been made by the bailee, even if it is only

Sect. 3.—Hire purchase: Sub-sect. 2.]

resume possession of the instrument" :—*Held:* upon default, the owner was entitled to the possession of the piano, although the instalments in arrear were tendered by the hirer before action brought. —CRAMER *v.* GILES (1883), 1 Cab. & El. 151.

257. Effect of seizure—Release of surety.]—Pltfs. let G. certain chattels, £125 being paid in advance, & the balance, £243, to be paid by monthly instalments. There was a power to seize in case of default, & if all instalments were met, the chattels were to belong to G. Default having been made, pltfs. seized. Deft., in consideration of the return of the chattels to G., guaranteed the remaining instalments. Further default was made as to two instalments, & pltfs. again seized, & afterwards sued deft. for the amount of the two instalments :—*Held:* pltfs. had determined the original contract, & could not recover from the surety.

The agreement which is called a hire & purchase agreement, is primarily a sale & purchase agreement (COLLINS, J.).—HEWISON *v.* RICKETTS (1894), 63 L. J. Q. B. 711 ; 71 L. T. 191 ; 10 R. 558, D. C.

Annotation :—**Distd.** Brooks *v.* Beirnstein, [1909] 1 K. B. 98.

258. —— No waiver of arrears.]—The owner of furniture agreed to let it on hire, on the terms of the hirer paying a lump sum in consideration of an option to purchase it at any time during the period of hiring, & further paying a monthly sum by way of rent. The agreement provided that the hirer might at any time terminate the hiring, on giving a week's notice & delivering up the goods without prejudice to the owner's right to recover any arrears of rent, & that if the hirer did not duly perform the agreement, the owner might retake possession of the furniture. The hirer being in arrear with the rent, the owner retook possession under the agreement :—*Held:* the owner by so retaking possession had not abandoned his right to sue for the arrears of rent.—BROOKS *v.* BEIRNSTEIN, [1909] 1 K. B. 98 ; 78 L. J. K. B. 243 ; 99 L. T. 970.

259. Rights of owner—Effect of seizure & sale.]—Furniture was let for hire with an option to purchase under a hire-purchase agreement, which contained a clause giving the owners the right without previous notice to determine the hiring & retake possession of the furniture, if it should at any time be seized or taken in execution. The furniture was taken in execution by the high bailiff of a county ct., &, no claim having been made to it, was appraised & sold under the execution & the proceeds paid into ct., & the furniture delivered to the purchaser. On the day after the sale the owners heard for the first time of the seizure & sale of the furniture, & gave notice of their claim to the proceeds. An interpleader summons was issued at the instance of the high bailiff, & in the course of the interpleader proceedings the execution creditor admitted the title of claimants, who gave a notice claiming damages against the high bailiff in respect of the alleged conversion of the furniture by selling it :—*Held:* as under the hiring agreement claimants had a right to its possession immediately upon its being taken in execution, the sale by the high bailiff amounted to an act of conversion for which he was responsible in damages to them.—JELKS *v.* HAYWARD, [1905] 2 K. B. 460 ; 74 L. J. K. B. 717 ; 92 L. T. 692 ; 53 W. R. 686 ; 21 T. L. R. 527 ; 49 Sol. Jo. 685.

See, further, EXECUTION; SHERIFFS & BAILIFFS.

260. Assignment by owner — Validity.]—An agreement for the hire, & ultimate purchase by the hirer, of specified articles of furniture, provided that, on payment by the hirer of an agreed price, which was to be paid in a fixed number of periodical instalments, the articles should become his property, but that, until the agreed price had been fully paid, they should remain the property of the lender. It was further provided that, if default should be made in the punctual payment of the hire, the lender might immediately enter upon the dwelling-house of the hirer & take possession of, & remove & sell the goods. During the currency of the agreement the lender assigned all his right & interest under the agreement to a person who had lent him money, as security for the advance, authorising him, if default should be made in repayment of the loan as agreed, to exercise all the powers contained in the hiring agreement, until the balance due to him should have been repaid :—*Held:* the licence to enter & take possession of the goods was not capable of being assigned.—*Re* DAVIS & CO., *Ex p.* RAWLINGS (1888), 22 Q. B. D. 193 ; 37 W. R. 203 ; 5 T. L. R. 119, C. A.

Annotation :—**Mentd** Wilmot *v.* Alton, [1897] 1 Q. B. 17, C. A.

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in payment of the last instalment, the bailor may retake possession of the chattel, & the ct. has no equitable jurisdiction to grant relief.—CAMPBELL *v.* BUCKMAN'S OFFICIAL ASSIGNEE (1909), 28 N. Z. L. R. 875.—**N.Z.**

256 iii. —— —— *Whether subsequent tender too late.*]—A. signed a hire-purchase agreement for a sewing machine, the agreement providing (*inter alia*) that in case he made default in paying the rent, pltfs. might take possession of the machine, & he would forfeit any rent paid, & pltfs. agreed if A. paid the rent, they would sell the machine to him for 1 cent at the expiration of nine months. A. having made default in paying the monthly rent, pltfs. demanded the machine, which was in possession of deft. under a bill of sale from A. Deft. refused to give it up, but afterwards, & before action brought, tendered pltfs. $14, the balance of the $65 unpaid :—*Held:* even if the property did not vest in A. till the whole price was paid, the tender of the $14 before action would prevent pltfs. from recovering.—WHEELER & WILSON MANUFACTURING CO. *v.* CHARTERS (1882), 21 N. B. R. 480.—**CAN.**

256 iv. —— —— *Forcible entry.*]—Under a hire receipt of an organ sold by R. to pltf.'s son, & signed by the latter, R. was authorised on default of payment to resume possession of the organ, & he & his agent were given full right & liberty to enter any house where the organ might be, with authority to remove same, without resorting to any legal process. On default R. sent his book-keeper & two assistants, with instructions to get the organ. The book-keeper, taking the hire receipt as his authority, went to pltf.'s house, where the organ was, opened the house door & entered the hall, but on his attempting to open the door of the room in which the organ was, pltf.'s wife resisted his entrance, when a scuffle ensued, & pltf.'s wife was injured :—*Held:* R. was responsible for the acts of his servant, the book-keeper.—FERGUSON *v.* ROBLIN (1888), 17 O. R. 167.—**CAN.**

256 v. —— —— ——.]—Pltf. took a piano from deft. co. on the hire-purchase system, under an agreement containing a licence to the co. in certain events to enter & retake the piano. Pltf. having fallen into arrears, the co. sent four men up to his house. These men were admitted to the hall, & finding the door locked of the room in which the piano was, burst it in, using considerable violence :—*Held:* the licence empowered the co. to break an inner door in a proper case, but there was evidence that the co. had acted unreasonably, & the case should have gone to the jury upon the point.—WIENER *v.* PHILLIPS (BELFAST), LTD. (1915), 49 I. L. T. 205.—**IR.**

e. *Right of owner to remove chattel at his option—Reasonable grounds.*]—Pltfs. supplied deft. with a piano upon a hiring agreement, under which pltfs. were at liberty to remove the piano whenever they might deem it proper to do so :—*Held:* they might exercise the power, on the ground that they had by mistake supplied the piano too cheap.—BEALE *v.* PRICE (1904), 4 S. R. N. S. W. 101.—**AUS.**

259 i. *Rights of owner — Effect of seizure.*]—The proprietors of a hall let it furnished to a tenant at a rent payable weekly in advance, to be used as a cinematograph theatre. The tenant having hired a mechanical piano on the hire-purchase system, brought it into the hall for use in the theatre. The property in the piano remained in the owners until the whole of the instalments of the price was paid. Before the whole of the instalments was paid the tenant failed to pay his rent, though he remained in possession, & the proprietors of the hall attached the piano :—*Held:* in the circumstances the landlord's hypothec did not extend to the piano & the sequestration in so far as it included the piano, recalled.—EDINBURGH ALBERT BUILDING CO., LTD. *v.* GENERAL GUARANTEE CORPN., LTD. (1917), 54 Sc. L. R 191.—**SCOT.**

261. —— ——.]—By one & the same deed the owner of a piano assigned, by way of security for money, the piano, & also the benefit of a hire & purchase agreement into which he had entered respecting it:—*Held:* the assignment of the agreement was severable from that of the piano, & the deed was not void *in toto* under Bills of Sale Acts for non-registration, or because it was not in the statutory form.—*Re* ISAACSON, *Ex p.* MASON, [1895] 1 Q. B. 333; 64 L. J. Q. B. 191; 71 L. T. 812; 43 W. R. 278; 11 T. L. R. 101; 39 Sol. Jo. 169; 2 Mans. 11; 14 R. 41, C. A.

262. Assignment by hirer—Sale of chattel—Alleged conversion—Measure of damages.]—Pltfs. let a piano on the usual terms of a hire-purchase agreement, the hirer to have the option of purchase by paying a certain number of quarterly instalments, with the right to terminate the agreement at any time by returning the piano. After paying several instalments, the hirer, without informing pltfs., sold the piano to deft., representing it to be her actual property. Upon learning the facts pltfs. sued deft. in an action of detinue & conversion, & claimed the return of the piano. Deft. paid into ct. a sum representing the amount of instalments still unpaid:—*Held:* (1) as at the date of the sale there had been no breach of the agreement, & no present right in pltfs. to resume possession, the option to purchase the piano was, in the absence of any provision in the contract to the contrary, assignable to deft., who had acquired all the rights of the hirer & had the right in equity to compel the hirer to complete the contract for her benefit; (2) in equity where pltf. alleged the money value of a chattel it was not the practice of the ct. to order its specific delivery, & the measure of pltfs.' damages was the amount of the unpaid instalments, which had been satisfied by deft. —WHITELEY *v.* HILT, [1918] 2 K. B. 808; 87 L. J. K. B. 1058; 34 T. L. R. 592; 62 Sol. Jo. 717, C. A.

263. Wrongful sale by hirer.]—The rules of a society established for the purpose of providing the shareholders with canal-boats, provided that as soon as a certain sum was raised, a boat should be ordered by & for a particular member selected by lot, to whom, on the dissolution of the society, the boat should belong, the holder in the meantime paying to the society for the use of it £5 per cent. on the sum expended by the society in its completion, "as such boat shall not be the property of the member to whom same shall be allotted, until the society shall be discontinued, but belong to the committee for the time being in trust for the society." The rules further stipulated that, until the dissolution of the society, every boat should be kept in good repair "by the member to whom same shall be allotted, & at such dissolution the boats shall become the absolute property of the respective persons to whom they shall have been allotted." The rules also provided that if any member, "after he shall have obtained a boat by allotment, shall make default in paying the remainder of his subscription money, forfeits, & interest, in respect of every share he may hold in this society, when due, it shall be lawful for the committee, without any notice whatever, to seize every such boat so allotted to such defaulter, & to let out same for hire, for the benefit of all the members of the society, & the defaulter shall not be entitled to resume the possession of, or use such boat, until the expiration of three calendar months after he shall have fully paid all subscriptions, forfeits, & interest due from him." W., a member of the society, became the allottee of a boat, & subsequently sold it to A., his landlord, for a certain sum credited to W. in his rent, A. at the time not having notice of the nature of the title of W., who subsequently became a defaulter to the society, who thereupon seized the boat:—*Held:* the society was entitled to the boat as against W.—ATTWOOD *v.* HILL (1852), 19 L. T. O. S. 353.

264. —— **Remedy against third party.**]—Where a hirer in possession of goods under a hire-purchase agreement sells them to a *bonâ fide* purchaser without notice before all instalments agreed upon are paid, & is prosecuted to conviction for larceny as a bailee, the owner can maintain an action for conversion against the purchaser.—PAYNE *v.* WILSON, [1895] 2 Q. B. 537; 65 L. J. Q. B. 150; 73 L. T. 12; 43 W. R. 657, C. A.

265. Wrongful pledge by hirer—Determines bailment.]—Pltfs. entered into a hire-purchase agree-

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262 i. *Assignment by hirer.*]—The purchaser of a piano under a hire receipt, by which the property was to pass to him only on completion of certain payments on account, before he had paid the required sum agreed with his wife that she should purchase his interest & pay the balance due to the vendors:—*Held:* the wife entitled to be subrogated to the rights of the vendors of the piano to the extent of the payments made by her.—EBY *v.* MCTAVISH (1900), 32 O. R. 187.—**CAN.**

264 i. *Wrongful sale by hirer—Remedy against third party.*]—An agreement, by which the owner of a horse lets it for return at seven months, at the rate of £3 per week, with the stipulation that should the payments all be duly made, the horse shall become the property of the person hiring it, does not deprive the owner of his right of ownership until the whole amount is paid, & should the person hiring make default in any of the payments, the owner may claim it in the hands of a third party.—BERTRAND *v.* GAUDREAU (1882), 12 R. L. 154.—**CAN.**

264 ii. —— ——.]—A piano was hired from a firm by K. under a hire-purchase agreement & given to an auctioneer, who sold it with other effects, when a receipt was shown to the purchaser stating that K. was the owner:—*Held:* the firm who owned the piano, & who were owed some instalments of the amount of hire, were entitled to recover the value of it from the auctioneers.—THOMPSON *v.* GAMBLE (1873), 8 I. L. T. Jo. 500.—IR.

264 iii. —— ——.]—Resps. delivered to T. a chattel under a hire-purchase agreement, under which T. was entitled to determine his liability at any time after the payment of the first instalment due thereunder. Before payment of the last instalment T. sold the chattel to applt. In an action by resps. against applt. to recover the chattel or the amount of the last instalment applt. contended that resps. were estopped under Sale of Goods Act, 1908, s. 23 (1), from denying T.'s authority to sell, as the agreement was not registered, & as they had allowed T. to remain in possession of chattels under two other bailments after default entitling them to recover possession of same:—*Held:* resps. had done nothing amounting to an estoppel, & were entitled to judgment, the sole effect of non-registration being that specially provided in Chattels Transfer Act, 1908.—GALYER *v.* MASSEY-HARRIS CO., LTD. (1914), 33 N. Z. L. R. 1392.—**N.Z.**

264 iv. —— ——.]—A customer obtained a harmonium from M. & Co., a firm of music-sellers, under a contract, whereby she undertook "to pay to them a deposit of 30*s.* on delivery of the harmonium, & a further sum of £1 every four weeks thereafter as hire, until the full price shall have been paid, when the goods shall be the property of the hirer, without any further payment whatever." It was further stipulated that until the full sum was paid 'the hirer should have no property in the goods otherwise than as a hirer." The sum stipulated was deposited on delivery, & one instalment of 20*s.* was paid; thereafter the customer left the country, & on her instructions her furniture, including the harmonium, was sold by public roup. In an action by M. & Co. against the purchaser:—*Held:* they were entitled to delivery thereof.—MURDOCH & CO., LTD. *v.* GREIG (1889), 16 R. (Ct. of Sess.) 396; 26 Sc. L. R. 323.—**SCOT.**

f. *Wrongful transfer by hirer — Remedy against third party.*]—R. purchased furniture from pltfs. under a hire-purchase agreement. Before completing her payments, she stored the furniture with deft., a warehouseman, without the knowledge of pltfs., who some months afterwards, on discovering the fact, demanded delivery up of the furniture under the terms of their agreement. Deft. refused to deliver until his warehouse charges were paid:—*Held:* deft. was not entitled to retain the goods until his charges were paid.—SMITH (D. A.), LTD. *v.* CAMPBELL (1911), 16 B. C. R. 505.—**CAN.**

See, further, LIEN.

g. —— ——.] — Circumstances (*see supra*) in which held if the property in the machine did not vest in A. till the whole price was paid, there was a wrongful conversion by deft., which would not be affected by the subsequent tender of the balance of the purchase money.—WHEELER & WILSON MANUFACTURING CO. *v.* CHARTERS (1882), 21 N. B. R. 480.—**CAN.**

265 i. *Wrongful pledge by hirer — Remedy against third party.*]—C. obtained a piano from P. & Co. on hire, under an

Sect. 3.—Hire purchase: Sub-sect. 2. Sect. 4. Part IV. Sect. 1: Sub-sect. 1.]

ment with S., on the conditions that S. was to pay a weekly rent, & to keep the chattel on her own premises, with power to pltfs. to retake possession in default of performance of the terms of the agreement. S. could terminate the agreement by delivery of the chattel to pltfs., or by payment of a certain sum could become the purchaser of it. S. did not exercise that option, & pledged the chattel with deft. :—*Held :* at common law pltfs. were the owners of the article pledged, & entitled to the possession of it, for the bailment to S., the pawner, had been determined when it was pledged to deft., & deft. was liable to pltfs. in trover.—SINGER MANUFACTURING CO. *v.* CLARK (1879), 5 Ex. D. 37 ; 49 L. J. Q. B. 224 ; 41 L. T. 591 ; 44 J. P. 59 ; 28 W. R. 170.

266. —— Seizure on default—No right against third party.]—Defts. let a piano to A. on a hire-purchase agreement. Before the instalments were all paid A. pawned it to B. on a three months' contract, & after the three months B. sold it to pltf. Defts. having discovered that the piano was in pltf.'s possession, sent their men to his house, & having obtained entrance, forcibly took away the piano. In an action by pltf. for trespass :—*Held :* persons who, like defts., let chattels on hire were not entitled to follow their property & seize it, regardless of where it was or the claim or title of the person in whose possession it might be, but must proceed to recover their property by legal methods, & otherwise they were liable in damages for trespass.—MILLER *v.* STROHMENGER (1887), 4 T. L. R. 133.

267. —— Measure of damages.]—During the currency of a hire-purchase agreement, there being a sum due & unpaid on account of hire, the hirers, without the consent of the owners, pledged the chattel to a pledgee, who took it in good faith & without notice of the owners' rights. Subsequently the owners, hearing of the pledge, demanded the chattel from the pledgee, who refused to restore it. At the date of such demand & refusal there was a sum of £58 9*s.* due & unpaid on account of hire :—*Held :* the pledgee took no better title than the hirers had, & had an interest in the vehicle, & the measure of damages was not the full value of the vehicle, but was only the value of the owners' interest therein, *i.e.*, the amount of hire & purchase money remaining unpaid.—BELSIZE MOTOR SUPPLY CO. *v.* COX, [1914] 1 K. B. 244 ; 83 L. J. K. B. 261 ; 110 L. T. 151.

Annotation :—**Distd.** Whiteley *v.* Hilt, [1918] 2 K. B. 115.

268. Default—Distress—Landlord's rights.]—A. let furniture to B., who agreed that if the weekly hire should remain unpaid for seven days, A. might retake the furniture, & enter for such purpose the premises of which S. was tenant. The hire was unpaid for more than seven days, & C., who was B.'s landlord, informed A. that, as B. owed him rent, he refused to give him his furniture. A. then seized his furniture by means of force, threats, & intimidation. C. summoned A. under Metropolitan Police Cts. Act, 1839 (c. 71), s. 40, for detention of the furniture. The magistrate, without deciding whether any rent was due to C., or whether any formal or effective distress had been made by C. on the furniture, ordered A. to deliver up the goods to C. as an "owner" under the sect. :—*Held :* the case must go back to the magistrate to determine whether any rent was due from B. to C., & whether C. had levied a distress on A.'s furniture. —FRANKS *v.* TOWNSEND (1904), 68 J. P. Jo. 341.

Rights of owner when hirer's premises mortgaged with fixtures.]—*See* MORTGAGE.

Operation of hire-purchase agreement—As bill of sale.]—*See* BILLS OF SALE.

—— Upon reputed ownership of goods.]—*See* BANKRUPTCY & INSOLVENCY.

—— Under Factors Act, 1889 (c. 45).]—*See* SALE OF GOODS.

—— Under Law of Distress Amendment Act, 1908 (c. 53).]—*See* DISTRESS.

SECT. 4.—HIRE OF WORK AND LABOUR.

See, generally, WORK AND LABOUR.

269. Duty of bailee—To preserve thing bailed.]—A workman for hire is not only bound to guard the thing bailed to him against ordinary hazards, but likewise to exert himself to preserve it from any unexpected danger to which it may be exposed.—LECK *v.* MAESTAER (1807), 1 Camp. 138.

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agreement which provided that in default of any instalment P. & Co. might resume possession without previous demand, & that C. should pay interest upon the purchase-money at 7 per cent. C. paid only two instalments amounting to $150 & then became insolvent. On P. & Co. claiming the piano, they were opposed by H., a creditor of C., who claimed under an assignment made to him by C. as security for his debt, & received by him without any knowledge of the agreement with P. & Co. The assignment was duly filed & registered : —*Held :* P. & Co. should have the piano on paying to H. the amount they had received on its account from C.—*Re* PYKE (1873), 9 N. S. R. 342.—**CAN.**

h. *Special contract — Hirer to bear loss by fire.*]—Defts., on June 5, 1903, hired from pltfs. a piano at 10*s.* 6*d.* a month on the terms (*inter alia*) that defts. might become the purchasers if they paid to pltfs. in respect of rent £31 10*s.*, that they should remain bailees of the piano until they paid such sum, that they might at any time return the instrument, that defts. in case of damage by fire or otherwise, during the hiring, should bear the loss, that if the hiring was terminated by defts. within twelve months they should pay pltfs. such sum as, with the sums previously paid, would amount to the rent for twelve months. In Aug. & Oct., 1903, defts. called on pltfs. to remove the piano, but they declined to do so, unless the full hiring rent for twelve months was first paid. On Nov. 7, 1903, a fire occurred at defts.' residence, for which defts. were not responsible :—*Held :* pltfs. entitled to the value of the piano at the time it was burnt, & to the rent up to the gale day previous to the burning.—CRANE *v.* GALWAY (1905), 39 I. L. T. 94.—**IR.**

l. —— *Warranty of fitness.*] — Applts. delivered to resps. a harvester under a hire-purchase agreement containing (*inter alia*) the following terms : —"All our machines are warranted to be well made & of good material, & to do good work with proper management when set up & correctly operated. If upon starting any one of our machines it should not work well, immediate written notice must be given to George P. Harris, Scarfe & Co., Ltd., Perth, & the local agent from whom it was purchased, & reasonable time allowed to get it & remedy the defects, if any (the hirer rendering necessary & friendly assistance) ; if it cannot be made to do good work, it shall be returned free of charge to the place where received, & the payment of money & notes will be returned. Failure immediately to give notice as above, or continued possession of the machine, whether it is kept in use or not, shall be conclusive evidence that the machine fulfils every warranty." The machine when tested after delivery was not in good working order, but no notice of any kind was given to applts. for over six weeks :—*Held :* no notice having been given to applts. as required by the contract, resps. were precluded from raising any question as to a breach of warranty, & in the circumstances there was no waiver of notice.—HARRIS, SCARFE & CO., LTD. *v.* BROWNLIE BROTHERS (1915), 18 W. A. L. R. 55.—**AUS.**

PART III. SECT. 4.

269 i. *Duty of bailee—To preserve thing bailed—Accidental destruction.*]—Where a dress is left with a dyer & cleaner, the latter will be held only to the obligation of a prudent administrator, if the dress is destroyed by fire. He is not obliged to prove that the loss was occasioned by *vis major.* That burden rests with pltf., unless the dyer is guilty of negligence.—MOORE *v.* ALLEN (1915), Q. R. 47 S. C. 417.—**CAN.**

269 ii. —— —— *Sub-bailment of chattel.*]—A tailor who receives a suit of clothes to repair &, without the authorisation of the owner, sends it to a dye works to be cleaned, will be answerable for its loss as the consequence of a fire in the latter establishment.—GADBOIS *v.* LAUZON (1915), Q. R. 47 S. C. 276.—**CAN.**

269 iii. —— —— *Special contract.*]—Pltf. left his motor car at the works of defts. to have it repaired by them. He subsequently told them that he intended to insure the car, but, on being told by defts.' manager that the car was insured by them, he refrained from insuring it. The car was destroyed by fire while at

270. —— —— Liability for acts of servant.]—A. entrusted B., a watchmaker, with a watch to be repaired. B. suffered his servant to sleep in the shop in which the watch was deposited :—*Held :* B. was liable to A. for its value, B.'s servant having stolen it, & B. at the time when the theft was committed having deposited his own watches in a more secure place.—CLARKE *v.* EARNSHAW (1818), Gow, 30, N. P.

Annotation :—**Distd.** Jobson *v.* Palmer, [1893] 1 Ch. 71.

271. —— To redeliver.]—Pltf. sent a watch to deft. to be repaired. Deft., having repaired it, took it back to pltf. & asked for payment, & pltf. requested deft. to take the watch to his uncle A., who would pay for the repairs. Deft. could not find the uncle, but delivered the watch to pltf.'s uncle B., from whom it was stolen :—*Held :* deft. had not delivered the watch either to pltf. or to his authorised agent, & he was liable for its loss.—WILSON *v.* POWIS (1826), 3 Bing. 633 ; 11 Moore, C. P. 543 ; 4 L. J. O. S. C. P. 192 ; 130 E. R. 658.

272. —— —— Failure to redeliver within reasonable time—Goods destroyed by fire.]—Pltf. entrusted books to deft., a bookbinder, to be bound under a contract to deliver them when bound to pltf. within a reasonable time as & when required by him. Pltf. having required deft. to deliver the whole of the books then bound, deft. failed to deliver them within a reasonable time, & they were subsequently burnt in an accidental fire on his premises :—*Held :* deft. was liable in damages for the loss of the books, & he was not absolved by Fires Prevention (Metropolis) Act, 1774 (c. 78), s. 89.—SHAW & CO. *v.* SYMMONS & SONS, [1917] 1 K. B. 799 ; 86 L. J. K. B. 549 ; 117 L. T. 91 ; 33 T. L. R. 239.

273. Right to redelivery.]—Where chattels are bailed to an artisan for the purpose of his executing certain work upon them at an agreed price, the bailor may reclaim the chattels before such work is fully executed & the bailee has only a lien upon them to the extent of what would be a fair price for so much of the work as has then actually been executed.—LILLEY, ETC. (ASSIGNEES OF BENNETT) *v.* BARNSLEY (1844), 1 Car. & Kir. 344 ; 2 Mood. & R. 548.

Annotation :—**Refd.** Green *v.* All Motors, [1917] 1 K. B. 625, C. A.

274. —— —— Measure of damages.]—If a profit would arise from a chattel, & it is left with a tradesman for repair, & detained by him beyond the stipulated time, the measure of damages is *primâ facie* the sum which would have been earned in the ordinary course of employment of the chattel in the time.—*Re* TRENT & HUMBER CO., *Ex p.* CAMBRIAN STEAM PACKET CO. (1868), 4 Ch. App. 112 ; 38 L. J. Ch. 38 ; 19 L. T. 465 ; 17 W. R. 18, L. C.

Annotations :—**Refd.** *Re* Paraguassu Steam Tramroad Co., Black, Hawthorn's Case (1872), 27 L. T. 509 ; The Argentino (1888), 13 P. D. 191, C. A. ; The Greta Holme (1897), 66 L. J. P. 166. **Mentd.** *Re* Albert Life Assce., Cook's Policy (1870), L. R. 9 Eq. 703 ; Barratt *v.* L. B. & S. C. Ry. Co. (1877), De Colyar's County Ct. Cases, 195 ; *Re* Northern Counties of England Fire Insce. Co., Macfarlane's Claim (1880), 17 Ch. D. 337.

See, further, WORK & LABOUR.

Part IV.—Considerations Common to all Classes of Bailment.

SECT. 1.—GENERAL RIGHTS AND OBLIGATIONS OF BAILOR AND BAILEE INTER SE.

SUB-SECT. 1.—OBLIGATION OF BAILEE TO REDELIVER.

275. General principle.]—A bailment of goods to be redelivered imports an agreement to redeliver ; all special bailments import a contract to redeliver when the purpose for which the goods were deposited is answered (MANSFIELD, C.J.).—MILLS *v.* GRAHAM (1804), 1 Bos. & P. N. R. 140 ; 127 E. R. 413.

Annotations :—**Mentd.** Gledstane *v.* Hewitt (1831), 1 Tyr. 445 ; Whitehead *v.* Harrison (1844), 6 Q. B. 423 ; Stikeman *v.* Dawson (1847), 1 De G. & Sm. 90 : Danby *v.* Lamb (1861), 11 C. B. N. S. 423 ; R. *v.* Macdonald (1885), 1 T. L. R. 465, C. C. R.

See, also, Nos. 44—46, 225—240, *ante.*

276. Failure of purpose of bailment—Shares to order of German bank.]—Pltf., a British subject, instructed his London bankers to transfer certain shares to defts. " to the order of " a German bank, which had arranged to transfer them to New York. The shares were accordingly handed over to defts. " to the order of " the German bank, but the latter failed to give directions for their transfer to New York, & when war broke out between England & Germany the shares were still in defts.' hands. Pltf. claimed them back from defts. & brought an action for their delivery to him. The German bank had no lien upon the shares :—*Held :* as pltf. had a right, as against the German bank, to the delivery of the shares, defts. were bound to hand them over to pltf.—WETHERMAN *v.* LONDON & LIVERPOOL BANK OF COMMERCE, LTD. (1914), 31 T. L. R. 20.

277. Discharged by redelivery to bailor.]—If I bail goods to a man to keep for me & he delivers them to another man, & that second man delivers them to a third man, the second bailee is chargeable to the owner of the goods & to every one who had the possession ; but if the second man redeliver the goods to the first bailee, then he is discharged. So it is if the King's butler or other official bails goods of the King to a third person & then the bailee redeliver the goods to the butler, he is discharged. The same law governs, where I am in possession of the deeds of land of a third person & I deliver them to my servant to exhibit to my counsel, & afterwards my servant redelivers

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defts.' works, & defts. then discovered that it was not covered by the policy of insurance taken out by them :—*Held :* the effect of the conversation between pltf. & defts.' manager was to introduce a new term into the contract to repair, viz., that thenceforth defts. would keep pltf.'s car insured while at their works, & pltf. entitled to recover damages for the breach of it.—M'NEILL *v.* MILLIN & CO., LTD., [1907] 1 I. R. 328, 339 ; 40 I. L. T. 91, 154.—**IR.**

PART IV. SECT. 1, SUB-SECT. 1.

275 i. *General principle.*] — It is a primary duty of a depositary to return the thing deposited when it is required of him, &, if he is unable to do so, he cannot escape liability without proving that his inability does not arise out of his own negligence.

It is no valid defence to an action by a depositor for the return of the goods deposited, or for damages, that the depositary has sold them, unless it is clear that the sale was in the circumstances necessary & for the benefit of the depositor, in which case the depositary would only be liable for the price realised, less his expenses.—MEDALLIE & SHEIFF *v.* ROUX (1903), 20 S. C. 438 ; 13 C. T. R. 683.—**S. AF.**

277 i. *Discharged by redelivery to bailor.*]—Deft. agreed to return a steamer chartered on a certain day in good repair, dangers of the lake excepted :—*Held :* a plea " that before the day arrived pltf. took the boat from deft. without his consent, & kept her," was sufficient, though not in express terms confessing & avoiding the fact of not returning the boat.—LARNED *v.* MCRAE (1844), 1 U. C. R. 99.—**CAN.**

277 ii. —— *Or his servant.*] — Pltf. bailed a horse to deft., to be returned to him at a certain time. Before the time elapsed, deft. returned it to H., who was

Sect. 1.—General rights and obligations of bailor and bailee inter se: Sub-sects. 1 & 2.]

the same to me, then my servant is discharged so soon as he has delivered them to him to whom he was obliged to restore them. So it is if I am possessed of the goods of one who has been outlawed for trespass & deliver them to the escheator, I am discharged (KEBLE, J.).—A.-G. *v.* CAPEL (1494), Y. B. 10 Hen. 7, fo. 7, pl. 14.

278. Discharged when chattel perishes.]—In all contracts of loan of chattels or bailments, if the performance of the promise of the borrower or bailee to return the thing lent or bailed becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel (BLACKBURN, J.).—TAYLOR *v.* CALDWELL (1863), 3 B. & S. 826; 2 New Rep. 198; 32 L. J. Q. B. 164; 8 L. T. 356; 27 J. P. 710; 11 W. R. 726; 122 E. R. 309.

Annotations:—**Consd.** Appleby *v.* Myers (1866), L. R. 1 C. P. 615. **Apld.** Boast *v.* Firth (1868), L. R. 4 C. P. 1; Robinson *v.* Davison (1871), L. R. 6 Exch. 269; Howell *v.* Coupland (1874), L. R. 9 Q. B. 462. **Consd.** Howell *v.* Coupland (1876), 1 Q. B. D. 258, C. A.; *Re* Arthur, Arthur *v.* Wynne (1880), 14 Ch. D. 603. **Distd.** Marshall *v.* Schofield (1882), 52 L. J. Q. B. 58, C. A.; Turner *v.* Goldsmith, [1891] 1 Q. B. 544, C. A. **N.F.** Blum *v.* Ansley (1900), 64 J. P. 184. **Consd.** Nickoll & Knight *v.* Ashton, Edridge, [1901] 2 K. B. 126, C. A. **Apld.** Blakeley *v.* Muller, Hobson *v.* Pattenden (1903), 88 L. T. 90; Clark *v.* Lindsay (1903), 88 L. T. 198. **Consd.** Krell *v.* Henry, [1903] 2 K. B. 740, C. A. **Distd.** *Re* Hull & Meux, [1905] 1 K. B. 588, C. A.; The Salvador (1909), 25 T. L. R. 727, C. A.; Associated Portland Cement Manufacturers *v.* Cory (1915), 31 T. L. R. 442. **Apld.** *Re* Shipton, Anderson & Harrison's Arbitration, [1915] 3 K. B. 676; Horlock *v.* Beal, [1916] 1 A. C. 486, H. L. **Consd.** Leiston Gas Co. *v.* Leiston-cum-Sizewell U. C., [1916] 2 K. B. 428, C. A. **Apld.** *Re* Newman, Raphael's Claim, [1916] 2 Ch. 309, C. A. **Consd.** Smith, Coney & Barrett *v.* Becker, Gray, [1916] 2 Ch. 86, C. A. **Apld.** Metropolitan Water Board *v.* Dick, Kerr, [1917] 2 K. B. 1, C. A.; Scottish Navigation Co. *v.* Souter, Admiral Shipping Co. *v.* Weidner, Hopkins, [1917] 1 K. B. 222, C. A. **Expld.** Blackburn Bobbin Co. *v.* Allen, [1918] 2 K. B. 467. **Refd.** Appleby *v.* Myers (1867), L. R. 2 C. P. 651, Ex. Ch.; Castle *v.* Playford (1872), 26 L. T. 315, Ex. Ch.; Jackson *v.* Union Marine Insce. (1874), L. R. 10 C. P. 125, Ex. Ch.; Chapman *v.* Withers (1888), 57 L. J. Q. B. 457; *Re* Jamieson & Newcastle S.S. Freight Insce. Assocn., [1895] 1 Q. B. 510; Elliott *v.* Crutchley, [1903] 2 K. B. 476; Herne Bay Steam Boat Co. *v.* Hutton, [1903] 2 K. B. 683, C. A.; Scott *v.* Coulson, [1903] 2 Ch. 249, C. A.; Chandler *v.* Webster, [1904] 1 K. B. 493, C. A.; Stephens *v.* Junior Army & Navy Stores, [1914] 2 Ch. 516, C. A.; *Re* Worthington, *Ex p.* Pathé Frères, [1914] 2 K. B. 299; Tamplin (F. A.) S.S. Co. *v.* Anglo-Mexican Petroleum Products Co., [1916] 2 A. C. 397, H. L.; Lloyd Royal Belge Soc. Anon. *v.* Stathatos (1917), 33 T. L. R. 390. **Mentd.** Lumsden *v.* Barton (1902), 19 T. L. R. 53; Civil Service Co-operative Soc. *v.* General Steam Navigation Co., [1903] 2 K. B. 756, C. A.; Grimsdick *v.* Sweetman, [1909] 2 K. B. 740; Cummings *v.* Stewart (1912), 30 R. P. C. 1.

See, also, Nos. 225, 226, *ante.*

279. Mortgage by bailor—Demand by mortgagee.]—When a bailor mortgages the chattel bailed, & the mtgee. has a right to demand possession from the bailee & does demand it, the bailee may refuse to give the chattel up to the bailor at the expiration of the term of the hiring.

Pltfs. delivered a ship to defts. under a contract, which provided (*inter alia*) that defts. should, during the continuance of the contract & while the ship remained in the possession & use of defts., pay & discharge certain claims which would arise against the owners of the ship for its expenses, & upon the determination thereof redeliver the ship to pltfs. Pltfs. afterwards mtged. the ship, & certain expenses were incurred within the above provision, & then the mtgees. demanded possession under their mtge.:—*Held:* the mtge. & demand were an answer to the claim of pltfs. to have the ship redelivered to them, but were no answer to their claim to have the expenses paid.—EUROPEAN & AUSTRALIAN ROYAL MAIL CO., LTD. *v.* ROYAL MAIL STEAM PACKET CO. (1861), 30 L. J. C. P. 247; 8 Jur. N. S. 136.

280. Parting with possession under contract—Liability.]—If a bailee chooses to avail himself of the powers of the contract by which he is bailee to intrust the goods to other persons on contractual terms, so that he parts with the possession of the goods & can only have a right to get possession again under the terms of the contract he has made with these other persons, he is responsible if he does not get them back. He could no longer plead that he merely held them as bailee & had not been guilty of negligence. He has availed himself of the special terms of his contract & made a contract, by which the goods are delivered to third persons, with whom his bailor has nothing to do, & who may not have known his bailor, & he can no longer say, "I am not liable unless I personally have been negligent." If he cannot get them back under that contract so as to hand them back to his bailor he is liable (FLETCHER MOULTON, L.J.).—GENN *v.* WINKEL (1912), 107 L. T. 434; 28 T. L. R. 483; 56 Sol. Jo. 612; 17 Com. Cas. 323, C. A.

SUB-SECT. 2.—ESTOPPEL OF BAILEE.

281. Bailee cannot dispute bailor's title—General principle.]—A carrier had a parcel of goods delivered to him, to be carried from Maidstone to London. While the goods lay at his warehouse, a person came there, who said the goods were his, & claimed them from the carrier. The carrier said he could not deliver them, but that if he were indemnified, he would keep them, & not deliver them according to order. An indemnity was

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in pltf.'s employment both at the time of bailment & return, & who told deft. that pltf., had sent him for the horse. H. was known to deft., & to others generally, as being in the employment of pltf., as a general manager of his business. In trover for the horse:—*Held:* the delivery to H. was a good delivery to pltf.—BOUCHETTE *v.* ANDERSON, *temp.* Man. R. Wood, 64.—**CAN.**

m. *Measure of damages.*]—Defts. agreed to hold certain share certificates belonging to pltfs. & guaranteed that the certificates would be kept safely in deposit vaults & delivered upon demand under proper authority. Afterwards pltfs. demanded the certificates from defts., but the latter refused to deliver them up:—*Held:* pltfs. entitled to damages for the detention based on estimates of what had been lost by the detention & the measure of damages was the highest price of the shares represented by the certificates between the demand & the delivery.—ELGIN LOAN & SAVINGS CO. *v.* NATIONAL TRUST CO. (1905), 5 O. W. R. 466; 10 O. L. R. 41.—**CAN.**

n. ——.]—A bailee who, by reason of the loss of the article deposited, is not in a position to restore it, is bound to pay the value to the bailor, but he is not responsible for the loss of profits which the latter might have derived from the article; & the owner of a drawing, left with an engraver to be reproduced for advertising purposes, may recover the value if the article is not returned, but not damages for the loss of profits, which might have accrued from the publicity, which the distribution of the article ordered would have procured.—GIGNAC *v.* WOODBURN (1906), Q. R. 29 S. C. 431.—**CAN.**

p. ——.]—GREEN FUEL ECONOMISER CO. *v.* TORONTO (1915), 8 O. W. N 541.—**CAN.**

279 i. *Mortgage by bailor—Injunction.*]—Deft., a warehouseman, delivered warehouse receipts to A. for flour, & afterwards delivered over a portion thereof, at A.'s instance, on the understanding that the quantity so delivered out should be made up by other flour to be brought to his warehouse. Such course of dealing was in accordance with the usage of the trade. A. afterwards brought to the warehouse flour, which had not been manufactured at the time of giving the warehouse receipts, & which was assigned to pltf., who had made advances on it, after it was stored. The ct. refused an injunction to restrain the delivery of such flour to A.—WILMOT *v.* MAITLAND (1851), 3 Gr. 107.—**CAN.**

given, & the goods not being delivered according to order, the party, by whom they were delivered to the carrier, brought an action against the carrier :—*Held :* the carrier having received the goods from pltf., was precluded from questioning his title, or showing a property in any other person.—ANON. (undated), cited in 3 Esp. p. 115, N. P.

Annotation : **Distd.** Laclouch *v.* Towle (1800), 3 Esp. 114, N. P.

282. —— One of two joint obligees of bond.]—Pltf., one of two joint obligees of a bond, handed the bond to deft. to be safely kept & given back to pltf. Deft. would not give the bond back, though often requested, & without pltf.'s leave gave it to the obligor :—*Held :* action was properly brought by one of the obligees, because the delivery was by one only.—TANTON *v.* HARRIS (1626), Lat. 124; 82 E. R. 306.

283. —— Adverse claim abandoned.]—Deft., a wharfinger, received malt from & for B., who made a colourable sale of the malt to pltf., deft. transferring the malt in his books to pltf. B. became bkpt. & his assignees sued pltf. in trover for the malt. Deft. had no lien against pltf. Afterwards the assignees abandoned the action against pltf., who then brought *assumpsit* against deft. for money had & received. Deft. sought to answer pltf.'s claim by showing that the property in the malt was in B.'s assignees & to set up their right against pltf. :—*Held :* deft. had no right to dispute the validity of pltf.'s title.

To allow a depositary of goods or money, who has acknowledged the title of one person, to set up the title of another, who makes no claim or has abandoned all claim, would enable the depositary to keep for himself that to which he does not pretend to have any title in himself whatsoever (LORD DENMAN, C.J.).—BETTELEY *v.* REED (1843), 4 Q. B. 511; 3 Gal. & Dav. 561; 12 L. J. Q. B. 172; 7 Jur. 507; 114 E. R. 991.

Annotations :—**Consd.** Biddle *v.* Bond (1865), 6 B. & S. 225. **Apprvd.** Kingsman *v.* Kingsman (1880), 44 L. T. 124, C. A.; Rogers *v.* Lambert, [1891] 1 Q. B. 318, C. A.

284. —— Acceptance with knowledge of adverse claim.]—Although in certain cases a bailee may set up the *jus tertii*, yet if he accepts the bailment with full knowledge of an adverse claim, he cannot afterwards set up the existence of such claim as against his bailor.—*Re* SADLER, *Ex p.* DAVIES (1881), 19 Ch. D. 86; 45 L. T. 632; 30 W. R. 237, C. A.

285. —— Unless acting on behalf & by authority of owner.]—The bailee of goods cannot avail himself of the title of a third person to the goods as a defence to an action of detinue by the bailor, except by further showing that he is defending the action on behalf & by the authority of such third person.—ROGERS, SONS & CO. *v.* LAMBERT & CO., [1891] 1 Q. B. 318; 60 L. J. Q. B. 187; 64 L. T. 406; 55 J. P. 452; 39 W. R. 114; 7 T. L. R. 69, C. A.

Annotations :—**Refd.** Bristol & West of England Bank *v.* Mid. Ry. Co. (1891), 61 L. J. Q. B. 115, C. A.; Henderson *v.* Williams, [1895] 1 Q. B. 521, C. A.

286. Bailee discharged by eviction by title paramount.]—Pltf. declared that whereas he was possessed of a horse, & lent it deft. to ride to Y. & afterwards to deliver it back such a day, deft. promised in consideration thereof to redeliver the horse on the day mentioned in the declaration. Deft. by way of bar confessed the former matter, but laid the true property of the horse to be in S. before pltf. had anything in it, & that when deft. had ridden to Y. & was ready to have delivered back the horse to pltf. S. *vi et armis et contra voluntatem* of deft. retook the horse :—*Held :* that this was as an eviction of the horse out of deft.'s possession, which discharged the promise. —SHELBURY *v.* SCOTSFORD (1602), Yelv. 23; 80 E. R. 17.

Annotations :—**Apprvd.** Biddle *v.* Bond (1865), 6 B. & S. 225; *Re* Sadler, *Ex p.* Davies (1881), 19 Ch. D. 86, C. A.; Rogers *v.* Lambert, [1891] 1 Q. B. 318, C. A. **Refd.** Dutton *v.* Poole (1678), T. Jo. 102; Atkins *v.* Berwick (1718), 11 Mod. Rep. 295.

287. —— Or its equivalent.]—The estoppel against a bailee from disputing the title of his bailor, & setting up a *jus tertii*, ceases when the bailment on which the estoppel is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person, or that an adverse claim is made upon him, so that he may be entitled to an interpleader.

Goods of R. were seized by pltf. under a distress for rent of a house, alleged to have been demised by pltf. to R., & were delivered by pltf. to deft. to sell as his auctioneer. When the sale was about to begin R. served a notice on deft. that the distress was void, & requiring him not to sell, or, if he sold, to retain the proceeds for him. Deft. sold the goods, but refused to pay over the proceeds to pltf., & defended an action by pltf., relying on the right & by the authority of R. The distress was void & tortious, as the relation between pltf. & R. was not that of landlord & tenant, but although pltf. was a wrongdoer, there was no fraud on his part, & he thought he had a right to distrain :—

PART IV. SECT. 1, SUB-SECT. 2.

285 i. *Bailee cannot dispute bailor's title —Unless acting on behalf & by authority of owner.*]—A bailee of goods is not estopped from disputing the bailor's title, when he shows that the property is vested in a third party.—WHITE *v.* BROWN (1855), 12 U. C. R. 477.—**CAN.**

285 ii. ——.]—Pltf. sold goods to M., which were at the time lying at defts.' railway station. Defts. were fully aware of the sale, but notwithstanding they contracted with pltf. to carry & deliver them for him as required, & gave him a shipping bill accordingly. Although M. had notified defts. of his claim & made a demand for the goods, he had, in fact, sued pltf. & recovered his whole claim from him. In an action by pltf. against defts. for non-delivery :—*Held :* the case could not be brought within the principle of a bailee setting up the *jus tertii* against pltf., for defts. were not *bonâ fide* defending in right of such third person.—BRILL *v.* GRAND TRUNK RY. CO. (1870), 20 C. P. 440.—**CAN.**

285 iii. ——.]—M. & Co. bought a cartload of wheat on commission for C. They paid for it themselves, & shipped it by defts., taking the railway receipt in their own name as consignees. The car was addressed to the care of C., at W., M. & Co. being aware that it was to be ground there for C. At W., the wheat was delivered by defts. upon C.'s order to his brother, who had a mill there. It was mixed by him with other wheat & ground, & fifty-five barrels of flour, the equivalent for it, were delivered by him to defts. for C. C. became insolvent before the draft matured, & M. & Co. took it up & got the railway receipt indorsed to them. C. as assignee having sued defts. in trover & detinue for the flour, they in privity with M. & Co. denied pltf.'s right to it, & set up the title of M. & Co. :—*Held :* defts. entitled to set up the title of M. & Co. as a defence.—MASON *v.* GREAT WESTERN RY. CO. (1871), 31 U. C. R. 73.—**CAN.**

285 iv. ——.]—Pltf. executed a deed of arrangement, by which he assigned all his goods to trustees for the benefit of his creditors. After execution of the deed, pltf. went to reside with deft., taking with him his wearing apparel & other goods. On leaving he desired to take the goods away with him, but deft. refused to let him do so, claiming a right to retain them for a debt. Pltf. sued for their recovery, claiming damages for their detention. Deft. contended that, as the goods belonged to pltf.'s trustees under the deed, he could not recover. There was no evidence that the trustees actually claimed the goods, or authorised deft. to detain them :—*Held :* deft., being a bailee, could not set up the right of the trustees to the goods, not having shown that he was authorised by them to detain them.—PEACOCK *v.* ANDERSON, 4 J. R. N. S. 67.—**N.Z.**

287 i. —*Bailee discharged by eviction by title paramount—Or its equivalent.*]—A bailee is precluded from questioning the title of the bailor to the subject-matter of the bailment, unless the bailment has been determined by what is equivalent to an eviction by title paramount, in which case the bailee may set up the *jus tertii* to the goods.—MARAIS *v.* ANDERSON (1909), E. D. C. 76.—**S. AF.**

Sect. 1.—*General rights and obligations of bailor and bailee inter se: Sub-sects.* 2 & 3.]

Held: deft. might set up the *jus tertii* of R. as an answer to the action.—BIDDLE *v.* BOND (1865), 6 B. & S. 225; 5 New Rep. 485; 34 L. J. Q. B. 137; 12 L. T. 178; 29 J. P. 565; 11 Jur. N. S. 425; 13 W. R. 561; 122 E. R. 1179.

Annotations:—**Apld.** Leese *v.* Martin (1873), L. R. 17 Eq. 224. **Distd.** Kingsman *v.* Kingsman (1880), 6 Q. B. D. 122, C. A.; *Re* Sadler, *Ex p.* Davies (1881), 19 Ch. D. 86, C. A. **Apprvd.** Rogers *v.* Lambert, [1891] 1 Q. B. 318, C. A. **Consd.** Henderson *v.* Williams, [1895] 1 Q. B. 521, C. A. **Apprvd.** Ross *v.* Edwards (1895), 73 L. T. 100 P. C.

288. —— ——.]—In ordinary circumstances a bailee is estopped from disputing the title of the bailor, but, if there is an eviction by title paramount, the bailee is, in the absence of any special contract, discharged from all liability.—ROSS *v.* EDWARDS & CO. (1895), 73 L. T. 100; 11 R. 574, P. C.

289. —— **Claim by true owner.**]—A warehouseman, receiving goods from a consignee, who has had actual possession of them, to be kept for his use, may nevertheless refuse to redeliver them, if they are the property of another.—OGLE *v.* ATKINSON (1814), 5 Taunt. 759; 1 Marsh. 323; 128 E. R. 890.

Annotations:—**Distd.** Gosling *v.* Birnie (1831), 7 Bing. 339; Mitchel *v.* Ede (1840), 11 Ad. & El. 888. **Apprvd.** Cheesman *v.* Exall (1851), 6 Exch. 341. **Distd.** Turner *v.* Liverpool Docks (1851), 6 Exch. 543. **Consd.** Schotsmans *v.* L. & Y. Ry. Co. (1865), L. R. 1 Eq. 349. **Refd.** Wilmshurst *v.* Bowker (1844), 7 Man. & G. 882; Wait *v.* Baker (1848), 2 Exch. 1; Watson *v.* Lane (1856), 11 Exch. 769; Brown *v.* Hare (1858), 27 L. J. Ex. 372; Thorne *v.* Tilbury (1858), 3 H. & N. 534; Gabarron *v.* Kreeft, Kreeft *v.* Thompson (1875), L. R. 10 Exch. 274. **Mentd.** Delaney *v.* Fox (1857), 2 C. B. N. S. 768.

See, also, No. 164, *ante,* & No. 386, *post.*

290. —— ——.]—To an action of trover for goods, defts. pleaded that the goods were delivered by pltf. to defts. to be by them warehoused & taken care of, that before delivery the goods had been the property of T. deceased, & that there was not at the time of delivery any legal representative of the estate of T., & that fact was concealed from defts., that afterwards H. obtained letters of administration to the effects of T. & claimed the goods, & forbade defts. to deliver them to pltf.:—*Held:* a good plea. *Semble:* a warehouseman being a bailee of goods is not estopped from disputing the title of his bailor, but, if the goods are the property of another, he may refuse to redeliver them, if he does so relying upon the right & title by the authority of that other.—THORNE *v.* TILBURY (1858), 3 H. & N. 534; 27 L. J. Ex. 407; 31 L. T. O. S. 206; 157 E. R. 581.

Annotations:—**Apprvd.** Biddle *v.* Bond (1865), 6 B. & S. 225; Kingsman *v.* Kingsman (1880), 44 L. T. 124, C. A.; Rogers *v.* Lambert, [1891] 1 Q. B. 318, C. A. **Refd.** Best *v.* Hayes (1863), 1 H. & C. 718.

291. —— ——.]—When a bailor mtges. the chattel bailed, & the mtgee. has a right to demand possession from the bailee & does demand it, the bailee may refuse to give the chattel up to the bailor.—EUROPEAN & AUSTRALIAN ROYAL MAIL CO., LTD. *v.* ROYAL MAIL STEAM PACKET CO. (1861), 30 L. J. C. P. 247; 8 Jur. N. S. 136.

292. —— **Injunction.**]—A wharfinger received notice that certain goods deposited at his wharf were marked with a fraudulent imitation of a trade-mark, & that the owner of the trade-mark was about to apply to the Ct. of Ch. for an injunction to prevent the sale of the goods. After the injunction had been granted, but before the wharfinger had notice that it had been granted, he refused to deliver the goods to the holder of the dock-warrants:—*Held:* (1) he was justified in equity in such refusal; (2) the owner of the goods would be restrained from suing him at law for a wrongful conversion of the goods.—HUNT *v.* MANIERE (1864), 34 Beav. 157; 5 New Rep. 181; 34 L. J. Ch. 142; 11 L. T. 469; 11 Jur. N. S. 28; 13 W. R. 212; 55 E. R. 594.

293. Bailee entitled to reasonable time for inquiry.]—Wine, the property of pltf., being in the warehouse of deft., a wharfinger, notice from the Mayor's Ct. was served on deft., attaching in his hands all the goods of H., from whom pltf. had purchased the wine, & at the same time deft. was informed that the attachment had reference to the wine. Pltf. demanded the wine from deft.'s clerk, producing the delivery warrant which had been issued by deft. to B., a former owner, & indorsed by him to H., & by H. to pltf. Deft.'s clerk said that there was a difficulty in consequence of the attachment, & referred pltf. to deft., whom he could not find. Pltf.'s attorney thereupon wrote, demanding the wine before eleven o'clock the next morning. Deft.'s attorney replied, asking for time for inquiry; but a writ was issued before that answer was received:—*Held:* (1) there was some evidence of a conversion; (2) the conduct & position of deft. was evidence from which the jury might infer whether or not he had been guilty of a conversion of the wine, & before arriving at a conclusion it was proper for the jury to consider whether deft. had a *bonâ fide* doubt as to pltf.'s title to the wine, & whether a reasonable time for clearing up that doubt had elapsed before the action was commenced; (3) the goods were not *in custodiâ legis.*—PILLOTT *v.* WILKINSON (1864), 3 H. & C. 345; 4 New Rep. 445; 34 L. J. Ex. 22; 11 L. T. 349; 10 Jur. N. S. 991; 12 W. R. 1084; 159 E. R. 564, Ex. Ch.

Annotation:—**Refd.** Hiort *v.* L. & N. W. Ry. Co. (1879), 4 Ex. D. 188, C. A.

See, further, ESTOPPEL; TROVER & DETINUE.

Bailee's right to interplead.] — *See* INTERPLEADER.

SUB-SECT. 3.—ATTORNMENT BY BAILEE.

See No. 154, *ante.*

294. Bailee cannot deny title of attornee.]—Deft., a wharfinger, having acknowledged certain timber on his wharf to be the property of pltf.:—*Held:* he could not dispute pltf.'s title in an action for trover, brought against him by pltf.—GOSLING *v.* BIRNIE (1831), 7 Bing. 337; 5 Moo. & P. 160; 9 L. J. O. S. C. P. 105; 131 E. R. 131.

Annotations:—**Distd.** Hardman *v.* Willcock (1832), 9 Bing. 382, n.; Biddle *v.* Bond (1865), 6 B. & S. 225. **Refd.** Woodley *v.* Coventry (1863), 2 New Rep. 35; Henderson *v.* Williams, [1895] 1 Q. B. 521, C. A.

295. ——.]—W., possessed of a Stockton wharfinger's receipt for goods about to be shipped to London, assigned the receipt to pltf., together with an order on deft., a London wharfinger, to deliver the goods to pltf. Deft., on sight of the order before the goods arrived, promised to deliver them to pltf. on their arrival:—*Held:* deft. was not in a condition to set up any objection to pltf.'s

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PART IV. SECT. 1, SUB-SECT. 3.

294 i. *Bailee cannot deny title of attornee.*]—Defts., warehousemen, holding grain for M., gave him a warehouse receipt, which on Sept. 3 he indorsed to pltf. On Sept. 5, the sheriff received a *fi. fa.* against M., under which he seized, & M. having on the 22nd made a voluntary assignment in insolvency, the sheriff gave an order for the grain to the assignee. Pltf. having brought detinue & trover against defts., who had shipped a portion of the grain to him on Oct. 23, but retained the rest:—*Held:* he was entitled to recover.—RICHARDSON *v.* GRAY (1869), 29 U. C. R. 360.—CAN.

title, & pltf. might maintain trover against him on his refusal to deliver after arrival.—HOLL *v.* GRIFFIN (1833), 10 Bing. 246; 3 Moo. & S. 732; 3 L. J. C. P. 17; 131 E. R. 898.

Annotation:—**Refd.** Swan *v.* North British Australasian Co. (1862), 7 H. & N. 603.

296. ——.]—A. contracted to sell B. twenty sacks of flour, & gave him an order on C., his wharfinger, requesting him "to deliver to B. twenty sacks of households." On the order being presented to C. he stated that he had only five sacks to spare, but that B. might have them; & they were delivered accordingly. The order was filed by C., in the way that orders accepted generally were filed by him in the usual course of his business, without any indorsement being made on it of a partial acceptance only. Application was made the following day for the remaining fifteen sacks of flour, when C. replied that B. should have it as soon as he got any. A demand being afterwards made, C. refused to deliver any more, saying that he had no flour of A.'s in his possession. On trover brought by B. against C. to recover the value of the fifteen sacks, the jury found that C. had accepted the order generally, & gave a verdict for pltf.:—*Held:* the verdict was right, & trover was maintainable.

Defts. in this instance attorn as it were to the delivery order, & admit the pltf.'s right to call upon them to deliver twenty sacks of flour. Having received that order, it is binding on them (VAUGHAN, B.)—GILLETT *v.* HILL (1834), 2 Cr. & M. 530; 4 Tyr. 290; 3 L. J. Ex. 145; 149 E. R. 871.

Annotations:—**Refd.** Knights *v.* Wiffen (1870), L. R. 5 Q. B. 660; Thames Sack & Bag Co. *v.* Knowles (1918), 119 L. T. 287. **Mentd.** Henderson *v.* Williams (1894), 72 L. T. 98, C. A.

297. ——.]—A. shipped goods on board a ship belonging to defts., wharfingers, & received from the master of the ship (defts.' servant) a boat receipt to the effect that the goods were to be delivered to pltfs.:—*Held:* defts. were estopped from denying pltfs.' title in the goods on their arrival.—EVANS *v.* NICHOL (1841), 3 Man. & G. 614; 4 Scott, N. R. 43; 11 L. J. C. P. 6; 5 Jur. 1110; 133 E. R. 1286.

Annotation:—**Mentd.** Kerford *v.* Mondel (1859), 28 L. J. Ex. 303.

298. —— **Representation that goods in his possession.**]—In 1875 goods were stored by brokers with wharfingers, who issued warrants for them. These warrants were negotiated, & were in Jan., 1886, in the possession of B. & E. Deft. took over the business of the wharfingers, & in 1885 his servants, without his knowledge & by mistake, delivered the goods to certain persons, instead of goods to which those persons were entitled. In Jan., 1886, deft. wrote two letters to the brokers, whose business had been taken over & was then being carried on by pltf., informing them, as the persons supposed to be interested in the goods, that the goods were in hand, & that warrants were out that rent was due, & that the goods would be sold unless the rent was paid. Pltf. did not reply to those letters, but in consequence of them he inquired for the warrants, & purchased them from B. & E., & applied to deft. for the goods, when deft. first discovered & informed pltf. that the goods were no longer in his possession. In an action for damages for wrongful conversion:—*Held:* deft. was liable, because, having by negligent misrepresentation led pltf. to believe that the goods were in his possession, & such misrepresentation having been the real cause of pltf.'s loss, he having purchased the warrants in consequence thereof, deft. was estopped from denying that he had the goods specified in the warrants.—SETON, LAING & CO. *v.* LAFONE (1887), 56 L. J. Q. B. 415; 57 L. T. 547; 35 W. R. 749; 3 T. L. R. 624, C. A.

299. —— **Custom not available.**]—A warehouseman, who, on receiving an order from the seller of malt to hold it on account of the purchaser, gives a written acknowledgment that he so holds it, cannot set up, as a defence for not delivering it to the purchaser, that by the usage of trade the property in malt sold is not transferred till it is remeasured, & that before the malt in question was remeasured the seller became bkpt.—STONARD *v.* DUNKIN (1809), 2 Camp. 344, N. P.

Annotations:—**Apld.** Holl *v.* Griffin (1833), 10 Bing. 246. **Distd.** Biddle *v.* Bond (1865), 6 B. & S. 225. **Apld.** Knights *v.* Wiffen (1870), L. R. 5 Q. B. 660. **Consd.** Henderson *v.* Williams, [1895] 1 Q. B. 521, C. A. **Refd.** Hawes *v.* Watson (1824), 2 B. & C. 540; Gosling *v.* Birnie (1831) 7 Bing. 339; Woodley *v.* Coventry (1863), 2 New Rep. 35

300. —— ——.]—Deft., having a quantity of barley in sacks lying in his granary, which adjoined a railway station, sold eighty quarters of it to M. No particular sacks were appropriated to M., but the barley remained at the granary subject to his orders. M. sold sixty quarters of it to pltf., who paid him for them & received from him a delivery order addressed to the station-master, as was usual in such cases. Pltf. sent the order in a letter to the station-master, saying "Please confirm this transfer." The station-master showed the delivery order & pltf.'s letter to deft., who said, "All right, when you get the forwarding note I will put the barley on the line." M. became bkpt., & deft., as unpaid vendor, refused to deliver the barley when the forwarding note was presented to him by the station-master acting for pltf.:—*Held:* deft. was estopped by his statement to the station-master from denying that the property in the goods had passed to pltf., for, by making such statement, he induced pltf. to rest satisfied under the belief that the property had passed, & so to alter his position by abstaining from demanding back the money which he had paid to M.—KNIGHTS *v.* WIFFEN (1870), L. R. 5 Q. B. 660; 40 L. J. Q. B. 51; 23 L. T. 610; 19 W. R. 244.

Annotations:—**Distd.** Simm *v.* Anglo-American Telegraph Co., Anglo-American Telegraph Co. *v.* Spurling (1879), 5 Q. B. D. 188. **Consd.** Kingston-upon-Hull Corpn. *v.* Harding, [1892] 2 Q. B. 494, C. A.; Foster *v.* Tyne Pontoon & Dry Docks Co. & Renwick (1893), 63 L. J. Q. B. 50. **Refd.** Joseph *v.* Webb, Joseph *v.* Lyons, Joseph *v.* Pidcock, Joseph *v.* Jones (1883), Cab. & El. 262; Henderson

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298 i. —— *Representation that goods in his possession.*] — Defts. gave a receipt to C. & Co., stating that they had received & held on their (C. & Co.'s) account 500 bushels of wheat. Pltf. relying upon the receipt, & the representations made by C. & Co., purchased from them the supposed 500 bushels of wheat, & took an assignment of the receipt as evidence of his purchase, & as authority to defts. to deliver same. Defts. at the date of the receipt had, in fact, only received 270 bushels on account of C. & Co.:—*Held:* defts. having given their receipt for 500 bushels of wheat, were estopped from setting up that they had not at the date thereof that quantity of wheat in store for C. & Co.—HOLTON *v.* SANSON (1862), 11 C. P. 606.—**CAN.**

298 ii. ——— *Fraud of bailor.*]—D., a customer of S. Bank, handed over to U. Co. wool to be warehoused, & G., a servant of the co., whose duty it was to receive produce into the co.'s warehouses, gave a receipt, addressed to the bank, acknowledging that the co. had received a specified quantity of wool "under pledge to the bank for account of D., which the co. holds at the disposal of the bank until released by the bank." D. fraudulently obtained from G. receipts for more wool than was actually delivered to the co., & induced him to part with wool for shipment for which no release had been given by the bank. Bills of exchange were drawn by D. upon the consignees for the value of the wool, those bills with bills of lading annexed were purchased by the bank, cheques were drawn by D. upon his general account with the bank, & the amount of such cheques was placed to the credit of his produce advance account:—*Held:* as G. had no authority to do more than give the usual receipts for wool actually received, the co. was not liable in respect of wool, for which receipts had been given, but which was never delivered.—STANDARD BANK *v.* UNION BOATING CO. (1890), 7 S. C. 257.—**S. AF.**

Sect. 1.—General rights and obligations of bailor and bailee inter se: Sub-sects. 3, 4 & 5.]

v. Williams, [1895] 1 Q. B. 521, C. A.; Monarch Motor Car Co. *v.* Pease (1903), 19 T. L. R. 148. **Mentd.** Dixon *v.* Kennaway, [1900] 1 Ch. 833; Sheffield Corpn. *v.* Barclay (1902), 8 Com. Cas. 49.

301. —— Right to stop in transitu not available.]—A., by contract, sold to B. a quantity of tallow, then lying at a wharf, at so much per cwt., & on the same day gave a written order upon the wharfingers to weigh, deliver, transfer, & rehouse same. B. having entered into a contract to sell tallow to C., obtained from the wharfingers & gave to C. a written acknowledgment that they had transferred the tallow to the account of C., & that C. was to be liable to charges from a given date. B. having stopped payment, A. gave notice to the wharfingers not to deliver the tallow to B.'s order. In an action of trover by C. against the wharfingers:—*Held:* after their acknowledgment, they held the tallow as the agents of C., & they could not set up as a defence a right in A. to stop it *in transitu.*—HAWES *v.* WATSON (1824), 2 B. & C. 540; 4 Dow. & Ry. K. B. 22; 2 L. J. O. S. K. B. 83; 107 E. R. 484.

Annotations:—**Folld.** Gosling *v.* Birnie (1831), 7 Bing. 339. **Consd.** Crawshay *v.* Thornton (1837), 2 My. & Cr. 1; Swanwick *v.* Sothern (1839), 9 Ad. & El. 895. **Distd.** Biddle *v.* Bond (1865), 6 B. & S. 225. **Consd.** Knights *v.* Wiffen (1870), L. R. 5 Q. B. 660. **Refd.** Mellin *v.* Kelshaw (1830), 1 Tyr. 109; Meynell *v.* Angell (1862), 1 New Rep. 126; Woodley *v.* Coventry (1863), 2 H. & C. 164; *Re* Knight, *Ex p.* Golding Davis (1880), 13 Ch. D. 628, C. A.; Henderson *v.* Williams, [1895] 1 Q. B. 521, C. A.; Dixon *v.* Kennaway, [1900] 1 Ch. 833.

302. —— Transfer obtained by fraud.]—The owner of goods lying at a warehouse was induced by the fraud of F. to instruct the warehouseman to transfer the goods to the order of F., & the goods were placed at F.'s disposal. F. then sold the goods to an innocent purchaser, who, before paying the price, obtained a statement from the warehouseman that he held the goods at the purchaser's order. On the discovery of F.'s fraud, the warehouseman refused to deliver the goods to the purchaser. In an action by the purchaser against the warehouseman:—*Held:* the warehouseman, having attorned to the purchaser, was estopped from impeaching his title, & his refusal to deliver was a conversion.

The true owner, having enabled F. to hold himself out as the owner, could not set up his title against that of the purchaser (LORD HALSBURY).—HENDERSON & Co. *v.* WILLIAMS, [1895] 1 Q. B. 521; 64 L. J. Q. B. 308; 72 L. T. 98; 43 W. R. 274; 11 T. L. R. 148; 14 R. 375, C. A.

Annotations:—**Consd.** Farquharson *v.* King, [1901] 2 K. B. 697, C. A. **Refd.** Herdman *v.* Wheeler, [1902] 1 K. B. 361. **Mentd.** Compania Naviera Vasconzada *v.* Churchill, Compania Naviera Vasconzada *v.* Burton, [1906] 1 K. B. 237.

303. What constitutes attornment.]—Goods in bales were sent from the country to the wharf of defts., wharfingers in London, consigned to B. & Co., factors, for sale, & made deliverable to them or their assigns. M. having bought of B. & Co. forty-eight bales of goods, so consigned, & lying at defts.' wharf, B. & Co. ordered defts. to weigh & deliver same to M. Defts. weighed the goods, & communicated the weight to B. & Co., who sent to M. an invoice, stating the weight, together with the price. Five of these bales were afterwards delivered by defts., on the order of M., to a party to whom M. had resold them. The rest remained at defts.' wharf, & were afterwards stopped by B. & Co. as unpaid vendors. No transfer of any of the bales was made in defts.' books from B. & Co. to M., nor was any warehouse rent paid by him. M. afterwards became bkpt., & his assignees brought an action against defts. for non-delivery of the goods:—*Held:* (1) the above facts did not make defts. wharfingers to bkpt., so as to entitle pltfs. to sustain the action; (2) the part delivery of bkpt. to his vendees was not sufficient to defeat defts.' right of stoppage *in transitu.*—TANNER *v.* SCOVELL (1845), 14 M. & W. 28; 14 L. J. Ex. 321; 153 E. R. 375.

Annotations:—**Folld.** *Re* Pigott, *Ex p.* Cross (1851), Fonbl. 215. **Expld.** *Re* McLaren, *Ex p.* Cooper (1879), 11 Ch. D. 68, C. A. **Refd.** Grice *v.* Richardson (1877), 37 L. T. 677; *Re* Harcourt, Danby *v.* Tucker (1883), 31 W. R. 578.

304. ——.]—Goods were shipped by pltf. from abroad to England, & were sent to a shipping agent of pltf.'s in London, who received them & warehoused them with a wharfinger, informing deft. of their arrival. The wharfinger handed to the shipping agent a delivery-warrant, whereby the goods were made deliverable to him or his assignees by indorsement, on payment of rent & charges:—*Held:* the warrant was no more than an engagement by the wharfinger to deliver to the consignee, or any one he might appoint, & the wharfinger's possession was that of the consignee, until an assignment had taken place, & the wharfinger had attorned to the assignee, & agreed with him to hold for him, & then, but not till then, the wharfinger was the agent or bailee of the assignee, & his

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302 i. —— *Transfer obtained by fraud.*]—A. by artifice obtained an order from B., directed to his agent, to deliver wheat to A., which order A. presented, not to the agent, but to deft., a wharfinger, in whose warehouse B. had wheat. Deft. gave him his certificate for the wheat deliverable on demand, & A., after notice by deft. that he would not deliver, transferred his right to the wheat, but not the certificate, to pltfs.:—*Held:* deft. not estopped by his certificate from denying pltfs.' title.—DAVIS *v.* BROWN (1852), 9 U. C. R. 193.—**CAN.**

303 i. *What constitutes attornment.*]—C. & W. stored goods with J., who admitted their right. C. & W. sold some of the goods to P. The goods sold to P. were not identified or set apart. J. signed a document thus worded: "Received for storage on the conditions on the back hereof from P." The goods sold to P. were sold by him to B. & Co., & P. left the colony without paying C. & W. In an action by B. & Co. against J. for the stored goods sold to B. & Co.:—*Held:* the admission of the right of P. made by J. in the receipt to him, could not be used by B. & Co.—BECKX *v.* JONES (1863), 2 W. & W. 313.—**AUS.**

303 ii. ——.]—A keeper of a bonded warehouse sold upon credit goods of his own in such warehouse, & indorsed to the purchaser certificates, stating that the vendors were the bailors. On a demand by a sub-purchaser upon the warehouse clerk to have the goods transferred into his name, the clerk (in pursuance of general instructions) required time to communicate with his employer, who, however, was aware of the insolvency of his vendee:—*Held:* the warehouseman had a right to stop delivery.—LANGE *v.* GRICE, RICHARDSON *v.* GRICE (1876), 2 V. L. R. 251.—**AUS.**

303 iii. ——.]—Deft., who held wheat in store, on receiving a delivery order signed by A., undertook to hold the wheat for pltf., & negotiated with him for the purchase of it, but afterwards repudiated pltf.'s title on being indemnified by A., & refused to give the wheat up to pltf.:—*Semble:* deft., after what he had done, could not be permitted to set up A.'s title against pltf.—MURPHY *v.* YEOMANS (1878), 29 C. P. 421.—**CAN.**

303 iv. ——.]—When a warehouseman retains for a considerable space of time a delivery order in his possession, without giving notice to the party sending it that the property is not the property of the party by whom the order is made, the party who sent it has a right to conclude that the warehouseman has made the transfer of the property, & that he retains the order to show his authority for so doing, & the warehouseman will be responsible for the goods to the person sending the order.—TWINING *v.* OXLEY (1856), 2 Thom. 18.—**CAN.**

303 v. ——.]—Applt. attached machines which H. had placed in various hotels. The machines were claimed by resp., who alleged that they had been sold to him by H. in July for £125. A written contract of sale for £125 was produced & a receipt for £70 in full settlement. The proprietors of the hotels stated that they were paid their commission by the collector & that they had not received notice of any change in ownership. The collector of the moneys earned by the machines stated that he had pointed out all the machines to resp. & had accounted to him for all the moneys earned after July:—*Held:* the bailees of the machines, *i.e.*, the hotel proprietors, had never attorned to H. & had no knowledge of him:—RUBBI *v.* HARVEY (1908), 25 S. C. 312; 18 C. T R. 296.—**S. AF**

possession that of the assignee.—FARINA *v.* HOME (1846), 16 M. & W. 119; 16 L. J. Ex. 73; 8 L. T. O. S. 277; 153 E. R. 1124.

Annotations:—**Apld.** Meredith *v.* Meigh (1853), 2 E. & B. 364. **Refd.** Saunders *v.* Topp (1849), 4 Exch. 390; Castle *v.* Sworder (1861), 6 H. & N. 828, Ex. Ch.; Knights *v.* Wiffen (1870), L. R. 5 Q. B. 660; Dublin City Distillery *v.* Doherty, [1914] A. C. 823, H. L.

305. Effect of attornment without appropriation.]—An attornment by warehouseman or wharfinger does not dispense with an appropriation of goods where appropriation is necessary in order to vest the property in the purchaser.—UNWIN *v.* ADAMS (1858), 1 F. & F. 312, N. P.

306. ——.]—A wharfinger, who has agreed to hold goods under a delivery order, cannot resist an action of trover for the conversion of those goods, on the ground that they had not been separated from the bulk, & that no property passed to the person who lodged the order.—WOODLEY *v.* COVENTRY (1863), 2 H. & C. 164; 2 New Rep. 35; 32 L. J. Ex. 185; 8 L. T. 249; 9 Jur. N. S. 548; 11 W. R. 599; 159 E. R. 68.

Annotations:—**Apld.** Knights *v.* Wiffen (1870), L. R. 5 Q. B. 660. **Refd.** Dixon *v.* Kennaway, [1900] 1 Ch. 833.

SUB-SECT. 4.—OBLIGATION OF BAILEE TO OBSERVE TERMS OF BAILMENT.

307. Special instructions—Effect of disregard of.]—The position can never be maintained that all departure from a bailor's instructions is such negligence as gives him a right to cast the loss of his goods upon the bailee (LORD BROUGHAM).—TOBIN *v.* MURISON (1845), 5 Moo. P. C. C. 110; 9 Jur. 907; 13 E. R. 431, P. C.

See Nos. 51—53, 61, 62, 161-3, *ante.*

308. Condition requiring clean receipt before shipment.]—N. & Co. engaged with defts., shipowners, for the shipment of a large quantity of oil, & it was arranged that defts. were to receive no goods on board "unless a clean receipt were given." A. sold fifty barrels of oil to N. & Co. & delivered them to defts. Defts. received the oil, but refused to give a clean receipt for it. A. demanded redelivery, which defts. refused, as other cargo had been stowed on the top of it. N. & Co. having agreed to pay A. for the oil in cash in exchange for mate's receipt, refused to pay for the fifty barrels. A. brought an action against defts. for conversion & afterwards amended the writ by adding N. & Co.:—*Held:* (1) on the delivery & acceptance of the goods on the above terms, there was a complete contract of bailment between A. & defts., & a duty arose on defts.' part to give A. a clean receipt before they stored the goods on board; (2) in the circumstances A. had waived his right to demand redelivery of the goods, & no action lay against defts. for conversion.—ARMSTRONG *v.* ALLAN BROTHERS (1892), 67 L. T. 738; 9 T. L. R. 38; 7 Asp. M. L. C. 293; 4 R. 107, C. A.

SUB-SECT. 5.—OBLIGATION OF BAILEE TO ACCOUNT TO BAILOR.

309. Damages received from third party.]—The bailee, having in an action against a third party recovered the full value of the chattel, must account to the bailor for his proportion thereof.—THE WINKFIELD, [1902] P. 42; 71 L. J. P. 21; 85 L. T. 668; 50 W. R. 246; 18 T. L. R. 178; 46 Sol. Jo. 163; 9 Asp. M. L. C. 259, C. A.

Annotations:—**Apprvd.** Glenwood Lumber Co. *v.* Phillips, [1904] A. C. 405, P. C. **Folld.** Eastern Construction Co. *v.* National Trust Co. & Schmidt, [1914] A. C. 197, P. C. **Mentd.** Plasycoed Collieries Co. *v.* Partridge, Jones (1912), 81 L. J. K. B. 723, D. C.

310. ——.]—It would be against all notions of justice that the bailee, who recovers the full value of the goods wrongfully taken out of his possession, should be able to retain it for himself. The goods were not his, they belonged to the bailor. The money recovered under the judgment represents & is substituted for the goods themselves. To allow the bailee to keep it for himself would be to compensate him in damages for a loss he has never suffered, & the bailee, who in such circumstances recovers the full value of the goods, must account to the bailor for the sum recovered (LORD ATKINSON).—EASTERN CONSTRUCTION CO., LTD. *v.* NATIONAL TRUST CO., LTD. & SCHMIDT, [1914] A. C. 197; 83 L. J. P. C. 122; 110 L. T. 321, P. C.

311. Bailee insuring liable to account to bailor—Money had & received.]—A. deposited goods in the warehouse of B., a wharfinger, who received £10 per annum for rent of the warehouse & a commission on the sale. B. insured the goods, which were afterwards burnt in the warehouse, & received the amount from the insurer:—*Held:* he was liable to A. for so much money had & received to his use.—SIDAWAYS *v.* TODD (1818), 2 Stark. 400.

Annotations:—**Refd.** Waters *v.* Monarch Life & Fire Insce. (1856), 25 L. J. Q. B. 102; L. & N. W. Ry. Co. *v.* Glyn (1859), 28 L. J. Q. B. 188.

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305 i. *Effect of attornment without appropriation.*]—A storekeeper made advances to the owner of grain deposited in the storehouse. The owner sold the grain, & granted an order of delivery to the purchaser, & the order was intimated to the storekeeper, & several parcels of the grain delivered to the purchaser's order, but no transfer was made in the storekeeper's books to the name of the purchaser, nor was the grain measured over to him:—*Held:* the storekeeper not entitled to withhold delivery of the remainder, on the ground of a lien for the advances to the original owner.—LAURIE *v.* BLACK (1831), 10 Sh. (Ct. of Sess.) 1.—**SCOT.**

See, further, LIEN.

r. *Bailee can sue attornee for warehouse charges.*]—E., in Feb., sold to deft. flour to be delivered in May following, f.o.b. The flour was delivered in May, but deft. had no vessels then ready, & E. stored it with pltf., subject to deft.'s orders, paying all charges on it up to the end of May:—*Held:* deft. liable to pltf. for subsequent warehouse charges up to the time of shipment.—HOWLAND *v.* BROWN (1855), 13 U. C. R. 199.—**CAN.**

PART IV. SECT. 1, SUB-SECT. 4.

307 i. *Special instructions—Effect of disregard of.*]—Whenever goods are committed to any one for a specified purpose, any deviation from that purpose in the disposition of them is a conversion upon which an action in the nature of trover may be maintained.—ADAM *v.* HENDERSON (1819), 1 R. de L. 504.—**CAN.**

307 ii. —— ——.]—A. stored with B. two articles of furniture, the drawers of which were filled with goods & locked. This was known to B. A receipt was given for the two articles, but no mention was made in the receipt of the contents of the drawers. Upon parting with the articles B., without the authority of A., removed the contents, which were afterwards lost:—*Held:* B. liable for the value of the goods lost, the loss having occurred when he was acting in violation of the contract of bailment.—MCGALE *v.* SECURITY STORAGE CO. (1915), 30 W. L. R. 349; 7 W. W. R. 1015.—**CAN**

s. *Duty to insure.*]—There is no legal duty upon a bailee to insure goods entrusted to his care.—VIVIERS *v.* JUTA & CO. (1902), 19 S. C. 222; 12 C. T. R. 381.—**S. AF.**

PART IV. SECT. 1, SUB-SECT. 5.

311 i. *Bailee insuring liable to account to bailor.*]—A coach-builder effected insurance of his stock-in-trade including goods in trust or on commission. His premises were destroyed by accidental fire:—*Held:* he was entitled to satisfy himself in full for his own losses, out of the money recovered from the insurance co., without regard to losses sustained by customers having goods on the premises. *Qu.:* whether the insurer could be compelled to communicate to his customers the benefit of the surplus to any extent whatever.—DALGLEISH *v.* BUCHANAN (1854), 16 Dunl. (Ct. of Sess.) 332; 26 Sc. Jur. 160.—**SCOT.**

311 ii. ——.]—L., a miller, received from customers hay to be chopped, & on receipt of each lot of hay sent a note setting forth the quantity of hay received, with a statement of the charges

Sect. 1.—General rights and obligations of bailor and bailee inter se: Sub-sects. 5, 6 & 7.]

312. Bailee has insurable interest—Entitled to full value—Liability to account to bailor.]—Warehousemen & wharfingers, with whom goods are deposited, have an insurable interest in such goods, although there has been no previous authority to insure given by the real owners, nor any notice given to them of such insurance. The insurers are entitled in such a case to recover from the insurance office the full value of the goods destroyed by fire, but are liable to account to the true owners for the excess of the money received beyond the amount of their own charges in respect of such goods.—WATERS *v.* MONARCH FIRE & LIFE ASSURANCE CO. (1856), 5 E. & B. 870; 25 L. J. Q. B. 102; 26 L. T. O. S. 217; 2 Jur. N. S. 375; 4 W. R. 245; 119 E. R. 705.

Annotations:—**Apld.** L. & N. W. Ry. Co. *v.* Glyn (1859), 1 E. & E. 652. **Refd.** North British Insce. *v.* Moffatt (1871), L. R. 7 C. P. 25; Martineau *v.* Kitching (1872), 41 L. J. Q. B. 227; Ebsworth *v.* Alliance Marine Insce. (1873), L. R. 8 C. P. 596. **Mentd.** Seagrave *v.* Union Marine Insce. (1866), L. R. 1 C. P. 305; South Australian Insce. *v.* Randall (1869), 6 Moo. P. C. C. N. S. 341. P. C.

313. —— —— ——.]—Persons, who are the bailees of goods, have an insurable interest in them, as against the assurers, to their full value, although the assured may be trustees for third persons of part of the amount recovered.—LONDON & NORTH WESTERN RY. CO. *v.* GLYN (1859), 1 E. & E. 652; 28 L. J. Q. B. 188; 33 L. T. O. S. 199; 5 Jur. N. S. 1004; 7 W. R. 238; 120 E. R. 1054.

Annotations:—**Distd.** North British Insce. *v.* Moffatt (1871), L. R. 7 C. P. 25. **Refd.** Ebsworth *v.* Alliance Marine Insce. (1873), L. R. 8 C. P. 596. **Mentd.** Martineau *v.* Kitching (1872), L. R. 7 Q. B. 436.

See, further, INSURANCE.

SUB-SECT. 6.—DUTY TO PROTECT BAILOR'S TITLE.

314. Failure to give notice to bailor of adverse claim.]—RANSOM *v.* PLATT, No. 164, *ante.*

SUB-SECT. 7.—TERMINATION OF BAILMENT.

315. By act unauthorised by terms of bailment—Chattel sent to auctioneer to be sold.]—The hirer of a chattel, who sends it to an auctioneer to be sold, is guilty of a conversion.—LOESCHMAN *v.* MACHIN (1818), 2 Stark. 311.

Annotations:—**Distd.** Ferguson *v.* Cristall (1828), 2 Moo. & P. 524. **Folld.** Cooper *v.* Willomatt (1845), 1 C. B. 672; Fenn *v.* Bittleston (1851), 7 Exch. 152.

316. —— **Sale by bailee.**]—A bailee of goods for hire, by selling them, determines the bailment, & the bailor may maintain trover against the purchaser, though the purchase was *bonâ fide.*

A. conveyed goods by bill of sale to B. B. allowed A. to use the goods at a weekly rent, A. undertaking to deliver them up on demand. A. afterwards, before demand made, sold & delivered the goods to C., a *bonâ fide* purchaser:—*Held:* the bailment was determined & B. might maintain trover against C.—COOPER *v.* WILLOMATT (1845), 1 C. B. 672; 14 L. J. C. P. 219; 5 L. T. O. S. 173; 9 Jur. 598; 135 E. R. 706.

Annotations:—**Consd.** Bradley *v.* Copley (1845), 1 C. B. 685. **Folld.** Bryant *v.* Wardell (1848), 2 Exch. 479; Nind *v.* Arthur (1848), 12 L. T. O. S. 196; Fenn *v.* Bittleston (1851), 7 Exch. 152. **Apld.** Singer Manufacturing Co. *v.* Clark (1879), 5 Ex. D. 37. **Refd.** Ward *v.* Audland (1847), 16 M. & W. 862; Harrison *v.* Blackburn (1864), 17 C. B. N. S. 678; Payne *v.* Wilson, [1895] 1 Q. B. 653; Plasycoed Collieries Co. *v.* Partridge, Jones (1912), 81 L. J. K. B. 723, D. C. **Mentd.** Buckland *v.* Johnson (1854), 2 C. L. R. 784.

317. —— ——.]—A., by deed, dated Sept. 26, 1845, conveyed goods to B., subject to a proviso that if he should pay B. the sum thereby secured on Mar. 22, 1850, or at such earlier day or time as B. should appoint, by giving A. fourteen days' notice, & should pay interest in the meantime half-yearly, the conveyance should be void, & it was thereby agreed between the parties that, until default should be made in the payment of the principal sum secured at the time therein specified, or the interest, after fourteen days' notice, it should be lawful for A., his exors. or administrators, to hold & enjoy the chattels. A. continued in possession of the chattels according to the agreement until Dec. 13, 1849, when he became bkpt., & his assignees (defts.) on Feb. 19, 1850, sold the whole of the chattels absolutely, & not merely bkpt.'s interest in them. No demand had been made on A. by B., or by pltfs. (the assignees of B.), for the principal money or interest in the meantime:—*Held:* the sale by A.'s assignees destroyed the bailment, & was equivalent to a sale by the bailee himself, & trover would lie by B.'s assignees against A.'s assignees for the conversion by the sale of the goods during the term.—FENN *v.* BITTLESTON (1851), 7 Exch. 152; 21 L. J. Ex. 41; 18 L. T. O. S. 197; 155 E. R. 895.

Annotations:—**Apprvd.** Brierly *v.* Kendall (1852), 17 Q. B. 937. **Folld.** Letts *v.* Whitmore (1852), 18 L. T. O. S. 254. **Distd.** Spackman *v.* Miller (1862), 12 C. B. N. S. 659. **Consd.** Nyberg *v.* Handelaar, [1892] 2 Q. B. 202, C. A. **Refd.** Donald *v.* Suckling (1866), 7 B. & S. 783; Mulliner *v.* Florence (1878), 3 Q. B. D. 484, C. A. **Mentd.** *Re* Collins, *Ex p.* Harvey (1854), 1 Bankr. & Ins. R. 194.

318. —— —— **Bailee with option of repurchase.**]—The sale by a bailee with the right of repurchase is a conversion.—R. *v.* PRICE (1913), 9 Cr. App. Rep. 15, C. C. A.

319. —— **Failure to redeliver.**]—An agreement between pltf. & defts. provided that defts. should be allowed to have the use of certain property for a certain period, & at the expiration of the agreement the property should be given up to pltf. The goods having been, during the term, applied by defts. to a purpose in contravention of the agreement, & not having been redelivered by them at the end of the term:—*Held:* the bailment had been determined, & pltf. might maintain trover.—BRYANT *v.* WARDELL (1848), 2 Exch. 479; 154 E. R. 580.

Annotation:—**Refd.** Fenn *v.* Bittleston (1851), 7 Exch. 152.

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for chopping it under a printed heading: "All goods held in trust covered by insurance against fire." In 1905 an accidental fire occurred in L.'s mills which destroyed hay belonging to C. & Co., which they had sent to be chopped. At the date of the fire L. held a policy of insurance in his own name, which insured "stock-in-trade, the property of the insured, or held by him in trust or on commission, for which he is responsible" in his mills. L.'s estates having been sequestrated, & the trustees in the sequestration having recovered from the insurance co. a sum which included the value of C. & Co.'s hay:—*Held:* (1) L. had contracted to insure the hay on behalf of C. & Co.; (2) even if the policy did not cover customers' risks, C. & Co. were entitled to a preferential ranking on the sum recovered under the policy, the insurance co. having in fact paid the value of their hay to the trustee.—COCHRAN & SON *v.* LECKIE'S TRUSTEE (1906), 8 F. (Ct. of Sess.) 975; 43 Sc. L. R. 715.—**SCOT.**

312 i. *Bailee has insurable interest—Entitled to full value—Liability to account to bailor.*]—DALGLEISH *v.* BUCHANAN (1854), 26 Sc. Jur. 160.—**SCOT.**

t. *Profits earned by use of chattel—Gratuitous deposit.*]—Oxen, the property of an English farming co., were seized during war by a British force, & handed over to deft., who let them to a military contractor for transport purposes. The owners claimed an account of the profits earned under such contract:—*Held:* deft. having received them for safe keeping was in the position of a *negotiorum gestor,* & must account to pltfs. for the mesne profits acquired in that capacity.—GRANT'S FARMING CO., LTD. *v.* ATTWELL, 9 H. C. 91.—**S. AF.**

PART IV. SECT. 1, SUB-SECT. 7.

316 i. *By act unauthorised by terms of bailment—Sale by bailee.*]—Where there has been a misuser of the thing lent, there is an end of the bailment.—SIBLEY *v.* SIBLEY (1871), 8 N. S. R. 325.—**CAN.**

320. Misappropriation of part of chattel.]—A. employed B. to sell clothes for him. B. received for that purpose a parcel of clothes, a separate price being fixed by A. upon each article. B. was to be paid a percentage upon the amount received, & to bring back the clothes not sold. Instead of selling any he fraudulently pawned some, & kept the rest for his own use:—*Held:* (1) as there was but a single bailment of all the articles, the misappropriation of part determined the bailment as to the rest; (2) B. was properly convicted of larceny of the articles which he had kept.—R. *v.* POYSER (1851), 2 Den. 233; 4 New Sess. Cas. 594; 20 L. J. M. C. 191; 17 L. T. O. S. 135; 15 J. P. 323; 15 Jur. 386; 5 Cox, C. C. 241, C. C. R.

Annotation:—**Distd.** R. *v.* Saward (1851), 15 J. P. 501.

See, further, CRIMINAL LAW & PROCEDURE.

321. —— Treating goods as bailee's own.]—Where chattels have been placed in the hands of a bailee for a limited purpose, & he deals with them in a manner wholly inconsistent with the terms of the bailment, & consistent only with his intention to treat them as his own, the right to the possession revests in the owner, who can sue the bailee in trover (HAMILTON, J.).—PLASYCOED COLLIERIES CO., LTD. *v.* PARTRIDGE, JONES & CO., LTD., [1912] 2 K. B. 345; 81 L. J. K. B. 723; 106 L. T. 426, D. C.

322. Assignment of contract by bailor—Effect of—Subsequent hire.]—A., a coachmaker, entered into an agreement to furnish B. with a carriage for the term of five years, at seventy-five guineas a year. At the time of making the contract, C. was a partner with A., but this was unknown to B., the business being carried on in the name of A. only. Before the expiration of the first three years the partnership between A. & C. was dissolved, A. having assigned all his interest in the business & in the contract in question to C., & the business was afterwards carried on by C. alone. B. was informed by C. that the partnership was dissolved, & that C. had become the purchaser of the carriage then in his, B.'s, service. The latter answered that he would not continue the contract with C., & that he would return the carriage to him at the end of the then current year, & he did so return it. An action having been brought in the names of A. & C. against B. for the two payments which, according to the term of contract, would become due during the last two years of its continuance:—*Held:* the action was not maintainable, the contract being personal, & A. having transferred his interest to C., & having become incapable of performing his part of the agreement.—ROBSON *v.* DRUMMOND (1831), 2 B. & Ad. 303; 9 L. J. O. S. K. B. 187; 109 E. R. 1156.

Annotations:—**Apld.** Humble *v.* Hunter (1848), 12 Q. B. 310; *Re* Edwards, *Ex p.* Chalmers (1872), 42 L. J. Bcy. 2. **Consd.** British Waggon Co. *v.* Lea (1880), 5 Q. B. D. 149. **Consd. & Apld.** Jaeger's Sanitary Woollen System Co. *v.* Walker (1897), 77 L. T. 180, C. A. **Distd.** Phillips *v.* Alhambra Palace Co., [1901] 1 K. B. 59. **Refd.** International Fibre Syndicate *v.* Dawson (1901), 84 L. T. 803, H. L. **Mentd.** Beckham *v* Drake (1841), 9 M. & W. 79; Rhymney Ry. Co. *v.* Brecon & Merthyr Tydfil Ry. Co. (1900), 83 L. T. 111, C. A.

See No. 260, *ante.*

323. —— —— ——.]—Where the rector of a parish makes a contract for the hire of an organ with the makers, who afterwards dissolve partnership, & appoint a trustee to collect & pay debts, the trustee does not acquire any interest in the original contract so as to sue the rector for the hire, though notice has been given to the latter of the assignment, & he has paid two years' hire to such trustee.—BOWYER *v.* ROBINSON (1843), 2 L. T. O. S. 123; 8 J. P. 91.

324. —— —— ——.]—Pltfs., a waggon co., by agreement in writing let defts. a number of railway waggons for a term of years at an annual rent, the agreement providing that pltfs., their exors. or administrators, should during the term keep the waggons in repair. Pending the agreement an order was made for the winding up of pltf. co., under the supervision of the ct., in pursuance of a resolution previously passed by the co., & liquidators were appointed, who joined the co. in assigning the benefit of the contract to another co., upon the terms that such co. should perform the stipulations by the assignors contained in the original contract. The assignees took over the repairing stations of pltfs. & the staff of workmen employed by them, & were always ready & willing to execute all necessary repairs to the waggons:—*Held:* defts. had no defence to an action for rent, upon the ground that pltfs. had incapacitated themselves from performing their contract, for (1) the voluntary liquidation of the co. was immaterial, the liquidators having power under Cos. Act, 1862 (c. 89), ss. 95, 131, to continue the letting of the waggons, & (2) the repair of the waggons by the co. to whom the contract was assigned was a sufficient performance by pltfs. of their agreement to repair.—BRITISH WAGGON CO. *v.* LEA (1880), 5 Q. B. D. 149; 49 L. J. Q. B. 321; 42 L. T. 437; 44 J. P. 440; 28 W. R. 349, D. C.

Annotations:—**Folld.** Tolhurst *v.* Associated Portland Cement Manufacturers, Associated Portland Cement Manufacturers *v.* Tolhurst, [1902] 2 K. B. 660, C. A. **Apprvd.** Tolhurst *v.* Associated Portland Cement Manufacturers. Tolhurst *v.* Associated Portland Cement Manufacturers & Imperial Portland Cement Co., [1903] A. C. 414, H. L. **Folld.** Fratelli Sorrentino *v.* Buerger, [1915] 1 K. B. 307; Whiteley *v.* Hilt, [1918] 2 K. B. 808, C. A. **Refd.** Fratelli Sorrentino *v.* Buerger, [1915] 3 K. B. 367, C. A. **Mentd.** Jaeger's Sanitary Woollen System Co. *v.* Walker (1897), 77 L. T. 180, C. A.

325. Assignment of contract by bailee—Effect of.]—Pltfs. let a piano under an agreement whereby the hirer had an option to purchase it by payment of a certain number of quarterly instalments, but was to remain a bailee only until the last of the instalments should be paid, the hirer having the right at any time to terminate the agreement by returning the piano to pltfs. The hirer paid several of the instalments, but before they were fully paid sold the piano to deft. In an action of detinue & conversion in the county ct. the county ct. judge held (*inter alia*) that deft. had acquired the rights of the hirer under the agreement before anything had been done to terminate it, & that pltfs. were not entitled to recover the piano or its full value, but only the amount of the remaining unpaid instalments. The Divisional Ct. reversed that decision on the ground that deft. had acquired no interest in the piano, for the hirer by wrongfully selling it had *ipso facto* repudiated the agreement & had no interest in it to convey:—*Held:* the question being one of fact, & not of law, it was not open to the Divisional Ct. to take a different view of the facts from that taken by the county ct. judge, & to find that the sale amounted to a repudiation of the agreement, & the county ct. judge's judgment must be restored.—WHITELEY *v.* HILT, [1918] 2 K. B. 808; 87 L. J. K. B. 1058; 34 T. L. R. 592; 62 Sol. Jo. 717, C. A.

326. Notice under special condition.]—By an agreement pltfs. agreed to let, & E. agreed to hire, two carriage horses by the year from a certain date,

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v. *No stipulation as to duration of contract.*]—Deft. lodged property with pltf., to take care of, for which he was to pay $17 a month, but at the end of a week took it away & tendered $4.25. This pltf. refused, alleging that the price should be greater for a short period:—*Held:* pltf. could not recover more than was offered.—AVERY *v.* LAWLOR (1872), 3 R. C. 77.—CAN.

w. —— *Notice by bailee.*] — Where goods are warehoused for hire without a stipulation as to the duration of the contract, the depositary is not entitled to insist upon their being removed at his

Sect. 1.—General rights and obligations of bailor and bailee inter se: Sub-sects. 7 & 8.]

at £105 per annum, payment to be made quarterly. It was also provided, "After the expiration of the first year the hiring can be terminated by either party giving one quarter's written notice from a quarter day":—*Held:* the hiring was for one year certain, with a right to keep the horses after the end of the year, & then to terminate the contract by a quarter's notice.—TILLING, LTD. *v.* JAMES (1906), 94 L. T. 823; 22 T. L. R. 599, D. C.

SUB-SECT. 8.—REMEDIES OF BAILOR AND BAILEE.

327. No right of forcible seizure.]—If a person hire a horse for a certain time to go to a particular place, the owner cannot justify retaking the horse violently within the time, although the hirer go to a different place.—LEE *v.* ATKINSON & BROOKS (1609), Cro. Jac. 236; Yelv. 172; 1 Brownl. 217; 79 E. R. 204.

Annotation:—**Apld.** Donald *v.* Suckling (1866), L. R. 1 Q. B. 585.

328. Right of action.]—If a bailee of goods, whether for reward or otherwise, sells the subject of the bailment, case lies against him by reason of his wrong, although detinue may also lie if the bailor likes.—ANON. (1510), Keil. 160; 72 E. R. 334.

Annotation:—**Follld.** Coggs *v.* Bernard (1703), 2 Ld. Raym. 909.

329. —— Trover.]—In all cases where a person, to whom goods are delivered, has neither a general nor a special property, if he converts them to his own use, trespass will lie; it is otherwise of a bailee if he has a special property.—HARTOP *v.* HOARE (1743), 3 Atk. 44; 2 Stra. 1187; 1 Wils. 8; 26 E. R. 828.

Annotations:—**Apld.** Boyson *v.* Coles (1817), 6 M. & S. 14. **Mentd.** Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357; Wookey *v.* Pole (1820), 4 B. & Ald. 1; Thorndike *v.* Hunt, Browne *v.* Butter (1859), 32 L. T. O. S. 346, C. A.; Clayton *v.* Le Roy, [1911] 2 K. B. 1031, C. A.

330. —— —— Party entitled to take away possession—Delivery for special purpose.]—A person who is entitled to the temporary possession of a chattel, & delivers it back to the owner for an especial purpose, may, after that purpose is satisfied, & during his temporary right, maintain trover for it against the owner.—ROBERTS *v.* WYATT (1810), 2 Taunt. 268; 127 E. R. 1080.

Annotatoins:—**Consd.** Mackereth *v.* Dunn (1843), 7 Jur. 278; New Zealand Shipping Co. *v.* Société des Ateliers, etc. (1918), 87 L. J. K. B. 746, H. L. **Refd.** Nicolls *v.* Bastard (1835), 2 Cr. M. & R. 659.

331. —— —— Not for mere omission to redeliver.]—Goods, the property of pltf., to whom they were directed, were delivered by the captain of a vessel to defts. as wharfingers, for the use & upon the account of pltf., but were stolen or lost out of their possession. Afterwards the goods were demanded by pltf. of defts., to whom he tendered the wharfage for same, but the goods were not delivered to him:—*Held:* this being a bare omission, & no evidence of a conversion, trover would not lie, but the remedy was by action upon the case.—ROSS *v.* JOHNSON (1772), 5 Burr. 2825; 98 E. R. 483.

Annotations:—**Distd.** Devereux *v.* Barclay (1819), 2 B. & Ald. 702; Hollins *v.* Fowler (1875), L. R. 7 H. L. 757, H. L. **Refd.** Stephenson *v.* Hart (1828), 4 Bing. 476; Lindo *v.* Barrett (1856), 9 Moo. P. C. C. 456, P. C.; Fowler *v.* Hollins (1872), L. R. 7 Q. B. 616, Ex. Ch.

332. —— ——.]—Trespass will not lie for a chattel, of which there has been a bailment to deft. or his servant, but trover is the proper remedy.—LAMPRELL *v.* MARKHAM (1844), 2 L. T. O. S. 377, N. P.

333. —— —— Not for negligent dealing.]—A negligent dealing by a bailee with goods is not a conversion, & a bailee is not liable for a conversion arising out of a negligent dealing with the goods by him, but which is not an act participated in by him. He may be liable to an action of another description, but not to an action of trover, which only lies where some dominion is asserted by deft. over the chattel which is the subject of the action. One who unlawfully takes possession of goods, which are in consequence lost to the owner, is to a certain extent guilty of a conversion. But where there is no unlawful taking of possession, or assertion of dominion over the goods, although the goods may be destroyed, there is no conversion, unless the bailee is a participator in the act which causes their destruction.—HEALD *v.* CAREY (1852), 11 C. B. 977; 21 L. J. C. P. 97; 18 L. T. O. S. 64, 209; 16 Jur. 197; 138 E. R. 762.

Annotations:—**Follld.** Crouch *v.* G. W. Ry. Co. (1857), 26 L. J. Ex. 418; Evans *v.* Wright (1857), 2 H. & N. 527. **Refd.** Hollins *v.* Fowler (1875), L. R. 7 H. L. 757, H. L.

334. —— —— Executors cannot maintain for title deeds.] — Declaration in detinue for title deeds. Plea, that the deeds were entrusted to & deposited with defts. by G., deceased, that pltf. claimed the right to possession of them as devisee under the will of G., that the detention was a loss of them by deft. before the death of G., & that deft. never had possession of them since the death of G.:—*Held:* (1) (WIGHTMAN, J.) the plea was bad, as it did not allege that the deeds were destroyed, & assuming they were still existing, & as the property in them was vested by the devisee in pltf., he might maintain detinue; (2) (BLACKBURN, J.) the plea was good, as it did not admit that deft. had possession of the deeds since they were pltf.'s.

The exor. of the bailor cannot maintain detinue, for he has no property in the deeds, nor right to the possession, nor was there any request or refusal to deliver them in the bailor's lifetime (WIGHTMAN, J.).—GOODMAN *v.* BOYCOTT (1862), 2 B. & S. 1; 31 L. J. Q. B. 69; 6 L. T. 25; 8 Jur. N. S. 763; 121 E. R. 974.

Annotation:—**Consd.** Bristol & West of England Bank *v.* Mid. Ry. Co., [1891] 2 Q. B. 653, C. A.

335. —— Detinue.]—A man bails goods to one, who bails them over to another, he may have

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pleasure without showing reasonable cause therefor.—WHYTE *v.* MILLAR & YOUNG (1881), 8 R. (Ct. of Sess.) 432.—**SCOT.**

x. *Destruction of thing bailed.*] — Defts. sent a mare to M. to be served by his stallion. The mare was killed by collision with a motor-cycle:—*Held:* the killing of the mare had determined M.'s bailment & all his rights & obligations thereunder & restored to defts. their full right to possession & control.—FLY & YOUNG *v.* PERCY BROTHERS (1916), 35 N. Z. L. R. 837.—**N.Z.**

z. *Alteration in nature of chattel.*]—The insolvent, a miller, agreed to grind wheat for claimants, & to deliver to them nine hundred & ninety-five barrels of flour, as equivalent for wheat received by him & made away with:—*Held:* a bailment only of the wheat, which remained claimants', to the insolvent; & such bailment was determined by the conversion of the wheat, so that claimants might maintain trover for it, either as wheat or as flour if ground, or might sue for the value of the goods when they should have been delivered.—*Re* WILLIAMS (1871), 31 U. C. R. 143.—**CAN.**

PART IV. SECT. 1, SUB-SECT. 8.

331 i. *Right of action—Trover—Not for mere omissions to redeliver.*]—A. lent a horse to B. for a special purpose, & while B. was using him consistently with such lending, the horse was accidentally hurt, & left at a public stable, of which B. gave A. immediate notice. A. having seen the horse, refused to take him, & demanded him back sound as received:—*Held:* A. could not sustain trover—WELLS *v.* CREW (1836), 5 O. S. 209.—**CAN.**

333 i. —— —— *Not for negligent dealing.*]—Pltf. sent to J. two boxes of trees addressed to various purchasers. They went by steamer to deft., a forwarder at P., where they arrived on a Saturday & were taken from the boxes by deft., & some of them delivered to the persons

a detinue upon the bailment against the first bailee, & also he may have an action of detinue against the second bailee upon a *devenerunt ad manus* (COKE, C.J.).—ISAACK *v.* CLARK (1615), 2 Bulst. 306 ; 1 Roll. Rep. 126 ; 80 E. R. 1143.

Annotations :—**Apld.** Cooper *v.* Willomatt (1845), 1 C. B. 672. **Refd.** Garland *v.* Carlisle (1837), 4 Scott, 587, H. L. ; Clements *v.* Flight (1846), 1 New Pract. Cas. 567 ; Manby *v.* Scott (1662), O. Bridg. 229, Ex. Ch. ; Hollins *v.* Fowler (1875), L. R. 7 H. L. 757, H. L.

336. —— —— Bailee cannot plead own default.]—Where a chattel has been bailed to a person, it does not lie in his mouth to set up his own wrongful act in answer to an action of detinue, though the chattel has ceased to be in his possession at the time of the demand. It cannot be permitted to the bailee, though he has done no act to dispossess himself of the article, to defend himself on the ground that he has kept it so negligently that he is no longer in a condition to restore it to the bailor (COCKBURN, C.J.).—REEVE *v.* PALMER (1858), 5 C. B. N. S. 84 ; 28 L. J. C. P. 168 ; 5 Jur. N. S. 916 ; 141 E. R. 33, Ex. Ch.

Annotations :—**Folld.** Wilkinson *v.* Verity (1871), L. R. 6 C. P. 206. **Distd.** Bullen *v.* The Swan Electric Engraving Co. (1906), 22 T. L. R. 275. **Refd.** Goodman *v.* Boycott (1862), 2 B. & S. 1.

337. —— —— ——.]—The man who ought to have the goods shall not be allowed to set up a wrongful prior act, by which he has made away with them. He, who ought to produce the goods of the man who has the title to the goods & the property in the goods, cannot discharge himself by saying, " I have wrongfully made away with them, but that was before the accruer of your title " (FRY, L.J.).—BRISTOL & WEST OF ENGLAND BANK *v.* MIDLAND RY. CO., [1891] 2 Q. B. 653 ; 61 L. J. Q. B. 115 ; 65 L. T. 234 ; 40 W. R. 148 ; 7 Asp. M. L. C. 69, C. A.

Annotation :—**Refd.** London Joint Stock Bank *v.* British Amsterdam Maritime Agency (1910), 104 L. T. 143.

338. —— —— Statute of Limitations.]—Goods having been bailed by pltfs. to deft. for safe custody, deft. wrongfully sold them, & pltfs., more than six years after the date of the sale, being ignorant of the fact of its having taken place, demanded the return of the goods, which deft. refused. In an action of detinue for the goods :—*Held :* the above stat. ran from the date of the demand & refusal, & not from that of the sale, as pltfs. in such a case, though entitled if they had discovered the sale to sue immediately for a conversion of the goods, were also entitled to elect to sue upon the breach of the bailee's duty in the ordinary course by the refusal to deliver up on request. *Semble :* where an action of detinue is founded upon a bare taking & withholding of the property of another, without any circumstances to show a trust for the owner, or to found an option to sue either for the wrong or for the breach of the original terms of deposit, the stat. will run from the time at which the property was first wrongfully dealt with.—WILKINSON *v.* VERITY (1871), L. R. 6 C. P. 206 ; 40 L. J. C. P. 141 ; 19 W. R. 604 ; *sub nom.* WILLIAMSON *v.* VERITY, 24 L. T. 32.

Annotations :—**Distd.** Miller *v.* Dell, [1891] 1 Q. B. 468, C. A. **Refd.** Frost *v.* Knight (1872), L. R. 7 Exch. 111, Ex. Ch. ; Baker *v.* Courage (1909), 101 L. T. 854. **Mentd.** Bristol & West of England Bank *v.* Mid. Ry. Co. (1891), 61 L. J. Q. B. 115, C. A.

See, further, LIMITATION OF ACTIONS.

339. —— Action of tort—County Courts Act, 1888 (c. 43), s. 116.]—An action founded on the common law liability of a bailee is an action founded on tort within the above sect.

The relation of bailor & bailee must arise out of some agreement of the minds of the parties to it. Where such a relation is established, if pltf. can maintain his action by showing the breach of a duty arising at common law out of that relation, he is not obliged to rely on a contract within the meaning of the rule ; but if his cause of action is that the deft. ought to have done something, which would not be embraced by the common law liability arising out of the relation of bailor & bailee, then he is obliged to rely on a contract within the meaning of the rule (COLLINS, L.J.).—TURNER *v.* STALLIBRASS, [1898] 1 Q. B. 56 ; 67 L. J. Q. B. 52 ; 77 L. T. 482 ; 46 W. R. 81 ; 42 Sol. Jo. 65.

Annotations :—**Refd.** Sachs *v.* Henderson, [1902] 1 K. B. 612, C. A. **Mentd.** Davies *v.* Hood (1903), 88 L. T. 19 ; Steljes *v.* Ingram (1903), 19 T. L. R. 534.

See, further, COUNTY COURTS.

340. When contract illegal or immoral.]—The law will not assist a party to recover back property which he has paid or handed over in pursuance of an illegal or immoral contract.

Pltf. declared upon a bailment of the half of a £50 bank note, to which deft. pleaded & justified the detention of the note as a security for payment of £20 due from pltf. Pltf. replied that the alleged debt to deft. was for wine & suppers supplied by deft. in a brothel & disorderly house kept by deft., for the purpose of being consumed there by pltf., & divers prostitutes in a debauch to incite them to riotous, disorderly, & immoral conduct :—*Held :* the maxim " *In pari delicto potior est conditio possidentis* " applied, & pltf. was not entitled to recover.—TAYLOR *v.* CHESTER (1869), L. R. 4 Q. B. 309 ; 38 L. J. Q. B. 225 ; 21 L. T. 359 ; 33 J. P. 709.

Annotations :—**Expld.** Wilson *v.* Strugnell (1881), 7 Q. B. D. 548. **Distd.** Herman *v.* Jeuchner (1884), Cab. & El. 364. **Apld.** Herman *v.* Jeuchner (1885), 15 Q. B. D. 561, C. A. **Distd.** Hermann *v.* Charlesworth (1905), 74 L. J. K. B. 620, C. A. **Consd.** Gordon *v.* Metropolitan Police Chief

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to whom they were addressed, who called for them. Many of the trees were injured, & the evidence was contradictory as to the state in which they arrived, & as to whether such injury was caused by deft.'s treatment of them, or whether it was necessary, as he alleged, to open the boxes & deliver them without delay. Pltf. having brought trover :—*Held :* deft. had done nothing which would in law amount to a conversion.—LOVEKIN *v.* PODGER (1866), 26 U. C. R. 156. —**CAN.**

335 i. —— *Detinue—Demand by bailor.*]—When the lessee of movables remains in possession after the expiration of the period for which they were leased, the owner can at all times demand that such possession cease & that the movables be surrendered to him, but notice to the lessee is required, failing which, he is not held to be in default, nor liable for damages or costs.—MONARCH MANUFACTURING CO. *v.* BLOUIN (1908), Q. R. 34 S. C. 167.—**CAN.**

335 ii. —— —— ——.]—An action of detinue does not lie against a bailee of goods until demand made by the bailor after the determination of the bailment & before action brought.—CULLEN *v* BARCLAY (1881), 10 L. R. Ir. 224.—**IR**

335 iii. —— *Replevin.*]—If a bailee, in fraud of the bailor, wrongfully remove the goods from the place of bailment, the owner may replevy them for the purpose of obtaining possession of his goods.—REEVES *v.* MORRIS (1841), 3 I. L. R. 484, 491 ; 1 Leg. Rep. 258.—**IR.**

335 iv. —— *Demand by bailor.*]—Goods were lent to an insolvent by pltf. & retained by the assignee :—*Held :* they could be replevied without demand. —DENNISON *v.* GAVAZA (1885)] 6 R. & G. 490 ; 6 C. L. T. 540.—**CAN.**

See, generally, DISTRESS.

335 v. —— *After return of goods bailed.*]—A bailor who, in the absence of any agreement on the subject, has given the bailee a receipt for the goods bailed, is not, *ipso facto,* precluded from proving that the goods were in reality damaged or deficient in quantity when delivered to him.—EAST INDIAN RY. CO. *v.* SISPAL LAL (1911), I. L. R. 39 Calc. 311. —**IND.**

a. *Provision that owner may enter hirer's premises & remove chattel.*]—An agreement, that the lessor of a movable article may at any time, in case of violation by the lessee of the condition of the lease, enter upon the latter's premises & remove the article leased, is contrary to public order, & void, & a person who, assuming to act under such agreement, trespasses upon the dwelling-house of another, is responsible in damages.—CARDINAL *v.* FISET (1906), Q. R. 29 S. C. 424. **CAN.**

Sect. 1.—General rights and obligations of bailor and bailee inter se: Sub-sect. 8. Sect. 2: Sub-sect. 1.]

Comr., [1910] 2 K. B. 1080, C. A. **Refd.** Scott *v.* Brown, Doering, McNab, Slaughter & May *v.* Brown, Doering, McNab, [1892] 2 Q. B. 724, C. A.; *Re* Cronmire, *Ex p.* Waud, [1898] 2 Q. B. 383, C. A.; *Re* Robinson's Settlmt., Gent *v.* Hobbs, [1912] 1 Ch. 717, C. A.; Farmers' Mart *v.* Milne, [1915] A. C. 106, H. L.

SECT. 2.—RIGHTS AND OBLIGATIONS AS REGARDS THIRD PARTIES.

SUB-SECT. 1.—RIGHTS OF BAILOR AGAINST THIRD PARTIES.

341. Right to retake chattel—Wrongful sale by bailee—Sale in market overt.]—If a man bails goods to another at such a day to rebail, & before the day the bailee sells the goods in market overt, yet at the day the bailor may seize the goods, for the property of the goods was always in him, & not altered by the sale in market overt.—ANON. (1609), Godb. 160; 78 E. R. 98.

342. Right of action—Detinue—Wrongful sub-bailment.]—If a bailee bails the goods over to another, detinue lies against the second on a *devenerunt ad manus.*—ISAACK *v.* CLARK (1615), 2 Bulst. 306; 1 Roll. Rep. 126; 80 E. R. 1143.

Annotations:—**Mentd.** Manby *v.* Scott (1662), O. Bridg. 229, Ex. Ch.; Cooper *v.* Willomatt (1845), 1 C. B. 672; Clements *v.* Flight (1846), 2 Dow. & L. 261; Hollins *v.* Fowler (1875), L. R. 7 H. L. 757, H. L.

343. —— Trover—Wrongful pledge by bailee.]—Pltf., in 1729, lodged jewels for safe custody in the hands of B., a jeweller, inclosed in a paper that was sealed, & put in a bag, which was also sealed with pltf.'s seal, & deposited at B.'s house, & the same day his clerk gave a receipt for them in the following words, "Which bag, so sealed, I promise to take care of for [pltf.], for my master B.; signed C."; & in the receipt all the jewels were specified. In Feb., 1735, B. broke both the seals, took out the jewels, & carried them to deft., a banker, borrowed £300 of him, & deposited the jewels as his own proper goods & as a security for the £300, & gave his promissory note for the same sum. On deft.'s refusing to deliver the jewels to pltf. he brought an action of trover & conversion against him:—*Held:* pltf. entitled to judgment.—HARTOP *v.* HOARE (1743), 3 Atk. 44; 2 Stra. 1187; 1 Wils. 8; 26 E. R. 828.

Annotations:—**Refd.** Boyson *v.* Coles (1817), 6 M. & S. 14. **Mentd.** Mason *v.* Lickbarrow (1790), 1 Hy. Bl. 357, Ex. Ch.; Wookey *v.* Pole (1820), 4 B. & Ald. 1; Thorndike *v.* Hunt, Browne *v.* Butler (1859), 32 L. T. O. S. 346, L.JJ.; Clayton *v.* Le Roy [1911] 2 K. B. 1031.

344. —— —— Wrongful sale by bailee.]—A. let a horse on hire to B. for one month. B. kept it for two months, & then sold it to C.:—*Held:* A. might recover the value of the horse from C., although C. had acted *bonâ fide*, & had paid B. the full value.

B. had only a limited interest; when he sold it, he could give deft. no better title than he had got himself (BOSANQUET, J.).—SHELLEY *v.* FORD (1832), 5 C. & P. 313.

345. —— —— ——.]—A. conveyed goods by bill of sale to B. B. allowed A. to use the goods at a weekly rent, A. undertaking to deliver them up on demand. A. afterwards sold & delivered the goods to C., a *bonâ fide* purchaser:—*Held:* B. might maintain trover against C.—COOPER *v.* WILLOMATT (1845), 1 C. B. 672; 14 L. J. C. P. 219; 5 L. T. O. S. 173; 9 Jur. 598; 135 E. R. 706.

Annotations:—**Apld.** Bryant *v.* Wardell (1848), 2 Exch. 479. **Folld.** Nind *v.* Arthur (1848), 12 L. T. O. S. 196. **Consd.** Fenn *v.* Bittleston (1851), 7 Exch. 152. **Refd.** Bradley *v.* Copley (1845), 1 C. B. 685; Ward *v.* Audland (1847), 16 M. & W. 862; Singer Manufacturing Co. *v.* Clark (1879), 5 Ex. D. 37; Payne *v.* Wilson, [1895] 1 Q. B. 653. **Mentd.** Cooper *v.* Shepherd (1846), 7 L. T. O. S. 282; Harrison *v.* Blackburn (1864), 17 C. B. N. S. 678; Plasycoed Collieries Co. *v.* Partridge, Jones (1912), 81 L. J. K. B. 723, D. C.

346. —— —— ——.]—FENN *v.* BITTLESTON, No. 317, *ante.*

347. —— —— ——.]—A coachbuilder let a brougham for a year, &, according to the custom of the trade, the hirer's arms were painted on the panels. The hirer put the brougham up for sale by auction at Aldridge's, & it was purchased by a commission agent & horse dealer. In an action of trover by the owner against the purchaser of the brougham:—*Held:* by allowing the arms to be painted on the panels, the owner did not render himself responsible for the fraudulent sale by the hirer, & the purchaser was liable.—MARNER *v.* BANKS (1867), 17 L. T. 147; 16 W. R. 62.

Annotation:—**Mentd.** Clayton *v.* Le Roy, [1911] 2 K. B. 1031.

348. —— —— —— Bailee convicted of larceny.]—Where a hirer in possession of goods, under a hire purchase agreement, sells them to a *bonâ fide* purchaser without notice before all instalments agreed upon are paid, & is prosecuted to conviction for larceny as a bailee, the owner can maintain an action for conversion against the purchaser.—

PART IV. SECT. 2, SUB-SECT. 1.

344 i. *Right of action—Trover—Wrongful sale by bailee.*]—Where a person lends his cattle to the proprietors of a station, with authority to use them for stocking purposes, & such proprietors afterwards sell the cattle with the station to a third person, who pays for them without notice of the true owner's claim, & in the *bonâ fide* belief that they are the property of his vendors, the true owner is not estopped from recovering the cattle or their value from the purchaser.—SLY *v.* CAMPBELL (1887), 2 Q. L. J. 192.—**AUS.**

344 ii. —— —— ——.]—Trover is maintainable by the owner of property, where a third party, to whom the owner has given the use of the property, has sold it without authority.—SIBLEY *v.* SIBLEY (1871), 8 N. S. R. 325.—**CAN.**

344 iii. —— —— ——.]—A. hired pltf.'s horse to go a certain distance, but went further, & sold the horse to deft. in such circumstances as to lead to the presumption that he intended to steal the horse at the time of hiring:—*Held:* pltf. could not maintain trover against deft. until he had done everything in his power to prosecute A. for the felony.—PEASE *v.* MCALOON (1840), 1 Kerr, 111.—**CAN.**

344 iv. —— —— ——.]—S. left with C. a buffalo & a calf, to be taken care of during his absence from home. C. sold the animals to M. S. sued to recover them:—*Held:* the bailment by S. to C. was a gratuitous one, or else a mere custody by C. for S., & S. was at the time of sale in constructive possession of the animals, & C. could not transfer to M. an ownership that he had not himself.—SHANKAR MURLIDHAR *v.* MOHANLAL JADURAM (1887), I. L. R. 11 Bom. 704.—**IND.**

344 v. —— —— ——.]—It is not an unqualified rule of law that if any one to whom a thing has been lent or otherwise entrusted, alienates it without authority, the owner has no action against the person who had obtained it by a just title & in good faith. If the thing has been so entrusted in circumstances which might reasonably lead others to believe that the ostensible owner was the true owner to dispose of it, the owner cannot claim it from a person who has acquired it in such belief & for value, without tendering to repay such value.

A., the driver of a post-cart owned by pltf., a post-contractor, left one of pltf.'s horses, which became disabled in the road, in charge of B., & borrowed a mule from B. to prosecute the journey. B. sold & delivered the horse to deft.:—*Held:* in the absence of proof of circumstances as above stated, the magistrate erred in granting absolution from the instance in an action by pltf. against deft. for delivery of the horse.—ADAMS *v.* MOCKE (1906), 23 S. C. 782 16 C. T. R. 652.—**S. AF.**

344 vi. —— —— *Salvage sale by bailee.*—Pltf. ordered from defts. 4,000 bushels of wheat, paid therefor, & obtained from defts. orders for the 4,000 bushels upon the agent in charge of a railway elevator, where defts. had 20,000 bushels stored. Pltf. had received only 1,000 of the 4,000 bushels, & still held the orders, when a fire occurred which damaged all the wheat in the elevator. After the fire, pltf. demanded his wheat. Both the elevator man & defts. refused, the latter alleging that they had bought the wheat at the sale of the salvage by the insurance cos. The appraisal of the loss had been made on the assumption that defts. alone were interested in all the wheat. Pltf. did not assent to the proceedings to adjust the loss, was not notified, & was not a party to the sale:—*Held:* the sale vested no title to the wheat in defts., & defts. were liable for the conversion.—INGLIS *v.* RICHARDSON & SONS, LTD. (1913), 29 O. L. R. 229; 4 O. W. N. 1519 14 D. L. R. 137.—**CAN.**

PAYNE *v.* WILSON, [1895] 2 Q. B. 537; 65 L. J. Q. B. 150; 73 L. T. 12; 43 W. R. 657, C. A.

349. —— —— Before determination of bailment.]—The charterers of pltf.'s ship for three voyages, on her return home from the second, removed the anchors & cables to defts.' wharf. Shortly afterwards the ship was seized under an Admlty. warrant, & sold for debts due on bottomry bonds & the wages of the crew. Four days previous to the sale, pltf. demanded the anchors, etc., which were not included in the sale account of the ship, from defts., who refused to deliver them up:—*Held:* (1) pltf. was not entitled to recover the anchors & cables in trover against defts., although they had been removed by the charterers to avoid the process of the Admlty. Ct., & not in the ordinary course of business, as pltf. had no right of possession until after the sale; (2) the removal of the articles from the ship to the wharf was no injury to pltf.'s reversionary interest.—FERGUSON *v.* CRISTALL (1829), 5 Bing. 305; 2 Moo. & P. 524; 7 L. J. O. S. C. P. 91; 130 E. R. 1078.

350. —— —— On determination of bailment.]—Brewers in Dublin supplied porter in casks to a customer, on the terms that the empty casks were to be returned to Dublin at the customer's expense, within six months from the date of the invoice, or paid for at the invoice price at the option of the shippers:—*Held:* under such contract as soon as the casks were empty, the customer was in the situation with respect to them of a mere bailee during pleasure, & the brewers had such an immediate right of possession of the empty casks as would entitle them to maintain trover against any person who converted them to his own use.—MANDERS *v.* WILLIAMS (1849), 4 Exch. 339; 18 L. J. Ex. 437; 13 L. T. O. S. 325; 154 E. R. 1242.

Annotation:—**Expld.** Jelks *v.* Hayward, [1905] 2 K. B. 460.

351. —— —— Bill of exchange—Wrongful indorsement by bailee.]—R. being employed to procure a bill of exchange to be discounted for pltf., instead of doing so, indorsed it, & placed it in the hands of deft., clerk to a creditor of R. Deft. carried the bill to R.'s account with his creditor, & though afterwards apprised of the circumstances in which R. held the bill, refused to restore it:—*Held:* deft. liable to pltf. in trover.—CRANCH *v.* WHITE (1835), 1 Bing. N. C. 414; 1 Hodg. 61; 1 Scott, 314; 4 L. J. C. P. 113; 131 E. R. 1176.

Annotation:—**Apld.** Davies *v.* Vernon (1844), 6 Q. B. 443.

352. —— —— Wrong-doer taking possession from bailee.]—Trover may be maintained by a gratuitous bailor of cattle against a wrong-doer, who takes them out of the possession of the bailee.—NICOLLS *v.* BASTARD (1835), 2 Cr. M. & R. 659; 1 Gale, 295; 150 E. R. 279; *sub nom.* NICHOLLS *v.* BASTARD, Tyr. & Gr. 156; 5 L. J. Ex. 7.

Annotation:—**Mentd.** Gadsden *v.* Barrow (1854), 9 Exch. 514.

353. —— Joint owners—One entitled to possession can sue wrongful pledgee of other.]—Pltf., owner of a personal chattel, parted with a half-share in it to another person, on an agreement that pltf. was to have possession of the chattel until it should be sold. Pltf. entrusted the chattel to his co-owner for the purpose of its being taken to an auctioneer for sale. The co-owner lodged the chattel with deft. as security for a debt due from him to deft.:—*Held:* the transaction amounted to a bailment by pltf. to his co-owner for a special purpose, which he did not carry out, & on failure of the trust pltf.'s right to immediate possession of the chattel accrued at once, & pltf. had a right to recover it from deft. in an action of detinue.—NYBERG *v.* HANDELAAR, [1892] 2 Q. B. 202; 61 L. J. Q. B. 709; 67 L. T. 361; 56 J. P. 694; 40 W. R. 545; 8 T. L. R. 549; 36 Sol. Jo. 485, C. A.

See, further, sect. 4, *post.*

354. —— Against third party for injury to chattel.]—If the owner of a chattel gratuitously permit another person to use it, the owner may maintain trespass for an injury done to it while it is so used.—LOTAN *v.* CROSS (1810), 2 Camp. 464, N. P.

Annotations:—**Distd.** Hall *v.* Pickard (1812), 3 Camp. 187, N. P. **Mentd.** Laugher *v.* Pointer (1826), 5 B. & C. 547

355. —— ——.]—If the owner of a chattel lets it to hire to a third person for a certain time, during which it is destroyed by the negligence of deft., the remedy of the bailor against deft. for the injury done to his reversion is case & not trespass.—HALL *v.* PICKARD (1812), 3 Camp. 187, N. P.

Annotations:—**Refd.** Laugher *v.* Pointer (1826), 5 B. & C. 547. **Mentd.** Williams *v.* Holland (1833), 3 Moo. & S. 540.

356. —— ——.]—In the case of a bailment not for reward, either the bailor or the bailee may bring an action for an injury to the thing bailed; but in the case of a hiring, the owner cannot bring trover, because he has temporarily parted with the possession. Though the owner cannot bring an action where there has been no permanent injury to the chattel, where there is a permanent injury the owner may maintain an action against the person whose wrongful act has caused that injury (WILLIAMS, J.).—MEARS *v.* LONDON & SOUTH WESTERN RY. CO. (1862), 11 C. B. N. S. 850; 31 L. J. C. P. 220; 6 L. T. 190; 142 E. R. 1029.

357. —— —— Full damage paid to bailee—Wrong-doer discharged.]—Where a bailee in posses-

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352 i. —— —— *Wrong-doer taking possession from bailee.*]—T. sold to pltf. 2,000 out of 3,000 bushels of wheat owned by him & lying in the warehouse of S., whose receipts he held for same, & which he indorsed to pltf., who paid him for the quantity sold to him. The wheat remained in the warehouse for some time. T. & S. left the country, when defts. seized & converted the whole quantity to their own use & pltf. sued them in trover & detinue. The evidence of T., so far from showing that he repudiated the sale, fully upheld it, & proved that he told S. to appropriate all the wheat in one of the bins to pltf., & S. stated that he would not, after the notice of the sale to pltf., have delivered any of the wheat to any one but pltf., without retaining enough to satisfy pltf.'s 2,000 bushels. *Qu.:* whether defts., as wrong-doers, could set up the objection of the property not passing by reason of non-appropriation or non-severance.—COFFEY *v.* QUEBEC BANK 1869), 20 C. P. 110.—**CAN.**

352 ii. —— —— *Special contract.*]—Beer bottles were let out by pltfs. to brewers, on the terms that they should belong to pltfs., who, after they had been used for one sale of beer, should be entitled to recover possession of them. The bottles had blown in the glass pltfs.' trade mark, & the words "the property of" followed by pltfs.' name. Brewers having filled the bottles with beer sold the beer to retail dealers & gave them express notice that the bottles were the sole property of pltfs. A similar notice was advertised in newspapers. Retail dealers sold the beer in the bottles without giving the purchaser any such notice. No evidence having been given that any person who bought beer in the bottles was induced to believe that he had bought the bottles also:—*Held:* pltfs. entitled to recover from deft., who knew the real facts, bottles which had been so let out by them & had been acquired by him from purchasers from retail dealers, & to an injunction restraining him from purchasing, collecting, or dealing in similar bottles.—CURTIS *v.* PERTH & FREMANTLE BOTTLE EXCHANGE CO., LTD. (1914), 18 C. L. R. 17.—**AUS.**

354 i —— *Against third party for injury to chattel.*]—Pltfs., carriers, deposited goods intrusted to them in stores, near to which was a railway embankment constructed by deft. During the night a quantity of rain fell, & the water being penned back by the railway works, flooded the store & injured the goods stored there by pltfs.:—*Held:* pltfs. entitled to recover damages from deft. for a continuing act of negligence in not providing sufficient means to carry off rain water, which caused injury to pltfs.' goods.—MCMAHON *v.* RAILWAYS COMR. (1883), 4 N. S. W. L. R. 170.—**AUS.**

354 ii. —— ——.]—Contract Act, s. 180, provides that if a third person injures goods bailed, the bailor may bring a suit against the third person for such injury.—RAMNATH GAGOI *v.* PITAMBAR DEB GOSWAMI (1915), I. L. R. 43 Calc. 733.—**IND.**

357 i. —— —— *Full damage paid to bailee — Wrong-doer discharged.*]—A. hired a horse & buggy from a livery stable. Deft.'s horse & buggy ran into the horse & buggy driven by A., & the buggy was damaged & the horse ran away & was killed:—*Held:* the wrong-

Sect. 2.—Rights and obligations as regards third parties : Sub-sects. 1 & 2.]

sion of a chattel has brought an action against a stranger for loss of or injury to the chattel owing to the wrongful or negligent act of the latter, the wrong-doer having once paid full damages to the bailee has an answer to an action by the bailor.—THE WINKFIELD, [1902] P. 42 ; 71 L. J. P. 21 ; 85 L. T. 668 ; 50 W. R. 246 ; 18 T. L. R. 178 ; 46 Sol. Jo. 163 ; 9 Asp. M. L. C. 259, C. A.

Annotations :—**Refd.** Eastern Construction Co. *v.* National Trust Co. & Schmidt, [1914] A. C. 197, P. C. **Mentd.** Glenwood Lumber Co. *v.* Phillips, [1904] A. C. 405, P. C. ; Plasycoed Collieries Co. *v.* Partridge, Jones (1912), 81 L. J. K. B. 723, D. C.

358. —— —— Replevin.]—F. being indebted to pltf., brought him £15 towards payment of the debt, but requested & obtained permission to lay the money out in the purchase of a horse & cart, which were to be the property of pltf., but of which F. was to have the possession & the use, subject to such occasional use as pltf. might require to have of them, & to their being given up to pltf. when he should demand them. After F. had purchased the horse & cart, & had the possession & use of them for some time, he determined to emigrate. The horse & cart were used in transporting his effects to the pier at which he was to embark, & deft., to whom he owed money for fodder supplied to the horse, went with him to procure payment if he could. At parting, F. delivered the horse & cart to him, telling him to take them for the debt, but adding that he owed pltf. money also, & that if he would discharge the debt due to deft., which was much less than their value, he was to give them up to him. Pltf. for some time remained in ignorance of what had passed, & afterwards coming to the knowledge of it, demanded them, but deft. refused to deliver them unless his debt were paid, whereupon pltf. proceeded to replevy them. On the plea of *non cepit :—Held :* there was no taking of the horse & cart which would entitle pltf. to maintain replevin.

F. was the bailee of pltf. & had a lawful possession which conferred on him a special property, but this did not authorise him to transfer his possession to deft. After a demand & refusal pltf. could clearly have maintained trover against deft. (COLERIDGE, J.).—MENNIE *v.* BLAKE (1856), 6 E. & B. 842 ; 25 L. J. Q. B. 399 ; 27 L. T. O. S. 260 ; 2 Jur. N. S. 953 ; 4 W. R. 739 ; 119 E. R. 1078.

Annotation :—**Mentd.** Pease *v.* Chaytor (1863), 3 B. & S. 620.

Validity of transfer by bailee under Factors Act, 1889 (c. 45).]—*See* AGENCY, Vol. I., pp. 330 *et seq. :* SALE OF GOODS.

Property of bailor liable to be seized in execution.]—*See* EXECUTION.

Actions against sheriffs & bailiffs.]—*See* EXECUTION ; SHERIFFS & BAILIFFS.

Actions against auctioneers.]—*See* AUCTION & AUCTIONEERS, pp. 1 *et seq., ante.*

SUB-SECT. 2.—RIGHTS OF BAILEE AGAINST THIRD PARTIES.

359. Right of action—Bailee may sue.]—The bailee of a bond may maintain trover for it.—ARNOLD *v.* JEFFERSON (1697), as reported in 1 Ld. Raym. 275 ; 91 E. R. 1080.

360. —— Possession gives sufficient title.]—Possession under a general bailment is a sufficient title for pltf. in trover.

Pltf. bought & paid for a ship stranded on the English coast, but the transfer was not regular ; he tried to save her, but she went to pieces, & deft. possessed himself of parts of the wreck, which drifted on his farm :—*Held :* pltf.'s possession enabled him to recover for them in trover.—SUTTON *v.* BUCK (1810), 2 Taunt. 302 ; 127 E. R. 1094.

Annotations :—**Folld.** Burton *v.* Hughes (1824), 2 Bing. 173. **Consd. & Apld.** The Winkfield, [1902] P. 42, C. A. **Refd.** Daniel *v.* Rogers, [1918] 2 K. B. 228, C. A. **Mentd.** Dunwich Corpn. *v.* Sterry (1831), 1 B. & Ad. 831 ; The Gas Float Whitton No. 2, [1895] P. 301.

361. —— ——.]—Mere possession of goods is sufficient to maintain an action of trover against a wrong-doer, & the latter cannot set up the *jus tertii.*—JEFFRIES *v.* GREAT WESTERN RY. CO. (1856), 5 E. & B. 802 ; 25 L. J. Q. B. 107 ; 26 L. T. O. S. 214 ; 2 Jur. N. S. 230 ; 119 E. R. 680.

Annotations :—**Apld.** Baggalley *v.* Davey (1857), 29 L. T. O. S. 211 ; The Winkfield, [1902] P. 42, C. A. ; Glenwood Lumber Co. *v.* Phillips, [1904] A. C. 405, P. C. ; Eastern Construction Co. *v.* National Trust Co. & Schmidt, [1914] A. C. 197, P. C. **Refd.** Freshney *v.* Wells (1857), 26 L. J. Ex. 129.

362. —— ——.]—In the case of a bailment not for reward, either the bailor or the bailee may bring an action for an injury to the thing bailed ; but in the case of a hiring the owner cannot bring trover because he has temporarily parted with the possession.—MEARS *v.* LONDON & SOUTH WESTERN RY. CO. (1862), 11 C. B. N. S. 850 ; 31 L. J. C. P. 220 ; 6 L. T. 190 ; 142 E. R. 1029.

363. —— —— Gratuitous bailee.]—A. sent his horse for the night to pltf., who turned it out after dark into his pasture-field, adjoining to & separated from a field of deft. by a fence, which deft. was

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doer, having once paid full damages to the bailee, had an answer to any action by the bailor.—COMPTON *v.* ALLWARD (1912), 19 W. L. R. 783 ; 1 D. L. R. 107 ; 1 W. W. R. 452.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 2.

359 i. *Right of action—Bailee may sue.*]—Contract Act, s. 180, provides that if a third person deprives the bailee of the use or possession of the goods bailed or does them an injury, the bailee is entitled to use such remedies as the owner might have used in the like case, if no bailment had been made, & the bailee may bring a suit against the third person for such deprivation or injury. — RAMNATH GAGOI *v.* PITAMBAR DEB GOSWAMI (1915), I. L. R. 43 Calc. 733.—**IND.**

360 i. —— *Possession gives sufficient title.*]—A mare was in pltf.'s field, where it was killed by deft.'s bull, which had broken into pltf.'s close. The mare had been put there by pltf.'s father, who said he had given it to pltf. —*Semble :* the right of property was immaterial, as pltf., even if only a bailee, could recover its value against a wrong-doer.—MASON *v.* MORGAN (1865), 24 U. C. R. 328.—**CAN.**

360 ii. —— ——]—Pltf. was intrusted with the possession of goods by the owner, who was about to leave Nova Scotia, to be forwarded to him. With that intention the goods were sent to a wharf to be shipped by a vessel then lying there, but there was no formal delivery to the master or any one on board. Deft., who showed no justification, caused the goods to be taken & sold :—*Held :* until the assent of the master of the vessel to receive the goods was shown, they remained in the possession of pltf. as special owner, so as to enable him to maintain an action against a wrong-doer.—SANFORD *v.* BOWLES (1873), 9 N. S. R. 304.—**CAN.**

360 iii. —— ——.]—Pltf. hired a horse & buggy from a livery stable deft.'s horse & buggy ran into the horse & buggy driven by pltf., & the buggy was damaged, & the horse ran away & was killed :—*Held :* pltf. was entitled to recover for the injury to the buggy & the loss of the horse, although he was not the owner, & not liable over to the owner for the damage, as he had possession as bailee, &, as against a wrong-doer, possession was title.—COMPTON *v.* ALLWARD (1912), 19 W. L. R. 783 ; 1 D. L. R. 107 ; 1 W. W. R. 452.—**CAN.**

360 iv. —— ——.]—A drover of sheep has sufficient possession as bailee to maintain trover as against a wrong-doer.—BENNETT *v.* FLOOD (1864), 3 N. S. W. S. C. R. 158.—**AUS.**

360 v. —— *Replevin.*]—*Qu. :* whether the bailee of a chattel can maintain an action of replevin, & if he can, whether it is necessary that he should have the actual possession of the chattel at the time of the seizure.—BUTLER *v.* BRIDGE (1841), 3 I. L. R. 464 ; 1 Leg. Rep. 245.—**IR.**

bound to repair. The horse, from the bad state of the fence, fell from one field into the other, & was killed:—*Held:* pltf., though a gratuitous bailee, might maintain an action against deft. & recover the value of the horse.—ROOTH *v.* WILSON (1817), 1 B. & Ald. 59; 106 E. R. 22.

Annotations:—**Consd.** The Winkfield, [1902] P. 42, C. A.; Holgate *v.* Bleazard, [1917] 1 K. B. 443. **Refd.** Barnes *v.* Ward (1850), 9 C. B. 392; Lawrence *v.* Jenkins (1873), L. R. 8 Q. B. 274; Claridge *v.* South Staffordshire Tram. Co., [1892] 1 Q. B. 422. **Mentd.** Sneesby *v.* L. & Y. Ry. Co. (1874), L. R. 9 Q. B. 263.

364. —— —— ——.]—In the case of the simple bailment of a chattel, without reward, it may be recovered in trover, either by the bailor or the bailee, if taken wrongfully out of the bailee's possession.—NICOLLS *v.* BASTARD (1835), 2 Cr. M. & R. 659; 1 Gale, 295; *sub nom.* NICHOLLS *v.* BASTARD, Tyr. & Gr. 156; 5 L. J. Ex. 7; 150 E. R. 279.

Annotation:—**Refd.** Gadsden *v.* Barrow (1854), 9 Exch. 514.

365. —— —— **Hirer may sue for negligence.**]—Pltfs. hired a chariot for the day, appointed the coachman, & furnished the horses:—*Held:* they were properly described as owners & proprietors of it, in a declaration against deft. for an accident arising from his servant's negligence in driving against the chariot.—CROFT *v.* ALISON (1821), 4 B. & Ald. 590; 106 E. R. 1052.

Annotations:—**Refd.** Laugher *v.* Pointer (1826), 5 B. & C. 547. **Mentd.** Freeman *v.* Rosher (1849), 18 L. J. Q. B. 340; Greenwood *v.* Seymour (1861), 30 L. J. Ex. 327, Ex. Ch.; Seymour *v.* Greenwood (1861), 7 H. & N. 355, Ex. Ch.; Udell *v.* Atherton (1861), 7 H. & N. 172; Limpus *v.* London General Omnibus Co. (1862), 1 H. & C. 526, Ex. Ch.

366. —— **Bailor with limited interest — Bailor acting improperly.**]—Pltf. received a parcel from G. to book for London at the office of defts., common carriers. Pltf., instead of obeying his instructions, put the parcel into his bag, intending to take it to London himself. Defts. having lost the bag:—*Held:* pltf. could not recover damages from them in respect of the parcel.—MILES *v.* CATTLE (1830), 6 Bing. 743; L. & Welsb. 353; 4 Moo. & P. 630; 8 L. J. O. S. C. P. 271; 130 E. R. 1467.

367. —— —— —— **Proof of title.**]—Possession under a general bailment is sufficient to entitle a party to maintain trover against a stranger.

The owner of furniture let it to pltf. on hire, under the terms of a written agreement, pltf. placed it in a house occupied by the wife of a person who had become bkpt., & it was seized by order of the assignees:—*Held:* pltf. might recover in an action of trover, without producing the agreement, although it was insisted that he had a mere qualified interest, which could not be proved without the production of that instrument.—BURTON *v.* HUGHES (1824), 2 Bing. 173; 9 Moore, C. P. 334; 3 L. J. O. S. C. P. 241; 130 E. R. 272.

Annotations:—**Consd.** The Winkfield, [1902] P. 42, C. A.; Daniel *v.* Rogers, [1918] 2 K. B. 228, C. A.

368. —— **Bailee with limited interest—Laundress.**]—The bailee of goods sending them by a carrier to the bailor, *e.g.*, a laundress returning clean linen may sue the carrier for negligence.—FREEMAN *v.* BIRCH (1833), 3 Q. B. 492, n.; 1 Nev. & M. K. B. 420; 114 E. R. 596.

369. —— **Infant bailee.**]—The delivery of goods on a condition to an infant creates in him a special property which is so far recognised & protected by the law that he could bring an action, whilst the special property lasted, against any person depriving him of the goods (CAVE, J.).—R. *v.* MCDONALD (1885), 15 Q. B. D. 323; 52 L. T. 583; 49 J. P. 695; 33 W. R. 735; 1 T. L. R. 465; 15 Cox, C. C. 757, C. C. R.

Annotation:—**Mentd.** R. *v.* Ashwell (1885), 16 Q. B. D. 190, C. C. R.

370. Measure of damages—Costs paid to bailor.]—Pltf. hired a horse & cart from A., & put them up at a livery stable, from which deft. obtained them by representing himself to be the owner, & then detained them. A. sued pltf. & recovered damages & costs:—*Held:* the taking by deft. was utterly wrongful & he was liable to pltf. for the value of the goods & also for the costs to which he had been put.—PRITCHARD *v.* BLICK (1858), 1 F. & F. 404, N. P.

371. ——.]—Where a man has temporary possession of an article, the ownership being in another, the bailee may maintain an action, but only for the real damage sustained by him in the deprivation of the possession.—CHINERY *v.* VIALL (1860), 5 H. & N. 288; 29 L. J. Ex. 180; 2 L. T. 466; 8 W. R. 629; 157 E. R. 1192.

Annotations:—**Expld.** Attack *v.* Bramwell (1863), 3 B. & S 520. **Apld.** Johnson *v.* Stear (1863), 15 C. B. N. S. 330. **Consd.** Donald *v.* Suckling (1866), L. R. 1 Q. B. 585; Johnson *v.* L. & Y. Ry. Co. (1878), 3 C. P. D. 499. **Distd.** Mulliner *v.* Florence (1878), 3 Q. B. D. 484, C. A. **Refd.** Hiort *v.* L. & N. W. Ry. Co. (1879), 4 Ex. D. 188, C. A.; Rew *v.* Payne, Douthwaite (1885), 53 L. T. 932; Armstrong *v.* Allan (1892), 67 L. T. 417; London Joint Stock Bank *v.* British Amsterdam Maritime Agency (1910), 104 L. T. 143; Belsize Motor Supply Co. *v.* Cox, [1914] 1 K. B. 244.

372. ——.]—The rule in respect of the measure of damages in trover by a bailee against a stranger, as contradistinguished from an action against a party having an interest in the goods, is that the bailee is only entitled to the value of his interest therein, the bailor being entitled to the residue (ERLE, C.J.).—TURNER *v.* HARDCASTLE (1862), 11 C. B. N. S. 683; 31 L. J. C. P. 193; 5 L. T. 748; 142 E. R. 964.

Annotations:—**Consd.** Johnson *v.* L. & Y. Ry. Co. (1878), 3 C. P. D. 499. **Refd.** The Winkfield, [1902] P. 42, C. A.; Royal Mail S.S. Co. *v.* Macintyre (1911), 16 Com. Cas. 231; Eastern Construction Co. *v.* National Trust Co. & Schmidt, [1914] A. C. 197, P C.

373. —— **Value of chattel.**]—In an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed. *Claridge* v. *South Staffordshire Tram. Co.* No. 374, *post*, overd.

The position, that possession is good against a wrongdoer & that the latter cannot set up the *jus tertii* unless he claims under it, is well established in our law, & really concludes this case against the resps. A long series of authorities establishes this in action of trover & trespass at

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373 i. *Measure of damages — Value of chattel.*]—A bailee for hire in possession may recover, in an action against a stranger, the full value of an injury done to the chattel, & not merely damages proportioned to his temporary interest as bailee.—MANGAN *v.* COX, 2 J. R. N. S. 264.—**N.Z.**

373 ii. ——.]—Pltfs. were bailees of a scow belonging to a co. who were delivering building material at pltfs.' wharf. Pltfs., by their contract with the co., were to be responsible for any damage done to it while tied up at their wharf. The co. were also delivering other material at the same wharf, & P. agreed with the co. to tow their scows from their own wharf to pltfs.' wharf & to tie them up there securely at a certain specified rate per scow. While the scow which had been tied up at pltfs.' wharf by the co. was in the custody of pltfs., P. brought in & tied up at the wharf one of the co.'s scows, under the above arrangement, but so negligently that it came in contact with the scow in the custody of pltfs., & injured it. Pltfs. procured temporary repairs to be made to the injured scow, & brought an action to recover the cost of the repairs & consequent demurrage, & also the cost, to be incurred, of making permanent repairs:—*Held:* pltfs., as bailees, were entitled to recover from P. damages based upon the whole injury done to the scow, as if they were the actual owners of the scow, or had already reimbursed the owners, & notwithstanding that the money had not yet been expended in making the permanent repairs.—COTTON CO., LTD. *v.* COAST QUARRIES, LTD. & PATTERSON (1913), 24 W. L. R. 288; 4 W. W. R. 142; 11 D. L. R. 219. —**CAN.**

Sect. 2.—Rights and obligations as regards third parties: Sub-sects. 2, 3 & 4.]

the suit of a possessor. The principle being the same, it follows that he can equally recover the whole value of the goods in an action on the case for their loss through the tortious conduct of the deft. It involves this also, that the wrong-doer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor & bailee, & must treat the possessor as the owner of the goods for all purposes quite irrespective of the rights & obligations as between him & the bailor (COLLINS, M.R.).—THE WINKFIELD, [1902] P. 42; 71 L. J. P. 21; 85 L. T. 668; 50 W. R. 246; 18 T. L. R. 178; 46 Sol. Jo. 163; 9 Asp. M. L. C. 259, C. A.

Annotations:—**Refd.** Glenwood Lumber Co. *v.* Phillips, [1904] A. C. 405, P. C.; Plasycoed Collieries Co. *v.* Partridge, Jones (1912), 81 L. J. K. B. 723; Eastern Construction Co. *v.* National Trust Co. & Schmidt, [1914] A. C. 197, P. C.

374. —— ——.]—The owner of a horse delivered it to pltf., an auctioneer, for sale, with liberty to use it until sold. The horse was injured, whilst being driven along a highway, by deft.'s negligence:—*Held*: pltf., being under no liability to his bailor for the injury, could not recover the diminution in the value of the horse.—CLARIDGE *v.* SOUTH STAFFORDSHIRE TRAMWAY CO., [1892] 1 Q. B. 422; 61 L. J. Q. B. 503; 66 L. T. 655; 56 J. P. 408; 8 T. L. R. 263, D. C.

Annotations:—**Follid.** Brown *v.* Hand-in-Hand Fire Insce. Soc. (1895), 11 T. L. R. 538. **Dbtd.** Meux *v.* G. E. Ry. Co., [1895] 2 Q. B. 387, C. A. **Overd.** The Winkfield, [1902] P. 42, C. A.

375. —— **Where bailor has transferred ownership to wrong-doer.**]—If, before action brought by the bailee against a wrong-doer, the bailor has clothed that wrong-doer with the ownership of the goods, the bailee cannot recover from the wrong-doer, thus converted into the true owner, the full value of the goods, no more then he could recover their full value from the bailor himself. In such an action the deft. would not be setting up a *jus tertii*, but, as donee or assignee of the *tertius*, a *jus sui* (LORD ATKINSON).—EASTERN CONSTRUCTION CO., LTD. *v.* NATIONAL TRUST CO., LTD. & SCHMIDT, [1914] A. C. 197; 83 L. J. P. C. 122; 110 L. T. 321, P. C.

376. Goods delivered by bailee to wrong party—Whether bailee can sue for money paid to bailor.]—Goods came to a wharfinger's consigned to A.: B., believing them to be meant for himself, carried them from the wharf, & used them, before he discovered the mistake:—*Held*: the wharfinger after paying A. the value of the goods could not maintain an action against B. for money paid to recover the amount.—SILLS *v.* LAING (1814), 4 Camp. 81, N.P.

377. Hire of steamer—Right to exclude third party.]—Deft. hired a steamboat for an excursion to R., the owner's captain navigating the vessel:—*Held*: deft. had not such a possession as to justify him in forcibly turning out a stranger, whom the captain had allowed to come on board.—DEAN *v.* HOGG (1834), 10 Bing. 345; 4 Moo. & S. 188; 3 L. J. C. P. 113; 131 E. R. 937.

Annotations:—**Refd.** Fenton *v.* City of Dublin Steam Packet Co. (1838), 8 Ad. & El. 835; R. *v.* Sherard (1863), 33 L. J. M. C. 5; The Great Eastern (1868), L. R. 2 A. & E. 88; Roads *v.* Trumpington Overseers (1870), L. R. 6 Q. B. 58.

378. Third party wrongfully using chattel.]—An action may be maintained by a person, who has hired a railway truck to carry his cattle, against a third person for wrongfully putting his cattle in, & so crowding & crushing pltf.'s cattle.—RAYNOR *v.* CHILDS (1862), 2 F. & F. 775, N. P.

379. Sub-charterers of ship—Possessory interest—Collision—Loss of freight.]—Pltfs., sub-charterers of a steam vessel which sank with her cargo after collision with defts.' vessel, sued defts. for the bill of lading freight which (but for the negligence of those in charge of defts.' vessel) they would have earned if the voyage of the chartered vessel had been completed:—*Held*: pltfs. had a sufficient possessory interest in ship & cargo to entitle them, as bailees, to maintain the action, the evidence showing that the contract of carriage was between pltfs. & the shippers of the cargo, pltfs. taking delivery of the goods from the shippers, putting them on board, & signing the bills of lading in their own name, & on their own behalf, as principals.—THE OKEHAMPTON, [1913] P. 173; 83 L. J. P. 5; 110 L. T. 130; 29 T. L. R. 731; 12 Asp. M. L. C. 428, C. A.

See, further, SHIPPING & NAVIGATION.

SUB-SECT. 3.—RIGHTS OF THIRD PARTIES AGAINST BAILOR.

380. Warranty of fitness — No obligation to keep fit.]—Although a person who supplies another with a machine which, from the nature of the thing, he must, or ought to know, will be used by third persons, is under an obligation to those third persons to see that the machine is, at the time it is supplied, in a state reasonably fit for the purpose for which it is intended, he is not under any obligation to them to keep & maintain it in that condition.—HOPKINS *v.* GREAT EASTERN RY. CO. (1895), 60 J. P. 86; 12 T. L. R. 25, C. A.

381. —— **Knowledge of purpose of hiring.**]—Consignees of wheat employed a dock co. to unload the wheat, & supplied sacks, hiring them from deft., who knew the purpose for which the sacks were required. Pltf., who was working for the dock co. in unloading the vessel, sustained injuries caused by the breaking of a defective sack:—*Held*: the county ct. judge was wrong in nonsuiting pltf. — HAWKINS *v.* SMITH (1896), 12 T. L. R. 532.

382. —— ——.]—Male pltf. hired from deft., a livery stable keeper, a landau with a horse & driver for the purpose of taking a drive. His wife accompanied him in the carriage. The horse showed considerable signs of restiveness when meeting motor cars, & when passing a traction engine shied & became unmanageable, & the carriage was upset & both husband & wife were

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376 i. *Goods delivered by bailee to wrong party—Whether bailee can sue for money paid to bailor.*]—A received a hogshead of sugar to be stored in his warehouse. It belonged to B., but through mistake was delivered to C., who claimed it. B. convinced A. that he had made a mistake in delivering it to C., & A. paid B. the price of the sugar:—*Held*: A. need not declare specially, but could recover against C. for money paid.—KITSON *v.* SHORT 1848), 4 U. C. R. 220.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 3.

381 i. *Warranty of fitness—Injury to servant of hirer.*]—Pltf. was a workman in the employment of the hirers, under a hire-purchase agreement, of a refrigerating plant, which was hired from defts., & suffered personal injuries owing to a defective cylinder:—*Held*: pltf. entitled to recover damages from defts. —NOKES *v.* KENT CO. (1913), 23 O. W. R. 771; 4 O. W. N. 665; 9 D. L. R. 772.—**CAN.**

381 ii. —— ——.]—The owner of machinery rented to an independent jobber, under an agreement that he (the owner) will keep it in repair, who has it examined for that purpose almost daily by his superintendent, thereby retains the care of it, & is liable for any damage caused to one of the jobber's workmen, through its being dangerous & not provided with accessories for the protection of those who use it.—DESPAROIS *v.* FROTHINGHAM & WORKMAN, LTD. (1914), Q. R 46 S. C. 93; 19 D. L. R. 806.—**CAN.**

injured. In an action by the husband & wife to recover damages for the injuries, the jury found that deft. ought to have known, if he had used proper care, that the horse was unsafe to be sent out with the carriage, but that the driver was not negligent. Deft. upon these findings, while admitting liability to the husband, contended that he was not liable to the wife :—*Held :* (1) as deft. ought to have known of the vicious propensity of the horse, he was in the same position as if he had known, & it was his duty to the wife, who he must have contemplated would use the carriage, to warn her of the dangerous character of the horse ; (2) this duty arose independently of contract, & deft. was liable to the wife ; (3) deft. was liable to the wife upon the ground that, as he kept control of the carriage & accepted her as a passenger therein, he was under a duty to use reasonable care to carry her safely & for that purpose to provide a proper horse.—WHITE *v.* STEADMAN, [1913] 3 K. B. 340 ; 82 L. J. K. B. 846 ; 109 L. T. 249 ; 29 T. L. R. 563.

Annotation :—**Distd.** Bates *v.* Batey, [1913] 3 K. B. 351.

383. Negligence of hirer in use of chattel.]—Deft., the owner of a traction engine, to which his name & address were affixed, as required by Locomotives Act, 1865 (c. 83), s. 17, let same for three months. Through the negligent management of the engine, whilst it was being used upon a highway by the hirer, personal injuries were occasioned to pltf., who was being driven in a carriage upon the highway :—*Held :* deft. was not liable in respect of such injuries.—SMITH *v.* BAILEY, [1891] 2 Q. B. 403 ; 60 L. J. Q. B. 779 ; 65 L. T. 330 ; 56 J. P. 116 ; 40 W. R. 28, C. A.

Annotations :—**Mentd.** Smith *v.* General Motor Cab Co., [1911] A. C. 188, H. L. ; Kemp *v.* Elisha, [1918] 1 K. B. 228, C. A.

Negligence of servants of owner or hirer.] — *See* MASTER & SERVANT.

384. Damage done by horse sent to breaker.]—The owner of a horse sent him to a breaker to break him into harness ; the breaker drove the horse along a public road, when it ran away, knocked down & damaged pltf. :—*Held :* an action would not lie against the owner for such damage, even though it was alleged in the declaration that the horse was in the possession of deft., & he pleaded only "not guilty."—SMITH *v.* THORPE (1850), 16 L. T. O. S. 65.

SUB-SECT. 4.—RIGHTS OF THIRD PARTIES AGAINST BAILEE.

385. Liability to true owner.—Bailee no better title than bailor.]—A bailee can claim no higher title to the possession of goods than could his bailor ; nor can he claim, as against the right owner of the goods, to hold them until he receives instructions from his bailor, or an indemnity from the right owner.

The captain of a ship, who had taken goods on freight, & claimed, though wrongly, to have a lien upon them, delivered them to a bailee. The real owner demanded them of the latter, who refused to deliver them without the directions of the bailor : —*Held :* the bailor not having a lien upon the goods, the refusal by the bailee was sufficient evidence of a conversion.

A bailee who forbears to interplead, & makes himself a party by retaining the goods for the bailor, must stand or fall by the bailor's title (LORD TENTERDEN, C.J.).—WILSON *v.* ANDERTON (1830), 1 B. & Ad. 450 ; 9 L. J. O. S. K. B. 48 ; 109 E. R. 855.

Annotations :—**Consd.** Catterall *v.* Kenyon (18 2), 6 Jur. 507 ; Lee *v.* Bayes (1856), 18 C. B. 599 ; Wetherman *v.* London & Liverpool Bank of Commerce (1914), 31 T. L. R. 20. **Refd.** Skinner *v.* Lambert (1850), 16 L. T. O. S. 244, N. P. ; The Tigress (1863), Brown. & Lush. 38 ; **Refd.** Biddle *v.* Bond (1865), 6 B. & S. 225. **Mentd.** Hawkes *v.* Dunn (1831), 1 Tyr. 413 ; Marshall *v.* Newsom (1843), 7 Jur. 991 ; Thorne *v.* Tilbury (1858), 31 L. T. O. S. 206 ; Glyn, Mills, Currie *v.* East & West India Dock Co. (1880), 5 Q. B. D. 129.

386. —— ——.]—A warehouseman having goods in his custody parted with some of them by order of the depositor, after notice of an adverse claim, but before the bill filed. The adverse claim being substantiated :—*Held :* the warehouseman was liable in damages to the true owner & the ct. had jurisdiction to direct an inquiry as to damages in respect of the goods so parted with.—SCHOTSMANS *v.* LANCASHIRE & YORKSHIRE RY. CO. (1865), L. R. 1 Eq. 349 ; 35 L. J. Ch. 100 ; 13 L. T. 733 ; 12 Jur. N. S. 42 ; 14 W. R. 270 ; 2 Mar. L. C. 300 ; *revsd.* without affecting this point (1867), 2 Ch. App. 332, L.C. & L.J.

Annotation :—**Mentd.** Berndtson *v.* Strang (1867), L. R. 4 Eq. 491.

387. —— ——.]—Certain cases of wine were ordered by L. of pltf. & were shipped by pltf. consigned to L., who deposited the bill of lading with deft., a wharfinger, with directions to take delivery & warehouse the wine on L.'s account. The wine, on its arrival, was entered at deft.'s wharf in L.'s name, subject to a stop for the freight. L. afterwards refused to accept the wine, on the ground that it was not according to contract ; pltf. agreed to take it back, & L. promised to send a delivery order to enable pltf. to obtain it, but on the same day L. indorsed the bill of lading to M., which M. took to deft.'s wharf & procured a transfer of the wine into his own name. Pltf. was afterwards informed by L. that the wine was at the disposal of pltf., but subject to charges amounting to £17 14*s.* 9*d.* & £5 for loss of profit. At an interview between M. & pltf., M. offered to give up the wine on payment of the above sums. Pltf. tendered the former sum, which M. would not accept. Pltf.'s attorney afterwards offered to deft. to pay all charges, & to indemnify him against the claim of any other person. Deft. refused to deliver the wine to pltf., alleging that he had given warrants to M. The wine was ultimately delivered to a third person by M.'s order. M. had in fact paid the freight, & obtained warrants to him or his order. The jury found that the transaction between M. & L. was colourable & with knowledge on the part of M. of the intention of L. to deprive pltf. of the wine :—*Held :* (1) deft. received the wine as bailee to L., & after the payment of the freight could have no better title than his bailor ; (2) by the finding of the jury M. had no better title than L. ; (3) as pltf. had tendered the amount of charges both to M. & deft., pltf.'s title was as valid against deft. as it would have been against L., & deft. was liable to pltf. for the value of the wine.—BATUT *v.* HARTLEY (1872), L. R. 7 Q. B. 594 ; 41 L. J. Q. B. 273 ; 26 L. T. 968 ; 20 W. R. 899 ; 1 Asp. M. L. C. 337.

Annotations :—**Refd.** Ancona *v.* Rogers (1876), 46 L. J. Q. B. 121, C. A. ; Glyn, Mills, Currie *v.* East & West India Dock Co. (1880), 5 Q. B. D. 129.

388. —— **Conversion—Setting up bailor's title.**]—Where a bailee sets up or relies upon the title of his bailor, in answer to a demand made by the true owner of the goods, his refusal is evidence of a conversion by him.

A. lost a horse & found it at R.'s stable, but R. refused to deliver it up, & said it belonged to B., & then both B. & R. refused. Afterwards B. said he bought it at X.'s (not being market overt), which turned out to be true. A. then offered R. & B. separately an indemnity if they would deliver the horse up, but R. refused to let it go, & B. said he left the matter entirely to R. In an action of

Sect. 2.—Rights and obligations as regards third parties: Sub-sect. 4. Sects. 3 & 4.]

trover against B. & R.—*Held:* there was sufficient evidence of conversion by R.—LEE *v.* BAYES & ROBINSON (1856), 18 C. B. 599; 27 L. T. O. S. 157; 20 J. P. 694; 139 E. R. 1504; *sub nom.* LEE *v.* ROBINSON & BAYES, 25 L. J. C. P. 249; 2 Jur. N. S. 1093.

Annotations:—**Mentd.** Hargreave *v.* Spink, [1892] 1 Q. B. 25; Clayton *v.* Le Roy, [1911] 2 K. B. 1031, C. A.

389. Person for whom benefit of bailment intended—May sue bailee.]—A. being indebted to C., & B. to A., it was agreed between A., B. & C. that B., in discharge of his debt to A., should discharge the debt of A. to C. by delivering to C. certain goods in B.'s possession belonging to A. B. did not deliver the goods to C., but after A.'s death converted them to his own use:—*Held:* C. could sue B. for conversion.

If a man bails goods to one, to bail them over to another, if he to whom this bailment was thus made, contrary to the trust in him reposed, does not deliver them over, as he was to have done, but converts them to his own use, he has by this deceit made himself liable to an action, both of the first bailor, & also of the party to whom they were to have been bailed over, & either of them may well have his action against him for this. And notwithstanding the third person here, to whom the goods ought to have been bailed, had never the possession of them, yet this conversion & nonfeasance, of that which he ought to have done, is a wrong, & very prejudicial to C., the third person. For this wrong & prejudice, he may have his action upon the case, as well as the first bailor. But both of them shall not have their actions. But he that first begins his action, shall go on with the same (*per* CUR.).—FLEWELLIN *v.* RAVE (1610), 1 Bulst. 68; 80 E. R. 769.

Annotations:—**Refd.** Tollit *v.* Shenstone (1839), 7 Dowl. 455. **Mentd.** Atkin *v.* Barwick (1719), 1 Stra. 165.

390. —— ——.]—If one man give money to another to pay it over to a third person, the *cestui que use* may maintain either an action of debt or account against the bailee for the recovery of it.—HARRIS *v.* DE BERVOIR (1624), Cro. Jac. 687; *sub nom.* SQUIRE'S CASE, Benl. 144; 79 E. R. 596.

Annotation:—**Refd.** Atkin *v.* Barwick (1719), 1 Stra. 165.

391. Cestui que trust — Trust deed — Bailee of trustee.]—A *cestui que trust* cannot maintain detinue for the deed, under which he claims, against a bailee of the trustee.—FOSTER *v.* CRABB (1852), 12 C. B. 136; 21 L. J. C. P. 189; 16 Jur. 835; 138 E. R. 853.

Annotations:—**Expld.** Wright *v.* Robotham (1886), 33 Ch. D. 106, C. A. **Refd.** Taylor *v.* Sparrow (1863), 4 Giff. 703; Leathes *v.* Leathes (1877), 36 L. T. 646.

392. Liability for injury to third party—Negligence.]—A. borrowed of B. a horse & chaise, & went in it, accompanied by C., on an excursion of pleasure, C. driving. By C.'s mismanagement the horse & chaise were driven against & injured pltf.'s horse:—*Held:* an action on the case might be maintained for the injury against A., on a declaration charging that he was possessed of & driving the horse & chaise, & that by his negligent driving the injury was occasioned.—WHEATLEY *v.* PATRICK (1837), 2 M. & W. 650; Murp. & H. 183; 6 L. J. Ex. 193; 150 E. R. 917.

Annotation:—**Distd.** Samson *v.* Aitchison, [1912] A. C. 844, P. C.

See, further, NEGLIGENCE.

SECT. 3.—STATUTE OF LIMITATIONS.

See No. 338, *ante;* LIMITATION OF ACTIONS.

SECT. 4.—JOINT BAILORS AND BAILEES.

393. Joint bailment—What constitutes.]—A box containing goods, some of which were the property of A., & some the property of B., was delivered on their behalf by a third person at a railway station, to be carried from W. to L. The box was addressed to A., & was received by him in L., & he paid the carriage:—*Held:* there was evidence of a joint bailment, in respect of which a joint action might be brought by A. & B. for the loss of the goods.—METCALFE *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO. (1858), 4 C. B. N. S. 307; 27 L. J. C. P. 333; 31 L. T. O. S. 166; 4 Jur. N. S. 487; 6 W. R. 593; 140 E. R. 1102.

Annotations:—**Mentd.** Vaughton *v.* L. & N. W. Ry. Co. (1874), L. R. 9 Exch. 93; M'Queen *v.* G. W. Ry. Co. (1875), L. R. 10 Q. B. 569; Shaw *v.* G. W. Ry. Co., [1894] 1 Q. B. 373.

394. —— **Demand by one—Trover.**]—If a thing be deposited by one, with the authority of another, & received by the bailee, to keep on the joint account of the two, one alone cannot lawfully demand it without the authority of the other, so as to maintain trover upon the bailee's refusal to deliver it.

It was agreed between the assignor & assignee of a lease that, to save the expense of a counterpart, it should be deposited in the hands of a third person, & the assignee delivered it to the bailee to keep, but without mentioning that it was on the joint account, & no communication was made of the deposit to the assignor, who never interfered further in the matter. Deft. afterwards (with the privity of the bailee, who acted as his agent) procured an illegal & void conveyance of the property in it from the assignee:—*Held:* the assignee or his legal representatives might alone maintain trover for it, after demand & refusal.—MAY *v.* HARVEY (1811), 13 East, 197; 104 E. R. 345.

395. —— —— ——.]—Four partners pledged goods with deft., with a power of sale, as security for repayment of an advance made by deft. to them. Afterwards the partnership was dissolved, & the property of three of the four partners vested in pltf. under several deeds of assignment. Pltf., without authority from the fourth partner, tendered to deft. the amount for which the goods were a security, & demanded the whole of the goods. Deft. refused to deliver the goods to pltf.:—*Held:* the refusal by deft. was not such a conversion of the goods as would entitle pltf. to maintain an action of trover against deft.—HARPER *v.* GODSELL (1870), L. R. 5 Q. B. 422; 39 L. J. Q. B. 185; 18 W. R. 954.

Annotations:—**Mentd.** Hawksley *v.* Outram, [1892] 3 Ch. 359, C. A.; Jacobs *v.* Morris, [1901] 1 Ch. 261.

396. —— —— **Detinue.**]—Where several joint owners of a chattel deliver it to a third person, he may detain it until all the joint owners require him to return it. If some of them ask him to return it, & others desire him to keep it, the bailee is not liable to an action at the suit of those who so ask for a return. If that were not so, each might have an action & so the bailee might be harassed with as many actions as there were joint owners. If two joint owners of a chattel concur in depositing it with a third person, one alone cannot by demanding it entitle himself to bring detinue for it (MAULE, J.).—ATWOOD *v.* ERNEST (1853), 13 C. B. 881; 22 L. J. C. P. 225; 21 L. T. O. S. 185; 1 C. L. R. 738; 138 E. R. 1449; *sub nom.* ATTWOOD *v.* ERNEST, 17 Jur. 603; 1 W. R. 436.

397. —— —— ——.]—One of two persons, who have equal rights to a chattel, cannot bring an action at law in detinue against the holder without the other (COTTON, L.J.).—WRIGHT *v.* ROBOTHAM (1886), 33 Ch. D. 106; 55 L. J. Ch. 791; 55 L. T. 241; 34 W. R. 668, C. A.

398. —— —— Delivery to one.]—Action by J., & two other pltfs. on a contract, on the deposit of goods by the three pltfs. with deft., not to give them up without the joint order of the three pltfs. Breach, that they were given up without the joint order. Plea, that they were given up to J., one of present pltfs., at his request:—*Held:* a good plea, for J. being disabled from suing for what he himself procured, could not at law sue, though joining other pltfs. with him.—BRANDON *v.* SCOTT (1857), 7 E. & B. 234; 26 L. J. Q. B. 163; 28 L. T. O. S. 264; 3 Jur. N. S. 362; 3 W. R. 235; 119 E. R. 1234.

Annotation:—**Mentd.** Smith *v.* Johnson (1858), 3 H. & N. 222.

Persons suing themselves, *see, generally,* ACTION, Vol. I., pp. 43, 44.

399. —— —— ——.]—If any inconvenient consequence arise to deft. from detaining the property of joint owners, it might have been avoided by giving it up to any one of them (LORD DENMAN, C.J.).—BROADBENT *v.* LEDWARD (1839), 11 Ad. & El. 209; 113 E. R. 395.

Annotation:—**Refd.** Mason *v.* Farnell (1844), 1 Dow. & L. 576.

400. —— —— Mortgagor & mortgagee.]—If deeds are deposited with A. by mtgor. & mtgee., before the condition broken, A. is trustee for the mtgor., afterwards for the mtgee.; & if A. deliver them to the mtgee., equity will not decree them to be delivered to the mtgor.—ANON. (undated), 2 Eq. Cas. Abr. 284; 22 E. R. 239.

401. Joint bailees—Liability for negligence.]—In an action against two, for negligently driving a chaise, if the two have hired it jointly, & were jointly in the possession of it, both are liable for the accident. It is otherwise if it belonged to one only, & the other was merely a passenger.—DAVEY *v.* CHAMBERLAIN (1803), 4 Esp. 229, N.P.

402. —— —— Partners.]—If two partners hire a horse & cart for the purposes of their business, & one of them, while driving the cart in the usual course of their business, negligently injures the horse & cart, both partners are responsible to the person from whom they have hired the horse & cart (*per* CUR.).—COUPÉ CO. *v.* MADDICK, [1891] 2 Q. B. 413; 60 L. J. Q. B. 676; 65 L. T. 489; 56 J. P. 39, D. C.

Annotations:—**Mentd.** Cheshire *v.* Bailey (1904), 74 L. J. K. B. 176, C. A.; Sanderson *v.* Collins, [1904] 1 K. B. 628, C. A.

PART IV. SECT. 4.

401 i. *Joint bailees—Liability for negligence.*]—Defts. hired from pltf. a team of horses. One of defts., having control of the horses, shot one of them, alleging that it was diseased. Before the shooting pltf. informed such deft. that the horse was not diseased. Deft. acted on his own opinion merely, & the evidence showed that he was wrong:—*Held:* defts. were jointly liable for the value of the horse.—MORRIS *v.* ARMIT (1887), 4 Man. L. R. 152,—**CAN.**

BAKEHOUSES.

See FACTORIES AND SHOPS.

BALLOT.

See ELECTIONS.

BANKERS AND BANKING.

PAGE

PART I. CONSTITUTION AND GENERAL POSITION OF BANKS 123

SECT. 1. THE BANK OF ENGLAND 123

SUB-SECT. 1. CONSTITUTION AND HISTORY 123

SUB-SECT. 2. TRANSFER OF STOCK 123

A. In General 123
B. By Executors and Trustees 123
C. Under forged Powers of Attorney 124
D. By Lunatics 126
E. By Married Women 127
F. By Bankrupts 127
G. Proceedings against Bank in respect of Stock 127

SUB-SECT. 3. PAYMENT OF DIVIDENDS 128

SUB-SECT. 4. ISSUE OF BANK OF ENGLAND NOTES 129

A. Notes as Tender and Payment 129
B. Altered Notes 130
C. Lost Notes 130
D. Notes stolen or obtained by Fraud 130

SUB-SECT. 5. RESTRICTION ON ISSUE OF BANK NOTES, ETC., BY OTHER BANKS . . 131

A. Bank Notes 131
B. Bills of Exchange 132
C. Promissory Notes. 133

SUB-SECT. 6. BANK BOOKS 133

SECT. 2. BANKS IN SCOTLAND 133

SECT. 3. BANKS IN IRELAND 134

SECT. 4. TRUSTEE SAVINGS BANKS 134

SUB-SECT. 1. RULES AND REGULATIONS 134

SUB-SECT. 2. TRUSTEES AND MANAGERS 135

SUB-SECT. 3. OFFICERS 136

SUB-SECT. 4. DEPOSITS 136

SECT. 5. SEAMEN'S AND NAVAL AND MILITARY SAVINGS BANKS: *see* ROYAL FORCES; SHIPPING & NAVIGATION.

SECT. 6. POST OFFICE AND GOVERNMENT SAVINGS BANKS 137

SECT. 7. PRIVATE AND JOINT-STOCK AND CHARTERED BANKS 138

SUB-SECT. 1. CONSTITUTION 138

SUB-SECT. 2. PUBLIC OFFICERS. 140

PAGE

SUB-SECT. 3. DIRECTORS 143

SUB-SECT. 4. SHAREHOLDERS 148

A. Proceedings against 148
B. Transfer of Shares 153
C. Other Cases 155

SUB-SECT. 5. WINDING UP 156

SECT. 8. FOREIGN AND BRITISH OVERSEAS BANKS: *see* COMPANIES.

SECT. 9. UNLAWFUL BANKS 159

SECT. 10. OFFICIALS OF BANKS 159

SUB-SECT. 1. MANAGER 159

SUB-SECT. 2. CASHIER 165

SUB-SECT. 3. CLERK 166

SUB-SECT. 4. AUDITOR 166

PART II. BUSINESS OF BANKING 167

SECT. 1. GENERAL RIGHTS AND OBLIGATIONS 167

SUB-SECT. 1. NATURE AND CONDITIONS OF BANKING 167

SUB-SECT. 2. THE RELATION OF BANKER AND CUSTOMER 168

SUB-SECT. 3. BRANCH BANKS AND BANKING AGENTS 173

A. Branch Banks 173
B. Banking Agents 174

SUB-SECT. 4. ASSIGNMENT AND ATTACHMENT OF MONEY, ETC., HELD BY BANK . . 175

SUB-SECT. 5. BANKERS' RECEIPTS 178

SUB-SECT. 6. SALE AND PURCHASE OF SECURITIES FOR CUSTOMER 178

SUB-SECT. 7. MONEY PAID TO BANK BY MISTAKE 179

SECT. 2. RECEIPT OF MONEY ON CURRENT ACCOUNT 179

SUB-SECT. 1. IN GENERAL 179

SUB-SECT. 2. TRUST ACCOUNTS AND EXECUTORS' ACCOUNTS. 181

A. Trust Accounts 181
B. Executors' Accounts 186

SUB-SECT. 3. OTHER ACCOUNTS 187

A. Joint Accounts 187
B. Agents 188
C. Solicitors 189
D. Companies and Corporations 189
E. Married Women 190
F. Lunatics 190

SECT. 3. RECEIPT OF MONEY ON DEPOSIT ACCOUNT 191

SUB-SECT. 1. THE DEPOSIT ACCOUNT. 191

SUB-SECT. 2. RECEIPTS ON DEPOSIT 193

SUB-SECT. 3. INTEREST ON DEPOSITS. 195

SECT. 4. BANK-NOTES GENERALLY, BANKERS' DRAFTS, AND BANK POST BILLS, ETC. . . 196

SUB-SECT. 1. ISSUE AND PAYMENT OF BANK-NOTES 196

SUB-SECT. 2. PAYMENT OF DEBTS AND LIABILITIES BY BANK AND OTHER NOTES . . 198

SUB-SECT. 3. BANKERS' DRAFTS AND BANK POST BILLS, ETC. 200

SUB-SECT. 4. FORGED OR ALTERED BANK-NOTES. 201

PAGE

SECT. 5. COLLECTION OF CHEQUES 201

SUB-SECT. 1. OBLIGATION TO PRESENT PROMPTLY 201

SUB-SECT. 2. OPEN CHEQUES 203

SUB-SECT. 3. CROSSED CHEQUES 205

SECT. 6. COLLECTION OF BILLS OF EXCHANGE AND PROMISSORY NOTES 205

SUB-SECT. 1. IN GENERAL 205

SUB-SECT. 2. RIGHTS ON DISHONOUR. 208

SUB-SECT. 3. SHORT BILLS 210

SECT. 7. COLLECTION OF OTHER DOCUMENTS 212

SUB-SECT. 1. DIVIDEND WARRANTS 212

SUB-SECT. 2. POST OFFICE MONEY ORDERS 213

SECT. 8. PAYMENT OF CHEQUES 213

SUB-SECT. 1. POST-DATED AND INSUFFICIENTLY STAMPED CHEQUES 213

SUB-SECT. 2. MODES OF PAYMENT, PAYMENT WITHOUT AUTHORITY, RECOVERY FROM PAYEE 214

A. Modes of Payment 214
B. Payment without Authority 215
C. Recovery from Payee 216

SUB-SECT. 3. DISHONOUR OF CHEQUES 217

A. Funds available 217
B. Funds insufficient 221
C. Cheques drawn in Breach of Trust 222
D. Other Cases 223

SUB-SECT. 4. STOPPING CHEQUES 224

SUB-SECT. 5. MARKING AND CERTIFYING CHEQUES 225

SECT. 9. PAYMENT OF OTHER DOCUMENTS 225

SUB-SECT. 1. BILLS OF EXCHANGE ACCEPTED PAYABLE AT A BANKER'S 225

SUB-SECT. 2. PROMISSORY NOTES, ETC. 229

SECT. 10. FORGED OR ALTERED CHEQUES 230

SECT. 11. FORGED OR ALTERED BILLS OF EXCHANGE OR OTHER DOCUMENTS . . . 235

SECT. 12. STATUTORY PROTECTION TO BANKERS PAYING CHEQUES 237

SUB-SECT. 1. BEARER CHEQUES 237

SUB-SECT. 2. ORDER CHEQUES 237

SUB-SECT. 3. CROSSED CHEQUES 240

SUB-SECT. 4. PAYMENT OF ORDERS WITH RECEIPT ATTACHED 243

SECT. 13. THE PASS-BOOK 243

SUB-SECT. 1. IN GENERAL 243

SUB-SECT. 2. ADVANCE CREDIT IN 246

SUB-SECT. 3. ERRONEOUS ENTRIES 247

SECT. 14. REMITTANCES TO BANK TO MEET ACCEPTANCES 248

SECT. 15. BILLS OF EXCHANGE DRAWN AGAINST SHIPPING DOCUMENTS AND ACCEPTED OR DISCOUNTED BY BANK 250

SECT. 16. LETTERS OF CREDIT. 253

PAGE

SECT. 17. CIRCULAR NOTES 255
SECT. 18. SAFE CUSTODY OF SECURITIES AND OTHER VALUABLES 256
SECT. 19. DISCOUNTING BILLS OF EXCHANGE, PROMISSORY NOTES, ETC. 257
SECT. 20. ADVANCES BY BANKERS 261
SUB-SECT. 1. LOAN AND OVERDRAFT 261
SUB-SECT. 2. INTEREST 265
SECT. 21. SECURITIES FOR ADVANCES 267
SUB-SECT. 1. LEGAL MORTGAGE 267
SUB-SECT. 2. EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS 268
SUB-SECT. 3. BILLS OF EXCHANGE, CHEQUES, AND PROMISSORY NOTES 268
SUB-SECT. 4. BONDS, SCRIP, STOCKS, SHARES, ETC. 270
SUB-SECT. 5. POLICIES OF LIFE ASSURANCE 276
SUB-SECT. 6. GOODS AND DOCUMENTS OF TITLE TO GOODS 277
SUB-SECT. 7. CHARGES, ASSIGNMENTS, AND SPECIAL PAYMENTS OF MONEY 282
SUB-SECT. 8. MISCELLANEOUS 284
SECT. 22. THE BANKER'S LIEN AND SET-OFF OR COUNTERCLAIM 285
SUB-SECT. 1. LIEN 285
A. In General 285
B. On Securities for Advances 287
C. On Securities received for Collection 290
D. On Deposits for Safe Custody 291
E. Arising on Combining Accounts 292
F. On Shares in Bank held by Customer 292
SUB-SECT. 2. SET-OFF OR COUNTERCLAIM 293
SECT. 23. GUARANTEES TO SECURE ADVANCES OR BALANCE OF ACCOUNT 295
SECT. 24. CHARGES AND COMMISSION 296
SECT. 25. FAILURE OF BANK 298
SECT. 26. BANKERS' OBLIGATION TO SECRECY 304
SECT. 27. REPRESENTATIONS AS TO CREDIT 305
SECT. 28. PRODUCTION AND INSPECTION OF BOOKS 305
SUB-SECT. 1. IN GENERAL 305
SUB-SECT. 2. UNDER BANKERS' BOOKS EVIDENCE ACT, 1879 (C. 11), AND SIMILAR COLONIAL ACTS 307

Agency, generally . . *See* AGENCY.
Bankruptcy of Banker or Customer, generally . ,, BANKRUPTCY & INSOLVENCY.
Bills of Exchange and Negotiable Instruments, generally . ,, BILLS OF EXCHANGE, PROMISSORY NOTES, & NEGOTIABLE INSTRUMENTS.
Bills of Lading . . ,, SHIPPING & NAVIGATION.
Building Societies . ,, BUILDING SOCIETIES.
Equitable Mortgage to secure Advances . *See* EQUITY ; MORTGAGE.
Foreign and British Overseas Banks . ,, COMPANIES.
Guarantee, generally . ,, GUARANTEE.
Industrial Societies . ,, INDUSTRIAL, PROVIDENT & SIMILAR SOCIETIES.
Joint Stock Companies . ,, COMPANIES.
Lien, generally . . ,, LIEN.
Mortgage to secure Advances . . . ,, MORTGAGE.
National Debt . . ,, REVENUE.
Winding up, generally . ,, COMPANIES.

Part I.—Constitution and General Position of Banks.

SECT. 1.—THE BANK OF ENGLAND.

SUB-SECT. 1.—CONSTITUTION AND HISTORY.

1. Establishment & development of bank.]—BANK OF ENGLAND *v.* ANDERSON, No. 77, *post.*

2. Branch of bank—Notice to head office is notice to branch.]—WILLIS *v.* BANK OF ENGLAND, No. 299, *post.*

See, further, Part II., Sect. 1, sub-sect. 3, A, *post.*

SUB-SECT. 2.—TRANSFER OF STOCK.

A. In General.

3. General principle.]—The Bank does not profess to hold money in trust for anybody. There is nothing in their Act or charter constituting them trustees for that purpose. If the Bank voluntarily enters in its own books a trustee's account, it may, in certain circumstances, become liable for the obligation of those trusts. But the Bank is merely a public servant, & is generally under the obligation to transfer the fund to the person in whom it is vested. Therefore, unless the bank choose to involve themselves in any transaction, there is nothing to implicate them. The only way in which they can be affected is by giving them distinct notice of a liability to which the stock is made subject (POLLOCK, C.B.).—HUMBERSTONE *v.* CHASE (1836) 2 Y. & C. Ex. 209; 160 E. R. 373.

4. —— Effect of National Debt Act, 1870 (c. 71).]—The transfer of stock in the public funds is regulated by Act of Parliament, & the statutory mode of transfer is by an instrument in the books of the Bank to be signed by the transferor. Although the above Act recognises an acceptance by the transferee, yet it does not make that acceptance necessary or essential, for s. 22 provides that "the person to whom a transfer is so made may, if he thinks fit, underwrite his acceptance thereof" (COTTON, L.J.).

The transfer of stock & the rights of stockholders, *i.e.*, of persons in whose names the stock is standing, depends partly on general principles & partly on the above Act. By this stat. a transferee of stock *primâ facie* acquires the legal title to it; & if his transferor had himself a good title to the stock & a right to transfer it, & has transferred it, the transfer cannot be treated by him or by the Bank as a nullity. Nor is there any method by which the transferor can get back his stock without the concurrence of the transferee or some order of a competent ct. requiring him to execute a retransfer. Formal acceptance by the transferee of the transfer to him is not necessary to complete his legal title (*see* s. 22). Although a donee may dissent from & thereby render null a gift to him, yet that gift to him of property, whether real or personal, by deed, vests the property in him subject to his dissent. The same principle is applicable to transfers of stock in the books of the Bank of England. If the assent of the transferee were necessary to complete his legal title, the Legislature would not have made his formal acceptance of a transfer to him unnecessary, as it has done by the sect. to which I have already alluded. It would be very embarrassing to the Bank if acceptance of a transfer were necessary, & yet that no evidence of it in their books should be so (LINDLEY, L.J.).—STANDING *v.* BOWRING (1885), 31 Ch. D. 282; 55 L. J. Ch. 218; 54 L. T. 191; 34 W. R. 204; 2 T. L. R. 202, C. A.

Annotations:—**Refd.** *Re* Arbib & Class's Contract, [1891] 1 Ch. 601, C. A. **Mentd.** London & County Banking Co. *v.* London & River Plate Bank (1888), 21 Q. B. D. 535, C. A.; *Re* Blake, Blake *v.* Power (1889), 60 L. T. 663; *Re* Weston, Davies *v.* Tagart, [1900] 2 Ch. 164; Mallott *v.* Wilson, [1903] 2 Ch. 494; *Re* Howes, Howes *v.* Platt (1905), 21 T. L. R. 501.

See, further, REVENUE.

B. By Executors and Trustees.

5. Executor—With no beneficial interest—Right to have transfer.]—*Qu:* whether exors., who take no beneficial interest & have no debts to pay, are entitled to have the stock of their testator transferred to their names.—R. *v.* BANK OF ENGLAND (1780), 2 Doug. K. B. 524; 99 E. R. 334.

Annotations:—**Mentd.** R. *v.* Severn & Wye Ry. Co. (1819), 2 B. & Ald. 646; R. *v.* Hopkins (1841), 1 Q. B. 161; *Re* Nathan, R. *v.* I. R. Comrs. (1884), 12 Q. B. D. 461, C. A.; R. *v.* Lambourn Valley Ry. Co. (1888), 22 Q. B. D. 463.

6. —— Bequest to, for life—Purchase of interest in remainder by executor—Refusal to transfer.]—Bequest of stock to exor. for life, remainder to W. The exor. having bought W.'s reversionary interest, & the bank refusing to allow a transfer, the ct. ordered a transfer to be made, but gave the Bank their costs.—PEARSON *v.* BANK OF ENGLAND (1789), 2 Bro. C. C. 529; 2 Cox, Eq. Cas. 175; 29 E. R. 290, L.C.

Annotations:—**Apld.** Austin *v.* Bank of England (1803), 8 Ves. 522. **Consd.** Franklin *v.* Bank of England (1826), 1 Russ. 575.

7. —— —— Life interest relinquished—Refusal to transfer.]—Specific bequest of stock to an extrix. for life, & after her death to her daughter absolutely at twenty-one:—*Held:* the Bank, resisting a transfer, according to an agreement to relinquish the life interest, without the direction of the ct., were entitled to costs.—AUSTIN *v.* BANK OF ENGLAND (1803), 8 Ves. 522; 32 E. R. 457.

Annotation:—**Refd.** Franklin *v.* Bank of England (1826), 1 Russ. 575.

8. —— Bequest to, in trust—Transfer by executor to persons not entitled—Liability of bank.]—Bank stock was specifically bequeathed to A. in trust to pay a bond debt to himself, & as to the rest for B. for life, remainder over. The trustee, being also exor., transferred to persons not entitled under the will:—*Held:* the Bank were not chargeable.—HARTGA *v.* BANK OF ENGLAND (1796), 3 Ves. 55; 30 E. R. 891.

Annotations:—**Distd.** Austin *v.* Bank of England (1803), 8 Ves. 522. **Apld.** Bank of England *v.* Lunn (1809), 15 Ves. 569. **Consd.** Franklin *v.* Bank of England (1826), 1 Russ. 575.

9. —— Specific bequest—No assent by executor—Duty of Bank.]—Where the proprietor of stock in the public funds makes a specific bequest of it, the Bank must nevertheless allow the exor. to make a transfer of it, unless it be shown that he has assented to the legacy.—FRANKLIN *v.* BANK OF ENGLAND (1829), 9 B. & C. 156; 4 Man. & Ry. K. B. 11; 7 L. T. O. S. K. B. 183; 109 E. R. 58.

10. *S. P.* FRANKLIN *v.* BANK OF ENGLAND (1826), 1 Russ. 575; 4 L. J. O. S. Ch. 214; 38 E. R. 221.

11. —— Bequest of residue—Transfer of stock by executor—Rights of Bank.]—Though a residue is specifically given, the Bank has no right to restrain the exor. from transferring the funds.—BANK OF ENGLAND *v.* MOFFAT (1791), 3 Bro. C. C. 260; 5 Ves. 668; 29 E. R. 523.

Annotation:—**Consd.** Franklin *v.* Bank of England (1826), 1 Russ. 575.

12. —— Fraudulent transfer by—Consent of Bank obtained by misrepresentation—Liability of Bank.]—S. made a specific bequest of the dividends of certain stock to W. & his wife for their lives, the principal, after the decease of the survivor of them, to go to such of their children as should attain twenty-one, &, in default of such children, to sink into the residue. Upon the death of testatrix, the

Sect. 1.—The Bank of England: Sub-sect. 2, B. & C.]

various bequests of the will were appropriated to the respective legatees, & W. regularly received his dividends, the principal stock still standing in the name of testatrix. Afterwards, the wife of W. died, leaving one child by W. In consequence of this event, the extrix. of S., colluding with W. & other interested parties, applied to the Bank to have part of the stock transferred to the residuary legatee, upon the representation that there was no child of W. The Bank consented to the transfer, but took a bond of indemnity containing recitals from which it appeared that they had notice of the will, & of the appropriation of the legacies. The stock in question was transferred to the residuary legatee & ultimately sold out:—*Held:* the Bank were not liable for the misapplication of the stock.

The Bank stand in relation to stock as a depository of goods in relation to the goods. The Bank can only be made responsible for a transfer of stock after distinct notice given to them of an existing claim upon the stock. Although the Bank are bound to allow the transfer to or by the exor. of stock specifically bequeathed, if the exor. has not assented to the legacy, yet it does not follow that, if he has assented to the legacy, the Bank are bound to transfer it to the legatee.—HUMBERSTONE *v.* CHASE (1836), 2 Y. & C. Ex. 209; 160 E. R. 373.

13. —— Trusts of will—Transfer by executor with legal title—Duty of Bank.]—The Bank are not to look, beyond the legal title, to the trusts of the will, & cannot prevent the exor. from selling out or transferring stock into his own name.—BANK OF ENGLAND *v.* PARSONS (1800), 5 Ves. 665; 31 E. R. 794.

Annotations:—**Apld.** Austin *v.* Bank of England (1803), 8 Ves. 522. **Consd.** Franklin *v.* Bank of England (1826), 1 Russ. 575.

14. Trustee—Charging order obtained by judgment creditor—Duty of Bank to transfer at direction of trustee.]—Where a judgment creditor has obtained a charging order absolute upon the contingent equitable interest of a judgment debtor in Govt. & Bank of England stock, standing in the name of a trustee, the Bank is compellable to transfer the respective stocks at the direction of the trustee, notwithstanding that notice of the charging order has been served upon the Bank. The judgment creditor can protect his rights by giving notice to the trustee & by issuing a notice in lieu of *distringas* upon the Bank.—ADAM *v.* BANK OF ENGLAND (1908), 52 Sol. Jo. 682.

15. Refusal to transfer—Action—Mandamus.]—The ct. will not on the application of exors. grant a *mandamus* to the Bank to transfer stock, because there is a remedy by an action on the case, if they refuse.—R. *v.* BANK OF ENGLAND (1780), 2 Doug. K. B. 524; 99 E. R. 334.

Annotations:—**Consd.** *Re* Nathan, R. *v.* I. R. Comrs. (1884), 12 Q. B. D. 461, C. A. **Refd.** R. *v.* Severn & Wye Ry. Co. (1819), 2 B. & Ald. 646; R. *v.* Lambourn Valley Ry. Co. (1888), 22 Q. B. D. 463. **Mentd.** R. *v.* Hokpins (1841), 1 Q. B. 161.

16. Transfer to corporation & individual—Duty of Bank.]—*Held:* the ct. would not grant a *mandamus* requiring the Bank to register a transfer of consols (part of a trust estate) in the joint names of a corpn. & an individual.—LAW GUARANTEE & TRUST SOCIETY, LTD. & HUNTER *v.* BANK OF ENGLAND (GOVERNOR & CO.) (1890), 24 Q. B. D. 406; 62 L. T. 496; 54 J. P. 582; 38 W. R. 493; 6 T. L. R. 205.

Annotations:—**N.F.** *In he Goods of* Martin (1904), 90 L. T. 264. **Consd.** *Re* Thompson's Sett'mt. Trusts, Thompson *v.* Alexander, [1905] 1 Ch. 229. Until recently there was a difficulty in a natural person being a trustee jointly with a corpn., as a corpn. & a natural person could not hold property as joint tenants, but only as tenants in common. The law in this respect has, however, been altered by Bodies Corporate (Joint Tenancy) Act, 1899, c. 20 (SWINFEN EADY, J.).

C. Under forged Powers of Attorney.

See, generally, COMPANIES.

17. Right of true owner to recover.] — *Held:* a party might recover from the Bank the dividends arising on his stock in the funds, though at the time the dividends were payable he knew the stock had some months previously been placed, under a forged power of attorney, to the name of another person, & omitted to inform the Bank of the circumstances, & did not demand payment of the dividends till after the escape of the offender.

Property in stock is not transferred from the owner by being placed, under a forged power of attorney, to the name of another person in the books of the Bank of England.—DAVIS *v.* BANK OF ENGLAND (1824), 2 Bing. 393; 9 Moore, C. P. 747; 3 L. J. O. S. C. P. 4; 130 E. R. 357; *revsd.* on another point *sub nom.* BANK OF ENGLAND *v.* DAVIS (1826), 5 B. & C. 185.

Annotations:—**Consd.** Coles *v.* Bank of England (1839), 10 Ad. & El. 437; Carlisle *v.* S. E. Ry. Co. (1850), 1 Mac. & G. 689. **Expld.** Bank of Ireland *v.* Evans' Trustees (1855), 25 L. T. O. S. 272, H. L. **Apld.** Taylor *v.* Mid. Ry. Co. (1860), 28 Beav. 287. **Consd.** Barton *v.* North Staffordshire Ry. Co. (1888), 38 Ch. D. 458. **Expld.** Bank of England *v.* Cutler, [1907] 1 K. B. 889. **Refd.** Hume *v.* Bolland (1826), Ry. & M. 371; *Re* Marsh, *Ex p.* Bolland (1828), Mont. & M. 315; Stracy *v.* Bank of England (1830), 6 Bing. 754; Marsh *v.* Keating (1834), 1 Bing. N. C. 198, H. L.; Peer *v.* Humphrey (1835), 2 Ad. & El. 495; Sloman *v.* Bank of England (1845), 14 Sim. 475; Johnston *v.* Renton, Johnston *v.* Parsey (1870), L. R. 9 Eq. 181; Bank of England *v.* Cutler, [1908] 2 K. B. 208, C. A.

18. ——.]—A., B., & C. were proprietors of stock as trustees, & C., D., & E. were bankers. C. executed a letter of attorney, empowering D. & E. to sell the stock, & forged the signature of A. & B. The stock was sold & transferred in the books of the Bank, to the credit of the buyers, & the produce of the stock was paid into the banking house of C., D., & E. C. was afterwards tried & convicted of forging a similar instrument, & executed:—*Held:* the money received by the banking-house constituted a debt due from them to the trustees.—STONE *v.* MARSH (1827), 6 B. & C. 551; 9 Dow. & Ry. K. B. 643; 5 L. J. O. S. K. B. 201; 108 E. R. 554.

Annotations:—**Apprvd.** Marsh *v.* Keating (1834), 2 Cl. & Fin. 250, H. L. **Distd.** Bishop *v.* Jersey (1854), 22 L. T. O. S. 326. **Consd.** *Re* Redpath, *Ex p.* G. N. Ry. Co. (1857), 30 L. T. O. S. 211. **Refd.** *Re* Marsh, *Ex p.* Bolland (1828), Mont. & M. 315; *Re* Jermyn, *Ex p.* Elliott (1837), 2 Deac. 179; White *v.* Spettigue (1845), 13 M. & W. 603; Wickham *v.* Gatrill (1854), 2 Sm. & G. 353; Lee *v.* Bayes (1856), 18 C. B. 599; Dudley & West Bromwich Banking Co. *v.* Spittle (1860), 8 W. R. 351; Chowne *v.* Baylis (1862), 31 Beav. 351; The Princess Royal (1870), L. R. 3 A. & E. 41; *Re* Shepherd, *Ex p.* Ball (1879), 48 L. J. Bcy. 57, C. A.; Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561; Smith *v.* Selwyn, [1914] 3 K. B. 98, C. A.; Admiralty Comrs. *v.* S.S. Amerika, [1917] A. C. 38, H. L.

19. ——.]—F., a partner in a bank, caused stock standing in the books of the Bank of England & belonging to a customer to be sold out by a forged power of attorney, & the proceeds were paid to the account of the bank, at the house of the bank's agents, & were appropriated by F., who was afterwards executed for other forgeries. The partners of F. were ignorant of the fraud, but might, with common diligence, have known it:—*Held:* the customer could maintain an action against the partners for money had & received.—MARSH *v.* KEATING (1834), 1 Bing. N. C. 198; 8 Bli. N. S. 651; 2 Cl. & Fin. 250; 1 Mont. & A. 592; 1 Scott, 5; 131 E. R. 1094, H. L.

Annotations:—**Consd.** Bonzi *v.* Stewart (1842), 4 Man. & G. 295. **Distd.** Sadler *v.* Lee (1843), 6 Beav. 324; Vaughan *v.* Matthews (1849), 13 Q. B. 187; Bishop *v.* Jersey (1854), 22 L. T. O. S. 326. **Consd.** Dudley & West Bromwich Banking Co. *v.* Spittle (1860), 1 John. & H. 14; Bailey *v.* Johnson (1871), L. R. 6 Exch. 279; Reid *v.* Rigby, [1894] 2 Q. B. 40; Jacobs *v.* Morris, [1902] 1 Ch. 816, C. A.; Covell *v.* Scamell (1910), 103 L. T. 535, D. C. **Refd.** *Re* Jermyn, *Ex p.* Elliott (1837), 3 Mont. & A. 110, Ct. of R.; Bank of Ireland *v.* Evans' Trustees (1855), 25 L. T. O. S. 272; *Re* Shepherd, *Ex p.* Ball

(1879), 10 Ch. D. 667, C. A.; De Witte *v.* Addison (1899), 80 L. T. 207, C. A.; Oliver *v.* Bank of England, [1902] 1 Ch. 610, C. A.; Curtice *v.* London City & Midland Bank (1907), 77 L. J. K. B. 341; Burdett *v.* Horne (1911), 27 T. L. R. 402. **Mentd.** White *v.* Spettigue (1845), 13 M. & W. 603; Wickham *v.* Gatrill (1854), 2 Sm. & G. 363; Lee *v.* Bayes (1856), 18 C. B. 599; Chowne *v.* Baylis (1862), 31 Beav. 351.

20. By partner—Bankruptcy of firm—Proof by true owner.]—Stock of pltfs. was transferred under a forged power of attorney & the Bank offered to replace the stock if pltfs. would first prove the amount under a commission of bkpcy. issued against a firm in which the forger of the power had been a partner. After this offer, pltfs. received a dividend, & engaged to tender a proof of their demand under the commission of bkpcy.:—*Held:* they could not sue the Bank in respect of the stock till they had fulfilled their engagement to tender the proof under the commission of bkpcy.—STRACY *v.* BANK OF ENGLAND (1830), 6 Bing. 754; L. & Welsb. 357; 4 Moo. & P. 639; 8 L. J. O. S. C. P. 234; 130 E. R. 1471.

Annotations:—**Distd.** Allies *v.* Probyn (1835), 2 Cr. M. & R. 408; Carter *v.* Wormald (1847) 1 Exch. 81. **Expld. & Distd.** Ford *v.* Beech (1848), 11 Q. B. 852, Ex. Ch. The decision in *Stracy* v. *Bank of England* was not that any existing right of action was suspended by the agreement, but that pltf. suspended his right to call upon defts. to make a transfer until after he had done the acts mentioned in the agreement (PARKE, B.). **Expld.** Gibbons *v.* Vouillon (1849), 8 C. B. 483. *Stracy* v. *Bank of England* was not intended to be overruled by *Ford* v. *Beech.* I wrote the judgment in *Ford* v. *Beech,* & I remember I had a very long discussion with one of my learned brothers upon it (WILDE, C.J.). **Consd.** Belshaw *v.* Bush (1851), 11 C. B. 191. **Refd.** Overton *v.* Harvey (1850), 9 C. B. 324; Salmon *v.* Webb & Franklin (1852), 3 H. L. Cas. 510, H. L.

21. By co-trustee—Liability of Bank.]—One of two trustees of a sum of stock sold it out under a power of attorney, to which he had forged the signature of his co-trustee, & some time afterwards absconded:—*Held:* the Bank were compellable, in a ct. of equity to reinvest the stock in the name of the other trustee.—SLOMAN *v.* BANK OF ENGLAND (1845), 14 Sim. 475; 14 L. J. Ch. 226; 5 L. T. O. S. 326; 9 Jur. 243; 60 E. R. 442.

Annotations:—**Distd.** Duncan *v.* Luntley (1849), 14 Jur. 319. **Consd.** Barton *v.* North Staffordshire Ry. Co. (1888), 38 Ch. D. 458. **Apld.** Bank of England *v.* Cutler, [1907] 1 K. B. 889. **Refd.** Barton *v.* L. & N. W. Ry. Co. (1888), 38 Ch. D. 144, C. A. **Mentd.** Bank of Ireland *v.* Evans' Trustees (1855), 25 L. T. O. S. 272, H. L.; Bank of England *v.* Cutler, [1908] 2 K. B. 208, C. A.

22. By clerk of corporation—Liability of Bank.]—Pltfs., an incorporated co., possessed stock standing in their name in the books of the Bank. Having implicit confidence in D., their clerk, a solr., who was also himself one of the corporators, the co. intrusted to him the sole & entire management of their affairs & property, & he had for several years regularly & rightfully, under a power of attorney duly sealed with the corporate seal, received & accounted to the co. for the dividends on their stock. The co. had no address or place of business, nor any banking account, nor any books, except a minute-book, which was kept by D., & there were no rules, bye-laws, or regulations for the management of the corporate affairs. D., having fraudulently & without the knowledge or authority of the co. affixed the corporate seal to two powers of attorney for the sale & transfer of the stock, whereby he obtained possession of & appropriated the proceeds of such sale to his own use, was subsequently tried, convicted, & sentenced to a term of penal servitude for that offence:—*Held:* notwithstanding their negligence pltfs. were entitled to the sum of stock formerly standing in their name in the books of the Bank & the Bank should replace same, & make all necessary entries in their books for that purpose.—STAPLE OF ENGLAND (MAYOR, ETC., OF MERCHANTS OF THE) *v.* BANK OF ENGLAND (GOVERNOR & CO.) (1887), 21 Q. B. D. 160; 57 L. J. Q. B. 418; 52 J. P. 580; 36 W. R. 880; 4 T. L. R. 46, C. A.

Annotations:—**Consd.** Vagliano *v.* Bank of England Governor (1888), 22 Q. B. D. 103. **Distd.** Bank of England *v.* Vagliano, [1891] A. C. 107, H. L. **Consd.** Kepitigalla Rubber Estates *v.* National Bank of India, [1909] 2 K. B. 1010; Macmillan *v.* London Joint Stock Bank, [1917] 2 K. B. 439, C. A. **Refd.** Crapp *v.* East Stonehouse L. B. (1889), 5 T. L. R. 501, C. A.; Brockesby *v.* Temperance Bldg. Soc. (1893), 2 R. 594, C. A.; Scholfield *v.* Londesborough, [1895] 1 Q. B. 536, C. A.; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L. **Mentd.** Ruben *v.* Great Fingall Consolidated, [1904] 2 K. B. 712, C. A.

23. By broker—Liability of Bank—Liability of broker to indemnify Bank.]—S., a stockbroker, produced to the Bank a power of attorney for the sale & transfer of consols standing in the names of pltf. & another person, a solr., the form of power having been obtained in ordinary course from the Bank by S. upon the instructions of the solr., who professed to act on behalf of pltf. as well as himself; but pltf. knew nothing of the matter. The power purported to be signed by both stockholders, & at the foot was the usual "demand to act" signed by S. Acting on that "demand," & in pursuance of their statutory duty, the Bank allowed S. to execute the transfer in the bank-books as "attorney" for the two stockholders. S. received the purchase-money under the power & paid it to the solr., who applied it to his own use. Subsequently it was discovered that pltf.'s signature to the power had been forged, whereupon, in an action by pltf. against the Bank, the latter were ordered to transfer to him the like sum of consols, & also to pay to him all back dividends, together with the costs of the action. The Bank then claimed indemnity as against S. under a third-party notice. No blame was attributable either to S. or to the Bank for what had happened:—*Held:* a warranty was to be implied as against S. of the authority upon which he "demanded" of the Bank the performance of their statutory duty, & this implied warranty rendered him liable to indemnify the Bank.—STARKEY *v.* BANK OF ENGLAND, [1903] A. C. 114; 72 L. J. Ch. 402; 88 L. T. 244; 51 W. R. 513; 19 T. L. R. 312; 8 Com. Cas. 142, H. L.

Annotations:—**Apld.** Bank of England *v.* Cutler, [1908] 2 K. B. 208, C. A. **Refd.** Salvesen *v.* Rederi Akt. Nordstjernan, [1905] A. C. 302, H. L.; A.-G. *v.* Odell, [1906] 2 Ch. 47, C. A.; Yonge *v.* Toynbee, [1910] 1 K. B. 215, C. A. **Mentd.** Sheffield Corpn. *v.* Barclay, [1903] 1 K. B. 1.

24. Fraudulent impersonation of transferor—Liability of person preparing transfer—To indemnify Bank.]—Under the stats. authorising the issue of India stock, transfers of that stock were invalid unless they were entered & registered in a book kept at the Bank, & were signed therein by the transferor or his attorney. For the purpose of enabling the Bank to be satisfied that the party claiming to transfer India stock was the person entitled to it, it was the custom of the Bank to keep a list of stockbrokers whose identification of intending transferors would be accepted by them. The Bank would also accept identifications made by some of their own officials, or by the representatives of private banks. In the case of transfers of amounts exceeding £2,000, the Bank usually made an independent inquiry as to the identity of the transferor, but in the case of smaller amounts it was practically impossible to do so. Deft. was on the above-mentioned list of stockbrokers. A woman fraudulently personated another who was a registered holder of India stock, &, having procured herself to be introduced to deft. as the holder of that stock, instructed him to prepare a transfer. Deft. accordingly sent to the Bank a "ticket," *i.e.*, a statement of the names of the transferor & transferee, the nature of the stock, & the amount to be transferred, from which ticket the Bank prepared a transfer in the transfer-book,

Sect. 1.—*The Bank of England: Sub-sect.* 2, *C. D. E. F. & G.*]

& the personator attended & forged the holder's signature in the book, deft. identifying her as being the holder. The transfer being for a nominal consideration, deft., according to the usual practice in such cases, received a fee of one guinea for his services & attendance at the Bank from the transferor. The stock was subsequently transferred to G., who purchased it *bonâ fide* & for value. On discovery of the forgery the original stockholder claimed to be reinstated on the register as the holder of the stock, & the Bank, in satisfaction of that claim, purchased stock of a like amount & transferred it into her name. The Bank then sued deft. for indemnity in respect of their loss as upon a breach of warranty of the identity of the transferor:—*Held:* there was evidence on which the ct. could find, & the proper inference of fact was, that deft. requested pltfs. to permit the entry & registration of the forged transfer, which involved the legal consequence that deft. contracted to indemnify pltfs. against any liability resulting therefrom, & pltfs. were entitled to recover as damages the loss to which they had been put by having to purchase stock as aforesaid.—BANK OF ENGLAND *v.* CUTLER, [1908] 2 K. B. 208; 77 L. J. K. B. 889; 98 L. T. 336; 24 T. L. R. 518; 52 Sol. Jo. 442, C. A.

Annotations:—**Distd.** Guaranty Trust Co. of New York *v.* Hannay, [1918] 2 K. B. 623, C. A. **Refd.** Bamfield *v.* Goole & Sheffield Transport Co., [1910] 2 K. B. 94, C. A.

25. —— Means of knowledge—Gross negligence of true owner.]—The exors. of a stockholder sued the Bank for refusing to transfer stock of testatrix, & to pay the dividends. Nearly all the stock had been sold & transferred in the lifetime of testatrix by her nephew C., who had brought another woman to personate her, & forge her signature. After the sale, testatrix had repeatedly received the warrants for the reduced dividends in person, & had signed the warrants & the bank books, being on those occasions accompanied by C., who mentioned the amount of dividend in her presence. The jury found that she had the means of knowing of the transfer, but that there was no evidence of actual knowledge, & that she had been guilty of gross negligence, & that defts. had not been guilty of any:—*Held:* (1) the facts were a defence on the plea of not guilty; (2) they furnished evidence in support of pleas denying that testatrix was proprietor of the stock; & a plea denying that sufficient money had been received by defts. for paying the dividends.—COLES *v.* BANK OF ENGLAND (1839), 10 Ad. & El. 437; 2 Per. & Dav. 521; 9 L. J. Q. B. 36; 4 Jur. 266; 113 E. R. 166.

Annotations:—**Distd.** Martins *v.* Upcher (1842), 11 L. J. Q. B. 291. **Expld. & Distd.** Bank of Ireland *v.* Evans' Trustees (1855), 5 H. L. Cas. 389, H. L. **Dbtd.** Cornish *v.* Abington (1859), 28 L. J. Ex. 262. **Distd.** Swan *v.* North British Australasian Co. (1862), 7 H. & N. 603. **Dbtd.** Swan *v.* North British Australasian Co. (1863), 2 H. & C. 175, Ex. Ch. In a ct. of error I may say I consider *Coles* v. *Bank of England* not to be binding (BLACKBURN, J.). London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L. The authority of *Coles* v. *Bank of England* is shaken by the decision of the House of Lords in *Bank of Ireland* v. *Evans' Charities* (1855), 5 H. L. Cas. 389, H. L. (LORD FINLAY, C.). **Refd.** Cheltenham & Grand Junction Western Union Ry. Co. *v.* Daniel (1841), 6 Jur. 577; Machu *v.* L. & S. W. Ry. Co. (1848), 2 Exch. 415; Carlisle *v.* S. E. Ry. Co. (1850), 6 Ry. & Can. Cas. 670; Howard *v.* Hudson (1853), 2 E. & B. 1; Kent *v.* Thomas (1856), 1 H. & N. 473 Garton *v.* G. W. Ry. Co. (1859), E. B. & E. 846, Ex. Ch.; *Ex p.* Swan (1860), 30 L. J. C. P. 113; Baxendale *v.* Bennett (1878), 3 Q. B. D. 525, C. A.; Barton *v.* North Staffordshire Ry. Co. (1888), 38 Ch. D. 458. **Mentd.** Sloman *v.* Bank of England (1845), 5 L. T. O. S. 326; Halifax Union *v.* Wheelwright (1875), 23 W. R. 704.

D. By Lunatics.

See, further, LUNATICS & PERSONS OF UNSOUND MIND.

26. Appointment of receiver by court—Order to bring stock into court.]—Under Lunacy Act, 1890 (c. 5), s. 116, the judge or master in lunacy has jurisdiction to make an order appointing a receiver of dividends on stock standing in the Bank in the name of a person who is, "through mental infirmity arising from disease or age, incapable of managing his affairs," &, under ss. 133 & 146, the Bank may safely act on such order: but, as it is unusual to appoint a receiver of dividends on Bank of England stock standing in the name of another person, the better course in such cases, in the absence of any special reason to the contrary, is to bring the stock into ct. Such an order should not be intituled "In Lunacy."—*Re* BROWNE, [1894] 3 Ch. 412; 63 L. J. Ch. 729; 71 L. T. 365; 43 W. R. 175; 10 T. L. R. 656; 38 Sol. Jo. 679; 7 R. 580, C. A.

Annotations:—**Consd.** *Re* Langdale, [1901] 1 Ch. 3, C. A. **Foild.** *Re* Auchmuty (1908), 99 L. T. 462, C. A. **Consd. & Apld.** *Re* Spurling, [1909] 1 Ch. 199, C. A. **Mentd.** *Re* Belton (1913), 108 L. T. 344.

27. —— —— Form of order.]—By an order made under Lunacy Act, 1890, s.116, by the master in lunacy, a receiver was authorised, in the name & on behalf of a lady who had been found through mental infirmity to be incapable of managing her affairs, "to receive & give a discharge for all dividends, interest, & income & all arrears thereof respectively to which she is or may become entitled"; & it was ordered that the securities & bonds belonging to her then deposited with her bankers were not to be dealt with until further order. Among the securities belonging to the lady were certain stocks registered in her name in the books of the Bank; but the officials of the Bank declined to act upon the order until it had been amended by the insertion in the body thereof of particulars of the stocks in the bank-books which were sought to be dealt with thereby:—*Held:* (1) although there was jurisdiction to do so, the practice was not to appoint a receiver of the dividends only of stocks standing in the books of the Bank, but to order the stocks to be transferred into ct. in the name of the Paymaster-General, & then to let the receiver obtain the dividends from him; (2) the officials of the Bank were perfectly justified in declining to act upon so vague & general a direction as was contained in the order, & the practice had always been to have a schedule to such an order detailing the stocks which were sought to be dealt with thereby.—*Re* AUCHMUTY (1908), 99 L. T. 462, C. A.

Annotation:—**Distd.** *Re* Spurling, [1909] 1 Ch. 199, C. A.

28. —— —— Payment of arrears of dividends to receiver.]—Where an order is made by a master in lunacy under Lunacy Act, 1890, s. 116, appointing a receiver, on completing his security, to receive all dividends & arrears thereof to which a person suffering from "mental infirmity" is or may become entitled, "including dividends accrued & to accrue due before lodgment upon the funds to be lodged pursuant to the lodgment schedule," & directing the lodgment in ct. of certain Bank of England securities, the Bank must pay all arrears of dividends accrued before lodgment direct to the receiver & not into ct. The Bank may safely act upon an order in such form, & in so doing are clearly within the indemnity provided by ss. 146 & 333.—*Re* SPURLING, [1909] 1 Ch. 199; 78 L. J. Ch. 198; 99 L. T. 898, C. A.

29. Committee—Order by court authorising committee to appoint new trustees and new trustees to call for transfer.]—The ct. having authorised a lunatic's committee to exercise on her behalf the power of appointing new trustees, by the same order directed such trustees to call for a transfer of bank annuities into their own names. The bank

objected that there should have been two orders, one authorising the committee to appoint new trustees, the other vesting in such trustees the right to call for a transfer:—*Held:* the Bank were bound to obey the original order.—*Re* SHORTRIDGE, [1895] 1 Ch. 278; 64 L. J. Ch. 191; 71 L. T. 799; 43 W. R. 257; 11 T. L. R. 135; 39 Sol. Jo. 134; 12 R. 81, C. A.

Annotations:—**Refd.** *Re* Spurling, [1909] 1 Ch. 199, C. A. **Mentd.** *Re* C. M. G., [1898] 2 Ch. 324; *Re* A., [1904] 2 Ch. 328, C. A.

30. Lunatic trustee—Transfer by order of court of consols in name of—Form of order.]—A person of unsound mind not so found being sole trustee of a sum of consols, the judge in lunacy, upon the application of A., made an order, under Lunacy Acts, 1890 (c. 5) & 1891 (c. 65), that the right to call for a transfer of, & to transfer into his own name, the consols standing in the name of the lunatic, & to receive the dividends thereon, should vest in A., & that he should transfer the consols into his own name to be held by him upon the trusts applicable thereto. The Bank refused to act upon such order on the ground that some proper officer of the Bank should have been appointed to make the transfer:—*Held:* the order made by the judge was right, & the Bank must act upon it, & must allow the consols to be transferred accordingly.—*Re* C. M. G., [1898] 2 Ch. 324; 67 L. J. Ch. 468; 78 L. T. 669, C. A.

E. By Married Women.

31. Memorandum by Bank—Suspected defect of title—Whether permissible.]—Transfer of moneys in the Bank, in the name of a *feme covert*, made by the husband, which moneys, it was suspected, she held by virtue of a trust to her own separate use. A memorandum was made by the Bank, on transferring the stock, of a defect of title suspected:—*Held:* to make such memorandum must not be allowed, nor would any secret trust, as against the party who had open legal title, affect the Bank.—MAYO'S (LADY) CASE (1772), Lofft, 65; 98 E. R. 535.

32. Consols in name of married woman & other persons—Necessity for husband's consent—Married Women's Property Act, 1870 (c. 93), ss. 3, 7.]—The above Act does not empower a married woman, entitled under s. 7 to a sum of stock for her separate use, to transfer such stock without the concurrence of her husband, unless & until the stock has been placed, under s. 3, in her name as a married woman entitled for her separate use.

A sum of consols was standing in the name of three persons, one of whom was a married woman, who had been deserted by her husband & was entitled beneficially to the stock under s. 7 of the above Act. Those persons applied to the Bank to be permitted to transfer the stock without the concurrence of the husband of the married woman; & the Bank having refused:—*Held:* the Bank could not be compelled to permit such transfer.—HOWARD *v.* BANK OF ENGLAND (1875), L. R. 19 Eq. 295; 44 L. J. Ch. 329; 31 L. T. 871; 23 W. R. 303.

Annotation:—**Mentd.** *Re* Brooke & Fremlin's Contract (1898), 78 L. T. 416.

33. Married woman also executrix—With order for protection of property—Consols in name of testatrix—Costs.]—A married woman, deserted by her husband, was left extrix. & residuary legatee under a will, after proving which, she obtained from a magistrate, under Divorce & Matrimonial Causes Act, 1857 (c. 85), an order for the protection of her property:—*Held:* she was entitled to transfer consols standing in the name of her testatrix in the books of the Bank of England, & to receive dividends thereon as if she were a *feme sole.* *Semble:* the same rule would have applied if she had been merely extrix., without taking any beneficial interest under the will. Rule as to costs where the Bank of England is deft.

It is a question of the greatest nicety, & one requiring to be settled for the protection of the public at large. The property in question is consols, as to which the bank are public trustees. If it had been bank stock, which is their own property, a different question might have arisen. As it is, I cannot possibly say that the bank ought to pay costs (PAGE-WOOD, V.-C.).—BATHE *v.* BANK OF ENGLAND (1858), 4 K. & J. 564; 27 L. J. Ch. 630; 31 L. T. O. S. 230; 22 J. P. 400; 4 Jur. N. S. 505; 6 W. R. 612; 70 E. R. 235.

F. By Bankrupts.

34. Deed of assignment for creditors—Death of debtor before transfer—Power of court to order transfer.]—P. & Co. assigned all their estate to trustees for creditors by a deed in the form of sched. D. to Bkpcy. Act, 1861 (c. 134), which was duly registered under s. 192 of that Act. P. had then a sum of £500 Bank of England stock in his own name, but he died without transferring it to the trustees, & left no personal representative. The Bank refused to make the transfer in their books:—*Held:* under Bkpcy. Acts, 1849 (c. 106) & 1861, the ct. had jurisdiction to order the Bank to make an entry in their books to the effect that the stock was the property of the trustees. Form of order made.—*Re* PRICE, *Ex p.* BANK OF ENGLAND (1867), 2 Ch. App. 662; 36 L. J. Bcy. 24; 16 L. T. 760; 15 W. R. 1066, L.JJ.

35. Stock purchased in fictitious name—Fraud on creditors—Correction of books.]—Where a bkpt. had invested money in the purchase of stock in a fictitious name, for the purpose of defrauding his creditors, the ct., on a bill filed by the assignees against the Bank, ordered the Bank to erase from their books the fictitious name & insert that of bkpt.—GREEN *v.* BANK OF ENGLAND (1839), 3 Y. & C. Ex. 722; 160 E. R. 892.

Annotations:—**Refd.** Arthur *v.* Mid. Ry. Co., Mid. Ry. Co. *v.* Arthur (1857), 3 K. & J. 204; *Re* Price, *Ex p.* Eddison (1867), 16 L. T. 613.

G. Proceedings against Bank in respect of Stock.

36. Action for disparagement of title.]—The Bank, on transferring stock, made a memorandum of a suspected defect of title. *Semble:* the holder of the stock had an action against the Bank for disparaging his title.—MAYO'S (LADY) CASE (1772), Lofft, 65; 98 E. R. 535.

37. Action to compel transfer — Application to restrain litigants from proceeding—Bank as stakeholder — Interpleader.] — Where money in the public funds is the subject of a suit, to which the Bank are made defts., the ct. will not, on the application of the Bank, make any order on the litigating parties to restrain them from proceeding at law against the Bank to compel a transfer, but they must file a bill of interpleader. The Bank must be considered as private persons who are stake-holders, & as such are most certainly entitled, if they think proper, to file a bill of interpleader, but it is certainly necessary for the Bank to apply in the shape of pltfs. (LORD THURLOW, C.).—BIRCH *v.* CORBIN (1784), 1 Cox, Eq. Cas. 144; 29 E. R. 1101.

38. Action to restrain transfer—Making Bank parties—39 & 40 Geo. 3, c. 36.]—Notwithstanding the above Act, the Bank may still be made parties to a bill to restrain a transfer of stock filed since that Act. A demurrer by the Bank was overruled.—TEMPLE *v.* BANK OF ENGLAND (1802), 6 Ves. 769; 31 E. R. 1300.

39. Action for unreasonable delay—Passing power of attorney.]—If the Bank make unreasonable

Sect. 1.—*The Bank of England: Sub-sect.* 2, *G.; sub-sect.* 3.]

delay in the passing of a power of attorney to transfer stock, an action lies against them.—SUTTON *v.* BANK OF ENGLAND (1824), 1 C. & P. 193; Ry. & M. 52.

Annotation:—**Mentd.** Staple of England Merchants *v.* Bank of England Governors (1887), 21 Q. B. D. 160, C. A.

40. Suit to charge stock of felon—Making Bank parties.]—The Bank ought not to be made parties to a suit for the purpose of giving effect to a charge upon stock standing in the name of a felon convict.—PERKINS *v.* BRADLEY (1842), 1 Hare, 219; 6 Jur. 254; 66 E. R. 1013.

Annotations:—**Mentd.** Cash *v.* Belcher (1842), 1 Hare, 310; Fuller *v.* Benett (1843), 2 Hare, 394.

41. Order restraining Bank—Limited in time—5 Vict. c. 5, s. 4.]—The order, which under the above sect. may be issued upon motion or petition without bill filed, to restrain the Bank from permitting the transfer of stock or shares, or the payment of dividends, cannot be continued after time has been afforded for filing a bill, & no bill has been filed.—*Re* HERTFORD (MARQUIS) (1842), 1 Hare, 584; 11 L. J. Ch. 317; 66 E. R. 1164; S. C. on appeal without any decision on this point, *sub nom. Ex p.* HERTFORD (MARQUIS), 1 Ph. 129; 41 E. R. 580.

42. Notice to prevent transfer—Application to allow transfer—Interim injunction.]—A notice having been served on the Bank under Ord. 46, rr. 4, 7, to prevent the transfer of stock or the payment of dividends thereon without notice to the persons serving the notice, the Bank gave notice to them that an application had been made to the Bank to allow the transfer of the stock & to pay the dividends thereon, & that they should comply with the application, unless an order of the ct. should be served on them within eight days. A motion having been made *ex p.* for an order to restrain the Bank from permitting the transfer or paying the dividends:—*Held:* the proper course was to grant an *interim* injunction over the next regular motion day, & notice of the order must be served on the legal owners of the stock.—*Re* BLAKSLEY'S TRUSTS (1883), 23 Ch. D. 549; 48 L. T. 776.

43. Transfer by order of court—Indemnification of Bank.]—S. having recovered judgment against J. N. & R. N. in the K. B. Div. & obtained a charging order on stock standing in their respective names in the books of the Bank, commenced proceedings in the Ch. Div. against J. N. & R. N. to obtain a sale of so much of the stock as would provide sufficient to pay the amount due under the charging order, & on June 29 an order was made for sale by S. out of ct. of portions of the stock, & that the proceeds should be received by S. in discharge of the amount found due to him, & that within seven days after service of the order J. N. & R. N. should transfer to S. the stock ordered to be sold, & in case they should neglect to do so, the ct. appointed the Stock Exchange broker of the ct. to execute the transfer, & ordered him to do so. The Bank's advisers not being satisfied that they were protected by the order, the Bank were by arrangement joined as defts. in the proceedings in the Ch. Div., & thereupon S. applied to the ct. asking that, as J. N. & R. N. had neglected to transfer the stock, the Bank might be ordered to act on the order of June 29, & to suffer a transfer of the stock ordered to be sold to be executed in the books of the Bank by the ct. broker, or, alternatively, for a fresh order for sale of the stock to satisfy the claim of S. The Bank objected that (1) any order made should be intituled "In the matter of Jud. Act, 1884 (c. 61)"; (2) the ct. could not, under s. 14 of that Act, make one anticipatory order for (*a*) execution of a transfer by stockholders, & (*b*) for execution of the transfer by some other person in case of non-compliance; (3) it was not clear that, under an order framed in the manner proposed, the Bank would be entitled to any indemnity under National Debt Act, 1870 (c. 71):—*Held:* (1) it was unnecessary & inconvenient to alter the title of the order by referring to the Jud. Act, 1884, although as a matter of convenience the order might state that it was made under s. 14 of that Act; (2) without deciding that there was no case in which the ct. could make an anticipatory order, before making an order under s. 14 the ct. ought as a rule to be satisfied that the person originally ordered to execute a document had neglected or refused to comply with the order, & in the present case an anticipatory order ought not to be made; (3) as execution by the ct. broker of the transfer would in effect be the act of the stockbrokers, the Bank would be indemnified under National Debt Act, 1870.

The matter was subsequently brought before the ct., when the Bank urged that; (1) in a case like the present there was no indemnity to the Bank; (2) if the Bank were ordered to allow a transfer by the ct. broker it should only be on a condition imposed under s. 14 that S. should indemnify the Bank:—*Held:* (1) when once an order had been made under s. 14, & acted on, the transfer executed by the appointed person had the same effect as if it had been executed by the stockbroker, & the Bank were at any rate impliedly indemnified for acting on the order, even if the order turned out to have been invalidly made; (2) even if the condition asked for could be imposed under s. 14, it ought not to be imposed in the present case. Form of order.—SAVAGE *v.* NORTON, [1908] 1 Ch. 290; 77 L. J. Ch. 198; 98 L. T. 382.

44. Evidence—Proof of death—Discretion of Bank.]—Evidence which the Ct. of Ch. may now, in uncontested cases, consider sufficient to prove a death, is not necessarily binding & conclusive upon, or to be accepted as satisfactory by, the Bank. The Bank have a discretion to exercise for their own protection & the benefit of the public; & the ct. will not compel them, when exercising that discretion *bonâ fide*, to depart from their own settled practice.

An injunction to restrain the Bank from requiring an examined copy of a burial certificate purporting to be duly signed was refused.—PROSSER *v.* BANK OF ENGLAND (1872), L. R. 13 Eq. 611; 41 L. J. Ch. 327; 26 L. T. 60; 20 W. R. 362.

Annotation:—**Consd.** Hunt *v.* Hunt (1907), 97 L. T. 822, C. A.

45. Retransfer of stock—Legal owner—56 Geo. 3, c. 60.]—To obtain a retransfer of stock under the above Act it is not necessary for petitioners to show that they are beneficially entitled to it; it is sufficient if they prove their legal claim.—*Re* BIGG (1835), 1 Y. & C. Ex. 245; 4 L. J. Ex. Eq. 41; 160 E. R. 100.

SUB-SECT. 3.—PAYMENT OF DIVIDENDS.

46. Government funds—No duty until dividends received from Government.]—In an action against the Bank, the declaration stated that pltf. was lawfully possessed of certain 3 per cent. annuities in the care of defts., & standing in their books in the name of pltf., for the purpose (*inter alia*) of paying him all the dividends which might accrue due in respect of the stock, whilst same should not be transferred in the books with the authority of pltf., & that pltf. was entitled to the stock, & that it had not been transferred in the books to any person by his order or authority, & thereupon it

became the duty of defts. to pay to pltf. the dividends whilst same was not transferred, yet defts., although requested, had not paid them :—*Held :* the declaration was bad, as it did not appear the dividends had ever been issued by Govt. to the Bank, & until they were issued, it was not the duty of the Bank to pay them.—BANK OF ENGLAND *v.* DAVIS (1826), 5 B. & C. 185 ; 7 Dow. & Ry. K. B. 828 ; 4 L. J. O. S. K. B. 145 ; 108 E. R. 69.

Annotations :—**Consd.** Coles *v.* Bank of England (1839), 10 Ad. & El. 437 ; Sloman *v.* Bank of England (1845), 14 Sim. 475. **Refd.** *Re* Marsh, *Ex p.* Bolland (1828), Mont. & M. 315 ; Carlisle *v.* S. E. Ry. Co. (1850), 2 H. & Tw. 366 ; Barton *v.* North Staffordshire Ry. Co. (1888), 38 Ch. D. 458. **Mentd.** Hume *v.* Bolland (1826), Ry. & M. 371 ; Johnston *v.* Renton, Johnston *v.* Parsey (1869), L. R. 9 Eq. 181.

47. —— Interest charged under judgment debt —Right of executors to dividends.]—A., being possessed of £12,058 6*s.* 8*d.* new 3½ per cent. stock, bequeathed to C. an interest in £5,000, parcel thereof. A judgment having been obtained against C., the judgment creditor obtained a judge's order under Judgments Act, 1838 (c. 110), ss. 14 & 15, charging such latter sum with the judgment debt, which upon cause shown was made absolute as to so much of the dividends as were payable to C. for her own use. The orders having been served upon the Bank, the Bank refused to pay the dividends upon the £12,058 6*s.* 8*d.* to the exors. under A.'s will, & they brought an action against the Bank to recover those dividends. The Bank having applied for a stay of proceedings on payment of a portion of the dividends :—*Held :* there was no ground or necessity for the application, the Bank being bound to pay the dividends to the legal owners, the exors., who were answerable for their proper application.—FOWLER *v.* CHURCHILL, CHURCHILL *v.* BANK OF ENGLAND (1843), 11 M. & W. 323 ; 2 Dowl. N. S. 767 ; 12 L. J. Ex. 233 ; 7 Jur. 353, 538 ; 152 E. R. 827.

Annotations :—**Expld.** Hague *v.* Dandeson (1848), 17 L. J. Ex. 269. **Consd.** South Western Loan & Discount Co. *v.* Robertson (1881), 8 Q. B. D. 17.

48. —— Execution of transfer — Transferor cannot dispute transferee's title — Necessity for transferee to subscribe acceptance—Inspection.]—A party having executed a transfer of stock in the form prescribed by 11 Geo. 4 & 1 Will. 4, c. 13, s. 13, cannot, in an action against the Bank, dispute the title of the transferee on the ground that he has not subscribed an acceptance of the transfer as directed by that clause.

Pltf., having been a holder of 3½ per cent. stock, brought an action against the Bank for refusing to pay the dividends. Defts. pleaded, denying that pltf. was proprietor of the stock in manner & form, etc., & their defence in fact was that, before the dividends became due, the stock had been transferred out of pltf.'s name. The ct., on motion, made an order that pltf. should be at liberty to inspect that particular entry, in the transfer book at the Bank, which related to the transfer of the stock in question, but not any other part of the bank-books.—FOSTER *v.* BANK OF ENGLAND (1846), 8 Q. B. 689 ; 15 L. J. Q. B. 212 ; 7 L. T. O. S. 61 ; 10 Jur. 565 ; 115 E. R. 1032.

See, further, DISCOVERY, INSPECTION, & INTERROGATORIES.

49. Dividend warrants—Negotiability—Bonâ fide payment to holder—Liability of bank.]—Pltf. sued the Bank for refusing to pay a dividend warrant issued by them in respect of a dividend due on Apr. 5. Pltf. had given a power of attorney to W. to receive his dividend. & on Apr. 6 W. received the warrant from defts. The cashiers of the Bank would not pay such warrants until the 8th. On April 7 W. transferred the warrant to bankers for value, & they received payment of the amount. W. absconded. Pltf. afterwards applied to defts. for the money, but they refused to pay him. Defts. pleaded (*inter alia*) that by usage & custom of bankers & merchants in London, for sixty years past, dividend warrants were transferable & assignable by delivery only, & a *bonâ fide* holder thereof was entitled to payment by defts. on demand :—*Held :* the warrant was not negotiable, not being payable to bearer, to order or to assigns, & the usage pleaded could not alter the general rule of law, by which the dividend warrant would only confer a right of action on the payee, & pltf. was entitled to recover.—PARTRIDGE *v.* BANK OF ENGLAND (1846), 9 Q. B. 396 ; 15 L. J. Q. B. 395 ; 8 L. T. O. S. 195 ; 10 Jur. 1031 ; 115 E. R. 1324, Ex. Ch.

Annotations :—**Consd.** Crouch *v.* Credit Foncier of England (1873), L. R. 8 Q. B. 374 ; Goodwin *v.* Robarts (1875), L. R. 10 Exch. 337, Ex. Ch. **Expld.** Goodwin *v.* Robarts (1876), 1 App. Cas. 476, H. L.

See, generally, BILLS OF EXCHANGE, PROMISSORY NOTES & NEGOTIABLE INSTRUMENTS.

50. Distribution of extraordinary profit—Capital or income.]—An extraordinary division of a sum of money by the Bank among the proprietors of Bank stock, beyond the usual dividend :—*Held :* capital, & not the absolute property of the tenant for life, notwithstanding the division was in money, not stock, & it was to be presumed to be profit arising in the time of the tenant for life.—PARIS *v.* PARIS (1804), 10 Ves. 185 ; 32 E. R. 815.

Annotations :—**Consd.** Barclay *v.* Wainewright (1807), 14 Ves. 66, L.C. **Apld.** Hooper *v.* Rossiter (1824), M'Cle. 527. **Expld.** *Re* Barton's Trusts (1868), L. R. 5 Eq. 238. **Distd.** Straker *v.* Wilson (1870), 39 L. J. Ch. 463. **Expld. & Distd.** *Re* Bouch, Sproule *v.* Bouch (1885), 29 Ch. D. 635, C. A. **Distd.** *Re* Bromley, Saunders *v.* Bromley (1886), 55 L. T. 145. **Refd.** Cuming *v.* Boswell & Dickson, Boswell *v.* Cuming & Dickson (1856), 2 Jur. N. S. 1005 ; *Re* Hopkins' Trusts (1874), 43 L. J. Ch. 722 ; Bouch *v.* Sproule (1887), 12 App. Cas. 385, H. L. ; *Re* Alsbury, Sugden *v.* Alsbury (1890), 45 Ch. D. 237. **Mentd.** Baring *v.* Ashburton (1868) 17 L. T. 557.

51. —— ——.]—Distribution by the Bank of extraordinary profit, beyond the regular dividend, not by way of increased dividend, but as a bonus : —*Held :* capital, & the manner in which it was given, made no difference. Whatever conduct or language the Bank may hold, if they do not increase the dividend, but take this mode of distributing the profit, it is a part of the capital, & does not belong to the tenant for life. The Bank may so conduct themselves as to avoid the question altogether, for they may increase the dividend, & that increased dividend would be the ordinary fruit of the stock. But, if they do not take that course, the manner, in which they give the bonus, cannot make a difference. Though they may express it differently, the thing in fact is the same (LORD ERSKINE, C.).—WITTS *v.* STEERE (1807), 13 Ves. 363 ; 33 E. R. 330.

Annotations :—**Consd.** Barclay *v.* Wainewright (1807), 14 Ves. 66, L.C. **Refd.** Cuming *v.* Boswell (1857), 28 L. T. O. S. 344, H. L. ; Bouch *v.* Sproule (1887), 12 App. Cas. 385, H. L.

See, further, COMPANIES ; SETTLEMENTS.

SUB-SECT. 4.—ISSUE OF BANK OF ENGLAND NOTES.

Bank notes generally, bankers' drafts & bank post bills, etc., see Part II., Sect. 4, *post.*

A. Notes as Tender and Payment.

52. Before Bank of England Act, 1833 (c. 98)—Effect of objection—Annuity Act, 1777 (c. 26).]—*Held :* Bank of England notes were a good tender,

Sect. 1.—The Bank of England: Sub-sect. 4, A. B. C. & D.; sub-sect. 5, A.]

if not objected to.—WRIGHT *v.* REED (1790), 3 Term Rep. 554; 100 E. R. 729.

Annotation:—**Mentd.** Cousins *v.* Thompson (1795), 6 Term Rep. 335.

53. —— —— ——.]—*Held:* a tender of a Bank of England note was good, if not objected to at the time.—BROWN *v.* SAUL (1803), 4 Esp. 267, N. P.

54. —— —— **37 Geo. 3, c. 45.**]—Defts., bankers, tendered to pltf. a Bank note for £5 & 5s. in silver in payment of one of their own notes for five guineas. Pltf. insisted on being paid wholly in cash, which defts. refused to do:—*Held:* Bank of England notes were not made legal tender by the above Act.—GRIGBY *v.* OAKES (1801), 2 Bos. & P. 526; 126 E. R. 1420.

55. —— **Considered as money—Statement of consideration of annuity.**]—Bank of England notes are considered as money within Annuity Act, 1777 (c. 26); & therefore if bank notes & cash be given as the consideration of an annuity, the whole may be stated in the memorial as so much money.—COUSINS *v.* THOMPSON (1795), 6 Term Rep. 335; 101 E. R. 581.

B. Altered Notes.

56. Alteration of number—Material alteration—Avoidance of note.]—In an action against the Bank for non-payment of notes payable to bearer which had been regularly issued by the Bank, it appeared that the notes had been *bonâ fide* purchased by pltf. for value, but that before pltf. took them the notes had been altered by erasing the numbers upon them & substituting others, with the object of preventing the notes from being traced, as payment had been stopped & a notice issued specifying their numbers:—*Held:* although the alteration did not vary the contract, it was material in the sense of altering the notes in an essential part, & the notes were vitiated, so that pltf. could not recover in his action on them against the Bank.—SUFFELL *v.* BANK OF ENGLAND (1882), 9 Q. B. D. 555; 51 L. J. Q. B. 401; 47 L. T. 146; 46 J. P. 500; 30 W. R. 932, C. A.

Annotations:—**Apld.** Leeds & County Bank *v.* Walker (1883), 11 Q. B. D. 84. **Refd.** *Re* Howgate & Osborn's Contract, [1902] 1 Ch. 451.

57. Alteration of number & date—Material alterations—Avoidance of note—Bills of Exchange Act, 1882 (c. 61), ss. 64, 89.]—A Bank of England note which has been materially altered in number & date is worthless, & the Bank are entitled to refuse to pay on it.

A Bank of England note had been materially altered in number & date shortly before the passing of the above Act:—*Held:* (1) before the Act, the Bank were not liable on the altered note, which was worthless; (2) s. 64 of the Act was not retrospective, but even if it were so, the "necessary modifications" referred to in s. 89 would exclude bank-notes altogether from the operation of s. 64, & even if the proviso of s. 64 would otherwise have affected the altered bank-note, the alteration was "apparent," as the Bank could at once discern & point out to the holder of the note that it had been materially altered, although the alteration was not obvious to everybody.—LEEDS & COUNTY BANK, LTD. *v.* WALKER (1883), 11 Q. B. D. 84; 52 L. J. Q. B. 590; 47 J. P. 502.

Annotation:—**Mentd.** Imperial Bank of Canada *v.* Bank of Hamilton, [1903] A. C. 49, P. C.

C. Lost Notes.

58. Proof of loss—Action by executors—No proof of loss or possession by testator—List of notes made by testator.]—A bill was filed by exors. for payment of lost bank-notes, upon giving security to refund & indemnify the Bank in case any other claim should be made on them. There was no proof of actual loss, or that the notes had been in the possession of testator, other than a list of them & other notes marked as received by him. No issue was ever tried whether the notes were testator's:—*Held:* there was no proof of loss, the list not being admissible evidence.—GLYNN *v.* BANK OF ENGLAND (1750), 2 Ves. Sen. 38; 28 E. R. 26, L.C.

Annotations:—**Mentd.** Walmsley *v.* Child (1749), 1 Ves. Sen. 341, L.C.; Gleadow *v.* Atkin (1833), 1 Cr. & M. 410; Briggs *v.* Wilson (1853), 5 De G. M. & G. 12, L.JJ.

59. Proof of property in—Possession primâ facie evidence.]—In trover for a lost bank note, it is not a *primâ facie* case for pltf. to prove that the note belonged to him, & that deft. afterwards converted it, & deft. will not be called upon to show his title to the note, without evidence from the other side that he got possession of it *malâ fide* or without consideration.—KING *v.* MILSON (1809), 2 Camp. 5, N. P.

60. Notice to Bank—Indemnity—Holder's right to note of equal value—Bills of Exchange Act, 1882 (c. 61), ss. 69, 70.]—Where the holder of a Bank of England note has lost it, the proper course for him to take is to notify his loss to the Bank under Bills of Exchange Act, 1882 (c. 61), s. 69, & to get another note of equal value from the Bank on giving a good indemnity; & upon an indemnity being given to the satisfaction of the master, the Bank will be restrained from setting up the loss as a defence to an action on the note.—GILLETT *v.* BANK OF ENGLAND (1889), 54 J. P. 7; 6 T. L. R. 9.

D. Notes stolen or obtained by Fraud.

61. Rights of bonâ fide holder—Bank refusing to pay—Liability of Bank.]—F., being possessed of a Bank of England note, sent it by post to O. The mail was robbed & the note stolen, & it ultimately came into the possession of pltf., who took it in good faith & for value. Payment of the note was stopped, & when pltf. presented it at the Bank for payment, deft., a clerk in the Bank, refused either to pay the note, or to redeliver it to pltf.:—*Held:* pltf. was entitled to recover the value of the note in an action of trover.—MILLER *v.* RACE (1758), 1 Burr. 452; 2 Keny. 189; 97 E. R. 398.

Annotations:—**Apld.** Peacock *v.* Rhodes (1781), 2 Doug. K. B. 633. **Consd.** Mead *v.* Young (1790), 4 Term Rep. 28. **Folld.** Lawson *v.* Weston (1801), 4 Esp. 56, N. P. **Apld.** Wookey *v.* Pole (1820), 4 B. & Ald. 1. **Consd.** Snow *v.* Peacock (1826), 3 Bing. 406; Lang *v.* Smyth (1831), 7 Bing. 284; Glyn *v.* Soares (1835), 1 Y. & C. Ex. 644. **Apld.** Goodwin *v.* Robarts (1875), L. R. 10 Exch. 337. **Consd.** Moss *v.* Hancock, [1899] 2 Q. B. 111. **Refd.** Grant *v.* Vaughan (1764), 3 Burr. 1516; Clarke *v.* Shee (1774), 1 Cowp. 197; Gill *v.* Cubitt (1824), 3 B. & C. 466; Easley *v.* Crockford (1833), 10 Bing. 243. **Mentd.** R. *v.* Sadi (1787), 1 Leach, 468: Wright *v.* Reed (1790), 3 Term Rep. 554; Glyn *v.* Baker (1811), 13 East, 509; Stuart *v.* Bute (1813), 11 Ves. 657, L.C.; Camidge *v.* Allenby (1827), 6 B. & C. 373; Robinson *v.* Reynolds (1841), 2 Q. B. 196; Lichfield Union Grdns. *v.* Greene (1857), 1 H. & N. 884; Keene *v.* Beard (1860), 8 C. B. N. S. 372; *Re* Craven, Crewdson *v.* Craven (1908), 99 L. T. 390.

62. —— **Means of knowledge.**]—Pltf., having been asked by L. to cash a note for £100, obtained change for it from the bank with whom he kept his account, & handed such change to L. The Bank refused to cash the note, as it had been stolen, & pltf.'s account at his bank was debited with the amount:—*Held:* as pltf. was the holder of the note & as there was no question as to his *bona fides*, there must be a verdict for him.—RANSTED *v.* BANK OF ENGLAND (1900), 21 Journal of Institute of Bankers, 157.

63. —— —— **Forgetfulness & carelessness—Liability of Bank.**]—One who takes a bank-note or other negotiable security *bonâ fide*—that is giving value for it & having no notice at the time that the party from whom he takes it has no title—is entitled to recover upon it, even although he may at the

time have had the means of knowledge of that fact, of which means he neglected to avail himself.

A money-changer in Paris, twelve months after he had received & filed a printed notice of a robbery of bank-notes at Liverpool, took one of the stolen notes at Paris, giving cash for it, less the current rate of exchange, from a stranger, to whom he merely required to produce his passport & write his name on the back of the note :—*Held :* the circumstance of his forgetting or omitting to look for the notice was no evidence of *mala fides*.—RAPHAEL *v.* BANK OF ENGLAND (1855), 17 C. B. 161 ; 25 L. J. C. P. 33 ; 26 L. T. O. S. 60 ; 4 W. R. 10 ; 139 E. R. 1030.

Annotations :—**Apld.** Venables *v.* Baring, [1892] 3 Ch. 527. **Refd.** Joseph *v.* Webb, Joseph *v.* Lyms, Joseph *v.* Pidcock, Joseph *v.* Jones (1883), Cab. & El. 262 ; London Joint Stock Bank *v.* Simmons, [1892] A. C. 201, H. L.

64. —— Suspension of payment—Enquiry as to title of holder.]—The holder of a bank-note is entitled *primâ facie* to prompt payment ; but if another party has been plundered of it before, & has applied to the Bank, no impropriety can be imputed to them for suspending the payment, till it is ascertained that the party tendering it for payment is not contaminated with the guilt.—SOLOMONS *v.* BANK OF ENGLAND (1791), 13 East, 135 ; 104 E. R. 319.

Annotations :—**Refd.** Davis *v.* Willis (1836), 1 Har. & W. 679 ; Muttyloll Seal *v.* Dent (1853), 5 Moo. Ind. App. 328, P. C. ; Currie *v.* Misa (1875), L. R. 10 Exch. 153, Ex. Ch. **Mentd.** Snow *v.* Peacock (1826), 3 Bing. 406 ; Lang *v.* Smyth (1831), 7 Bing. 284.

65. —— Title of agent—Onus of proof as to title of principal.]—A Bank of England note, which was stolen in England in Feb., 1826, was remitted in May, 1827, by a merchant in Paris to pltf., his correspondent in London. On his presenting it at the Bank it was stopped as a stolen note, & payment of it refused. The foreign merchant, when he remitted it, was indebted to pltf. in a sum exceeding its amount, but pltf. did not before its stoppage make him any further advance on the credit of it ; in trover for the note :—*Held :* (1) pltf. must be considered only as the agent of the foreign merchant, & could recover only on his title ; (2) pltf. was bound to show that the foreign merchant gave such value for it as to exempt him from all suspicion of knowing that it had been improperly obtained.—DE LA CHAUMETTE *v.* BANK OF ENGLAND (1829), 9 B. & C. 208 ; Dan. & Ll. 318 ; 7 L. J. O. S. K. B. 179 ; 109 E. R. 78 ; *subsequent proceedings* (1831), 2 B. & Ad. 385.

Annotations :—**Distd.** *Re* Bentley, *Ex p.* Vere (1835), 4 Deac. & Ch. 295. **Consd.** Currie *v.* Misa (1875), L. R. 10 Exch. 153, Ex. Ch. **Expld.** Misa *v.* Currie (1876), 1 App. Cas. 554, H. L. ; M'Lean *v.* Clydesdale Banking Co. (1883), 9 App. Cas. 95, H. L. **Refd.** Lang *v.* Smyth (1831), 5 Moo. & P. 78. **Mentd.** Nash *v.* De Freville (1900), 69 L. J. Q. B. 484, C. A.

66. —— Notes obtained by fraud—Taken for value.]—Bank-notes cannot be followed by the legal owners into the hands of *bonâ fide* holders for a valuable consideration without notice.

A trader, after a commission of bkpcy. issued against him, wishing to redeem a bill of exchange which he had before remitted to his bankers, to whom he was indebted beyond the amount, secretly employed an agent, in whose hands he placed for that purpose four other bills of about the same value, & such agent, after endeavouring in vain to prevail on the bankers to take in exchange such four bills for the one, passed off the four bills in the market, & obtained bank-notes for same, with which bank-notes he took up the first bill out of the bankers' hands in the usual way :—*Held :* the assignees of bkpt. could not recover from the bankers the amount of such bank-notes, the produce of the four bills, part of bkpt.'s estate, though disposed of by him after his bkpcy., the bankers having taken the notes *bonâ fide* for a valuable consideration, & without notice.—LOWNDES *v.* ANDERSON (1810), 13 East, 130 ; 104 E. R. 317.

Annotation :—**Mentd.** Currie *v.* Misa (1875), 44 L. J. Ex. 94, Ex. Ch.

67. Rights of true owner—Note cashed for stranger without inquiry.]—Defts., bankers in a small town, gave notes of their own to a stranger, of whom they asked no questions, in exchange for a £500 Bank of England note :—*Held :* pltfs., from whom the £500 note had been stolen, & who had duly advertised their loss, might recover the note of defts.—SNOW *v.* PEACOCK (1826), 3 Bing. 406 ; 11 Moore, C. P. 286 ; 4 L. J. O. S. C. P. 120 ; 130 E. R. 569.

Annotations :—**Distd.** Beckwith *v.* Corrall (1826), 2 C. & P. 261 ; Slater *v.* West (1828), 3 C. & P. 325. **Consd.** Lang *v.* Smyth (1831), 5 Moo. & P. 78. **Apld.** Easley *v.* Crockford (1833), 10 Bing. 243. **Refd.** Backhouse *v.* Harrison (1834), 5 B. & Ad. 1098 ; Foster *v.* Pearson (1835), 1 Cr. M. & R. 849.

68. —— Note received in payment of bet.]—Deft., according to one witness, having admitted taking "from his bankers, or at Doncaster," & according to another, "from a stranger at Doncaster races, for bets won," a Bank of England note, without inquiring or taking any account of the number of the note, & the jury, in an action by pltfs., from whose servant the note had been stolen, & who had duly published their loss, having found a verdict for them, the ct. granted a new trial.—SNOW *v.* SADDLER (1826), 3 Bing. 610 ; 11 Moore, C. P. 506 ; 130 E. R. 649.

Annotations :—**Consd.** Easley *v.* Crockford (1833), 10 Bing. 243. **Refd.** Lang *v.* Smyth (1831), 5 Moo. & P. 78.

69. —— ——.]—In 1830, pltf. had his pocket picked of a £200 bank note, at a public meeting. The note was paid to deft., as he said, upon a bet on the Derby in 1832, but he could not say by whom :—*Held :* pltf. was entitled to recover in trover.—EASLEY *v.* CROCKFORD (1833), 10 Bing. 243 ; 3 Moo. & L. 700 ; 3 L. J. C. P. 22 ; 131 E. R. 897.

Annotations :—**Dbtd.** Symons *v.* Mulkern (1882), 30 W. R. 875. I doubt whether *Easley* v. *Crockford* can stand after the later decisions (FRY, J.). **Refd.** Backhouse *v.* Harrison (1834), 5 B. & Ad. 1098.

70. —— Negotiability abroad.]—*Held :* a Bank of England note, which had been stolen, was by 3 & 4 Ann. c. 8, negotiable abroad.—DE LA CHAUMETTE *v.* BANK OF ENGLAND (1831), 2 B. & Ad. 385 ; 9 L. J. O. S. K. B. 239 ; 109 E. R. 1186.

Annotation :—**Refd.** Jefferys *v.* Boosey (1854), 4 H. L. Cas. 815, H. L.

71. Bank refusing to pay—Title of agent—Trover.]—A. paid a Bank of England note to B. in discharge of a debt. B. paid it to C., who presented it at the Bank, where it was stopped, on the ground that it had been fraudulently obtained from a former holder :—*Held :* although A. thereupon paid the amount of the note to C. in discharge of the debt due to the latter from B., A. could not maintain trover for the note against the Bank.—BENJAMIN *v.* BANK OF ENGLAND (1813), 3 Camp. 417, N. P.

SUB-SECT. 5.—RESTRICTION ON ISSUE OF BANK NOTES, ETC., BY OTHER BANKS.

A. Bank Notes.

72. By banking company of more than six persons—Whether issue unlawful.]—S. carried on business at Carlisle as agent for L. Banking Co. of Scotland. The co. sent S. from time to time for the purpose of circulation parcels of notes of L. Bank-

Sect. 1.—The Bank of England: Sub-sects. 5, A. B. & C. & 6. Sect. 2.]

ing Co. signed by the accountant & cashier of the co. & made payable to the bearer on demand at the co.'s office in L. The co. consisted of more than six partners & S. was himself a partner:—*Held:* the issue of the notes was illegal & in violation of the stats. passed for the protection of the Bank of England.—*Re* HOBSON, *Ex p.* RANDLESON (1828), Mont. & M. 86; *subsequent proceedings* (1833), 2 Deac. & Ch. 534, Ct. of R.

73. By bankers ceasing to carry on business—Whether issue unlawful.]—A firm of bankers lawfully issuing notes on May 6, 1844, & accordingly permitted by Bank Charter Act, 1844 (c. 32), under certain conditions, to continue so to do, sold their business to a limited co., "excepting their right to issue notes, but including agreed benefit of the issue"; & it was agreed that they might continue to issue their notes, but through the co.'s officers only, that the co. should allow them interest on the circulation at 2 per cent. less expenses, that to continue the issue new partners might be admitted, but not without the co.'s consent, that if their right of issue were taken away any compensation given them should go to the co. unless it should get an equal right of issue, & that if it should acquire a right of issue their right of issue was to cease. The firm ceased to carry on business except under that agreement:—*Held:* after the making of the agreement the firm had "ceased to carry on the business of bankers" within ss. 12 & 28 of the Act, & the issue of the notes was unlawful.—A.-G. *v.* BIRKBECK (1884), 12 Q. B. D. 605; 53 L. J. Q. B. 378; 51 L. T. 199; 32 W. R. 905.

Annotation:—**Refd.** Prescott, Dimsdale, Cave, Tugwell *v.* Bank of England, [1894] 1 Q. B. 351, C. A.

74. Banking company ceasing to issue notes—Change of place of business & amalgamation—Payment of composition.]—In 1834 the H. Banking Co. was established at S., & the deed of settlement provided that "the bank shall be carried on at S. & nowhere else." In 1841 the H. bank, by agreement with the Bank of England, ceased to issue its own notes, & the H. Banking Co. was scheduled as one of the banks entitled to a composition from the Bank of England under Bank Charter Act, 1844 (c. 32), s. 23. The H. bank passed through many changes, & in 1876 it opened a branch in London. In 1876 also, a new banking business was acquired & a new co. was formed under the name of the "H. & N. W. Banking Co." In 1878 this latter co. acquired another business in London, & the name was changed to that of the "C. & C. Bank," which was registered in 1880 under Cos. Acts. The Bank of England had continued to pay to the "C. & C. Bank" the yearly composition due in respect of the H. Banking Co., but in 1886 they refused to pay on the ground that the right to the composition was lost by carrying on business in London & by amalgamation with other banks:—*Held:* pltfs. were entitled to recover the composition, as it was granted to the H. Banking Co. under the Act as a *persona designata*, and they had not lost this right by ceasing to carry on business exclusively at S., or by absorbing other banks, in conjunction, or change of name.—CAPITAL & COUNTIES BANK *v.* BANK OF ENGLAND (1889), 61 L. T. 516; 5 T. L. R. 738.

Annotations:—**Consd.** Prescott, Dimsdale, Cave, Tugwell *v.* Bank of England, [1894] 1 Q. B. 351, C. A.; Bell *v.* National Provincial Bank of England, [1903] 2 K. B. 249.

75. —— Ceasing to carry on business—Payment of composition.]—Five firms, two of which were London bankers without right to compensation, & three country bankers with such right under Bank Charter Act, 1844, ss. 23, 24, agreed to sell their businesses to a limited co., the considerations being shares in the co., & agreed in future not to carry on business as bankers. The co. carried on business at the old banks with the old staffs:—*Held:* the banks had ceased to carry on business, & the co. was not "such banker or bankers" as the three country firms, & neither the firms nor the co. were entitled to be paid any composition by the Bank of England.—PRESCOTT, DIMSDALE, CAVE, TUGWELL & CO., LTD. *v.* BANK OF ENGLAND, [1894] 1 Q. B. 351; 63 L. J. Q. B. 332; 70 L. T. 7; 10 T. L. R. 129; 38 Sol. Jo. 97; 9 R. 66, C. A.

Annotations:—**Consd.** Bell *v.* National Provincial Bank of England, [1903] 2 K. B. 249. **Expld.** Bell *v.* National Provincial Bank of England, [1904] 1 K. B. 149, C. A.

B. Bills of Exchange.

76. Payable at less than six months from acceptance—By non-trading corporation—Whether unlawful.]—Pltfs. sued as indorsees of a bill of exchange for £200 accepted by a corpn. payable three months after date:—*Held:* pltfs. could not recover, as the bill was an illegal infringement of the stats. for the protection of the monopoly of the Bank of England.—BROUGHTON *v.* MANCHESTER & SALFORD WATERWORKS CO. (1819), 3 B. & Ald. 1; 106 E. R. 564.

Annotations:—**Distd.** Perring *v.* Dunston (1826), Ry. & M. 426. **Refd.** East London Waterworks Co. *v.* Bailey (1827), 4 Bing. 283; Bank of England *v.* Anderson (1837), 3 Bing. N. C. 589. **Mentd.** Clarke *v.* Imperial Gas Light & Coke Co. (1832), 4 B. & Ad. 315; Henderson *v.* Australian Royal Mail Steam Navigation Co. (1855), 5 E. & B. 409; Bateman *v.* Mid-Wales Ry. Co. (1866), L. R. 1 C. P. 499; South of Ireland Colliery *v.* Waddle (1868), L. R. 3 C. P. 463.

77. —— By banking copartnership of more than six persons—Whether unlawful.]—The L. & W. Bank was a copartnership consisting of more than six persons carrying on business as bankers in London. M. was a banker at St. Albans & kept an account with the L. & W. Bank, who were his London agents. M. drew a bill of exchange for £25 on the L. & W. Bank payable twenty-one days after date to the order of R. The L. & W. Bank accepted the bill, having at the time moneys in their hands belonging to M. exceeding £25:—*Held:* the acceptance of the bill by the L. & W. Bank was an unlawful infringement of the privileges of the Bank of England, having regard to Bank of England Act, 1833 (c. 98), & the other Acts then in force respecting the Bank of England.—BANK OF ENGLAND *v.* ANDERSON (1837), 3 Bing. N. C. 589; 2 Keen, 328; 2 Hodg. 294; 4 Scott, 50; 6 L. J. C. P. 158; 1 Jur. 9, 12; 132 E. R. 538; *subsequent proceedings*, 7 L. J. Ch. 265.

Annotations:—**Folld.** Booth *v.* Bank of England (1840), 7 Cl. & Fin. 509, H. L. **Mentd.** Maclae *v.* Sutherland (1854), 3 E. & B. 1; Lucas *v.* Roberts (1855), 3 C. L. R. 987; Austria *v.* Day (1861), 3 De G. F. & J. 217, L.C.

78. —— —— ——.]—A joint-stock bank, consisting of more than six partners, & carrying on the business of bankers in the City of London, entered into an agreement with a bank in Canada, that P., manager of the London bank, but not a partner therein, should accept bills drawn on him by the Canada bank, payable at less than six months from the acceptance thereof, & that the London bank should provide funds for the due payment of such bills, the money transactions arising thereupon being, in the accounts between the two banks, to be treated as transactions between the banks:—*Held:* (1) the acceptance of such bills, in execution of such agreement, was unlawful, having regard to the Acts in force respecting the Bank of England; (2) such acceptances would not be lawful, even if the London bank, at the time of the acceptances, had in hand funds on account of the Canada bank equal to the amount of the bills so accepted; (3) the acceptances of such bills would not be lawful if the London bank had not, at the time of the acceptances, any funds in hand belonging to the Canada

bank, but the bills were accepted on the credit of a contract by that bank to remit funds to meet such acceptances before the bills became payable; (4) the Bank of England might maintain an action against the London bank for the infringement of its privileges.—BOOTH *v.* BANK OF ENGLAND (1840), 7 Cl. & Fin. 509; 6 Bing. N. C. 415; West, 298; 1 Scott, N. R. 701; 4 Jur. 762; 7 E. R. 1163, H. L.

C. Promissory Notes.

79. By commercial firm—Note at less than six months by partners—Whether valid.]—A commercial firm consisting of seven partners made a promissory note payable three months after date. Defts. objected that the note was illegal under Bank of England Act, 1741 (c. 13), s. 5:—*Held:* a valid note as the above Act must be construed *secundum subjectam materiam*, & it was the manifest object of the legislature, in framing the Act, to protect the Bank of England against rival banks.—WIGAN *v.* FOWLER (1816), 1 Stark. 459; 2 Chit. 128.

Annotations:—**Distd.** Broughton *v.* Manchester & Salford Waterworks Co. (1819), 3 B. & Ald. 1. **Apld.** Perring *v.* Dunston (1826), Ry. & M. 426.

80. —— —— Not appearing to be made by banking partnership—Whether valid.]—A joint & several promissory note, at a shorter date than six months, signed by more than six individuals, not appearing to be made by persons in partnership for the purposes of banking, is valid.—PERRING *v.* DUNSTON (1826), Ry. & M. 426.

SUB-SECT. 6.—BANK BOOKS.

81. Bank bills—Copies admissible in evidence.]—A copy of a bank bill on the file of the Bank is good evidence, the Bank being a public body established by Act of Parliament for public purposes.—MAN *v.* CAREY (1697), 3 Salk. 155; 91 E. R. 748.

82. Books—Copies admissible in evidence.]—Parol evidence cannot be given of the transfer of stock, but copies from the books of the Bank must be proved.—BRETON *v.* COPE (1791), Peake, 43.

Annotation:—**Refd.** Davis *v.* Bank of England (1824), 2 Bing. 393.

83. —— ——.]—Copies from the transfer books are good evidence.—MARSH *v.* COLLNETT (1798), 2 Esp. 665, N. P.

Annotation:—**Refd.** Davis *v.* Bank of England (1824), 2 Bing. 393.

84. —— —— **Production of originals.**]—Copies of the books of the Bank are evidence, but upon a question, whether the signature to a transfer is the genuine hand-writing, the book must be produced.—AURIOL *v.* SMITH (1811), 18 Ves. 198; 34 E. R. 292, L. C.

Annotation:—**Apld.** Davis *v.* Bank of England (1824), 2 Bing. 393.

85. —— —— ——.]—In order to prove the acceptance of stock by deft., evidence was adduced that a person unknown to the clerk in the Bank came there with T. & made an entry of his acceptance of the stock, & a witness was then called, who proved that he had inspected the Bank books, & that the signature to the acceptance of the stock was in deft.'s handwriting:—*Held:* this evidence was admissible to prove the acceptance of the stock by deft., & it was not necessary that the Bank books themselves should be produced, they not being removable on the ground of public convenience.

It has been established that the books of the Bank being of great concernment to the whole of the national creditors, the removal of them would be so inconvenient, that copies of them might be received in evidence (LORD ABINGER, C.B.).

The documents produced show a transfer & acceptance in point of form, but these being only copies, they do not show that the stock was transferred to & accepted by deft., unless some acts of his, done at the time when he is at the Bank, in the Bank books, be also shown. The Bank books are not capable of being produced without so much public inconvenience, that the cts. have directed them to remain in the Bank, & copies of them to be received in evidence for the purpose for which the books are receivable (ALDERSON, B.).—MORTIMER *v.* M'CALLAN (1840), 6 M. & W. 58; 9 L. J. Ex. 73; 4 Jur. 172; 151 E. R. 320; *subsequent proceedings*, 7 M. & W. 20; *sub nom.* M'CALLAN *v.* MORTIMER (1842), 9 M. & W. 636, Ex. Ch.

Annotations:—**Apld.** Owner *v.* Beehive Spinning Co., [1914] 1 K. B. 105. **Refd.** R. *v.* Mainwaring (1856), 7 Cox, C. C. 192, C. C. A. **Mentd.** Thomas *v.* Fredricks (1847), 10 Q. B. 775; Nicholson *v.* Gooch (1856), 5 E. & B. 999; *Re* Ryder (1857), 29 L. T. O. S. 217; Grissell *v.* Bristowe (1868), L. R. 3 C. P. 112; Langton *v.* Waite (1868), L. R. 6 Eq. 165; Calder *v.* Dobell (1871), L. R. 6 C. P. 486, Ex. Ch.

86. —— **Production of—Bill for discovery of stock.**]—To a bill against the Bank for discovery of stock standing in the name of pltf.'s late father either alone or jointly, for twenty years before & at his death, & for an inspection of the Bank books containing the entries of such stock, the Bank in their answer set forth an account of the stock, but declined to set forth a list of the books containing the entries:—*Held:* they were not exempted from the production of their books, & ought to set forth a list of them.—HESLOP *v.* BANK OF ENGLAND (1833), 6 Sim. 192; 58 E. R. 566.

Annotation:—**Mentd.** Saunders *v.* Saunders (1855), 3 Drew. 387.

87. List of unclaimed stock transferred to National Debt Commissioners—Who may inspect.]—Upon an application for a *mandamus* to compel the Bank to allow inspection of the above list to appct., who carried on business as a "next of kin & unclaimed money agent," & desired inspection in order to make a copy of the list for the purpose of his business:—*Held:* as appct. did not show that he *bonâ fide* claimed an interest in any unclaimed stock, either on his own behalf, or as representing some other person, he was not entitled to inspection of the list, under National Debt Act, 1870 (c. 71), s. 52.—R. *v.* BANK OF ENGLAND, [1891] 1 Q. B. 785; 60 L. J. Q. B. 497; 64 L. T. 468; 55 J. P. 695; 39 W. R. 558; 7 T. L. R. 421.

Annotation:—**Folld.** R. *v.* Bank of England, *Ex p.* Collis (1906), 22 T. L. R. 477.

88. —— ——.]—To entitle a person to inspection of the above list he must, at least, show some ground for claiming, either on his own behalf or on behalf of some other person, an interest in the stock.—R. *v.* BANK OF ENGLAND, *Ex p.* COLLIS (1906), 22 T. L. R. 477.

Production & inspection of bank books, generally, under Bankers' Books Evidence Act, 1879 (c. 11).]—*See* Part II., Sect. 28, Sub-sect. 2, *post.*

SECT. 2.—BANKS IN SCOTLAND.

89. Royal Bank of Scotland—Transfer of stock—Proprietor debtor to bank—Bye-law.]—A bye-law of the Royal Bank of Scotland, "that no proprietor, who is or shall become a debtor to the bank, shall be allowed to transfer his stock, or any part thereof, but in presence of a ct. of directors, to the end such ct. of directors, if they think fit, may stop such transfer until such proprietor

Sect. 2.—Banks in Scotland. Sects. 3 & 4: Subsects. 1 & 2.]

find security to the bank, for what he owes to them, to their satisfaction," is good; & under it the bank may, in case of debts due to them from a partnership, retain not only the stock standing in the firm of the partnership, but also such stock as is standing in the names of any of the partners individually.—HOTCHKIS *v.* ROYAL BANK OF SCOTLAND (1797), 6 Bro. Parl. Cas. 465; 2 E. R. 1202, H. L.

90. —— Power to issue notes.]—Prisoner was indicted for forging a note of the Royal Bank of Scotland:—*Held:* it was not necessary to prove that any of its charters gave the bank power to issue notes, as such power was sufficiently recognised by 48 Geo. 3, c. 149, s. 16, & 55 Geo. 3, c. 184, s. 23.—R. *v.* M'KEAY (1826), 1 Mood. C. C. 130.

91. Notes of Scottish bank—Forged in England.]—*Held:* Forgery Act, 1861 (c. 98), s. 16, extended to the engraving in England without authority of notes purporting to be notes of a banking co. carrying on business in Scotland only, notwithstanding that s. 55 enacted that nothing in the Act contained should extend to Scotland.—R. *v.* BRACKENRIDGE & KING (1868), L. R. 1 C. C. R. 133; 37 L. J. M. C. 86; 18 L. T. 369; 32 J. P. 436; 16 W. R. 816; 11 Cox, C. C. 96, C. C. R.

Annotation:—**Mentd.** Clarke *v.* Bradlaugh (1881), 7 Q. B. D. 38, C. A.

SECT. 3.—BANKS IN IRELAND.

92. Joint-stock bank—Right to sue in name of public officer.]—*Qu.:* whether 6 Geo. 4, c. 42, s. 10, conferred upon a joint-stock co. the right to bring an action in the name of its public officer against one of its members, for a debt due to the copartnership.—HUGHES *v.* THORPE (1839), 5 M. & W. 656; 9 L. J. Ex. 109; 151 E. R. 278.

Annotations:—**Refd.** Skinner *v.* Lambert (1852), 5 Scott, N. R. 197; Reddish *v.* Pinnock (1854), 10 Exch. 213.

93. —— Liability of shareholders in bankruptcy.]—The T. Bank was a joint-stock bank established in Ireland under 6 Geo. 4, c. 42. This bank having stopped payment, three creditors filed a petition on behalf of themselves & others, the creditors of the bank, seeking to have the trusts of 33 Geo. 2 declared as against the bank & the several shareholders thereof, but the other creditors of the individual shareholders were not made parties:—*Held:* (1) the joint-stock bank was not a banker within 33 Geo. 2, & that stat. had no application to joint-stock banks, the provisions of the joint-stock bank stats. being irreconcilable with it & impliedly repealing it; (2) even if 33 Geo. 2, c. 14, did apply to a joint-stock bank, then all the creditors of the several shareholders ought to have been made parties. *Semble:* 8 & 9 Vict., c. 98, applied to Irish joint-stock banks. A history of Irish banks given by Lord St. Leonards. The leading differences between private & joint-stock banks in England & Ireland commented upon.—O'FLAHERTY *v.* M'DOWELL (1857), 6 H. L. Cas. 142; 29 L. T. O. S. 331; 4 Jur. N. S. 33; 10 E. R. 1248, H. L.

Annotations:—**Refd.** Copland *v.* Davies (1872), L. R 5 H. L. 358, H. L. **Mentd.** Towne *v.* London & Limerick S.S. Co (1859), 5 Jur. N. S. 846.

94. Official manager of Irish bank—Enforcing judgment against.]—Judgment was obtained in a ct. of record at Dublin against the official manager of an Irish joint-stock banking co. for a large sum. The amount due was reduced by subsequent payments in the name of deft. Pltf. executed a warrant of attorney (under 6 Geo. 4, c. 42, s. 12) to confess judgment for the sum remaining due, & judgment was signed in England. Subsequently pltf. executed a fresh warrant to confess judgment for the sum for which judgment had been signed in the Irish Ct.; the judgment was signed accordingly. On this latter judgment a *sci. fa.* issued against a shareholder. On his motion to set it aside:—*Held:* the provisions in 6 Geo. 4, c. 42, s. 12, for enforcing judgments against the public officers of banking cos. in Ireland, were, by Joint Stock Cos. Winding-up Act, 1848 (c. 45), made applicable to judgments against official managers, & the judgment on which the *sci. fa.* proceeded was regular.—WALKER *v.* GOODYERE (1857), 7 E. & B. 960; 29 L. T. O. S. 246; 3 Jur. N. S. 1078; 5 W. R. 707; 119 E. R. 1504.

SECT. 4.—TRUSTEE SAVINGS BANKS.

SUB-SECT. 1.—RULES AND REGULATIONS.

95. Certificate by barrister—Rules conforming to Act—Not conclusive.]—The certificate of the barrister appointed under 9 Geo. 4, c. 92, that the rules of a savings bank were in conformity with the Act, is not conclusive.—*Re* CLARKE, *Ex p.* HAYNES (1844), 3 Mont. D. & De G. 663; 13 L. J. Bcy. 12; 8 Jur. 791.

96. Admissible in evidence.]—*Semble:* a printed copy of the rules of a savings bank, with two names of trustees printed at the end, with a manuscript certificate of the barrister showing his approval of the rules, was admissible in evidence under Savings Bank Act, 1844 (c. 83), s. 19, & Evidence Act, 1845 (c. 113), s. 1.—R. *v.* ESSEX (1857), Dears. & B. 371; 30 L. T. O. S. 171; 21 J. P. 789; 4 Jur. N. S. 15; 7 Cox, C. C. 384, C. C. R.

Annotations:—**Mentd.** R. *v.* Prince (1868), L. R. 1 C. C. R. 150, C. C. R.; R. *v.* Roberts (1878), 38 L. T. 690, C. C. R.

97. Formed & registered under Joint Stock Companies Act, 1856 (c. 47)—Whether banking company—Winding up.]—A co. called a "savings bank" was formed with limited liability & registered under the above Act, the objects being

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PART I. SECT. 3.

93 i. *Joint-stock bank.*]—*Held:* 33 Geo. 2, c. 14, was not repealed but regulated all banking transactions in Ireland.—DAVIES *v.* KENNEDY (1868), 17 W. R. 305.—**IR.**

a. *Transfer of funds of deceased customer—Appointment of receiver.*]—An order was made that all the funds of a deceased person in the Bank of Ireland should be transferred to the credit of a cause in the name of the Accountant-General, but there was no receiver of the personal property of deceased:—*Held:* a receiver should be appointed to obtain administration *pendente lite*, before the ct. could make an order on the bank for the transfer.—FLEETWOOD *v.* FLEETWOOD, 3 Ir. L. Rec. 1st Ser. 170.—**IR.**

Joint-stock Companies.]—*See* Sect. 7, *post.*

b *Bonus in addition to annual dividend—Capital or income.*]—A bonus declared by the Bank of Ireland on their stock, in addition to the annual dividend, is not in the nature of annual profits, but is an accretion of the capital.—*Ex p.* HODGENS (1847), 11 I. Eq. R. 99.—**IR.**

See, generally, COMPANIES; SETTLEMENTS.

PART I. SECT. 4, SUB-SECT. 1.

c. *Power to lend money.*]—A savings bank may, in virtue of its ordinary corporate powers, make loans of its own moneys.—LANGLOIS & LA CAISSE D'ECONOMIE N.-D. DE QUEBEC *v.* ARCAND (1893), Q. R. 4 S. C. 65.—**CAN.**

e. —— *Validity of securities pledged—Estoppel.*]—L. borrowed from a savings bank money which he agreed to repay with interest, transferring in pledge as collateral security letters of credit on the Govt. of Quebec, but L.'s creditors contested the bank's claim, on the ground that the securities were not of the class mentioned in R. S. C. (c. 122), s. 20, & the bank's act in making the loan was *ultra vires* & illegal:—*Held:* L., having received good & valid consideration for his promise to repay the loan, his creditors could not impugn the contract of loan, or assail the pledge of the securities.—ROLLAND *v.* CAISSE D'ECONOMIE DE QUEBEC (1895), 24 S. C. R. 405.—**CAN.**

alleged to be to receive deposits, grant loans on security & to conduct emigration agencies, with a capital of £50,000 in shares of £1 each. An order to wind up was made in Bkpcy., & afterwards a petition to wind up in Ch. was presented, on the ground that the co. was not a banking co., & that there was no jurisdiction to wind up in Bkpcy. It was proved that the co. was not registered under either of Banking Cos. Acts, 1857 (c. 49) & 1858 (c. 91), that money could not be withdrawn except upon a stated period of notice, that cheques could not be drawn in the ordinary form, & that the co. itself kept an account with a banking-house:—*Held:* (1) the co. was not a banking co. within the stats. regulating joint-stock cos.; (2) being a co. of limited liability registered under the Act of 1856, it must be wound up as directed by that stat. in the Ct. of Bkpcy.—*Re* DISTRICT SAVINGS BANK, LTD., *Ex p.* COE (1861), 3 De G. F. & J. 335; 31 L. J. Bcy. 8; 5 L. T. 566; 10 W. R. 138; 45 E. R. 907, L.JJ.

SUB-SECT. 2.—TRUSTEES AND MANAGERS.

98. Action against trustee—Dispute—Arbitration.]—*Held:* an action did not lie against the trustee of a savings bank which was governed by 9 Geo. 4, c. 92, in case of disputes, the only mode of proceeding being by arbn.—CRISP *v.* BUNBURY (1832), 8 Bing. 394; 1 Moo. & S. 646; 1 L. J. C. P. 112; 131 E. R. 445.

Annotations:—**Apprvd.** R. *v.* Mildenhall Savings Bank (1837), 6 Ad. & El. 952. **Distd.** Morrison *v.* Glover (1849), 4 Exch. 430. **Apld.** *Ex p.* Payne (1849), 18 L. J. Q. B. 197. **Distd.** Rochdale Canal Co. *v.* King (1849), 18 L. J. Q. B. 293. **Apld.** Reeves *v.* White (1852), 17 Q. B. 995. **Distd.** Prentice *v.* London (1875), L. R. 10 C. P. 679. **Consd.** Municipal Bldg. Soc. *v.* Kent (1884), 9 App. Cas. 260, H. L. **Refd.** R. *v.* Cheadle Savings Bank (1834), 3 Nev. & M. K. B. 418, n.; Timms *v.* Williams (1842), 3 Q. B. 413; Scott *v.* Avery (1856), 5 H. L. Cas. 811, H.L.; Callaghan *v.* Dolwin (1869), L. R. 4 C. P. 288; Huckle *v.* Wilson (1877), 2 C. P. D. 410; Western Suburban & Notting Hill Permanent Benefit Bldg. Soc. *v.* Martin (1886), 17 Q. B. D. 66; Davies *v.* Second Chatham Permanent Bldg. Soc., Mackenzie *v.* Everton & West Derby Bldg. Soc. (1889), 61 L. T. 680; Crosfield *v.* Manchester Ship Canal Co., [1904] 2 Ch. 123, C. A. **Mentd.** Farmer *v.* Smith (1859), 4 H. & N. 196; Norwich Corpn. *v.* Norwich Electric Tram. Co. (1906), 95 L. T. 12, C. A.

99. Compromise of claim—Dispute—Arbitration.]—On the failure of a savings bank, depositors agreed to a compromise & accepted a composition. They afterwards disputed the settlement, on the ground that certain persons were liable for the whole of the deficit, & the dispute was referred to the registrar of friendly societies. The trustees of the bank entered on their defence before the registrar, but subsequently applied for a prohibition restraining him from proceeding with the arbn., on the ground that there was no "dispute" within Savings Banks Act, 1863 (c. 14), s. 48:—*Held:* there was such a dispute, & the registrar had power to determine it.—CARDIFF SAVINGS BANK & ABERDARE DISTRICT OF ODDFELLOWS, *Ex p.* FRIENDLY SOCIETIES REGISTRAR (1887), 4 T. L. R. 10.

100. Embezzlement by clerk—Remedy of depositors—Appointment of arbitrator.]—The clerk of a savings bank embezzled the money of the de-

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PART I. SECT. 4, SUB-SECT. 2.

98 i. *Action against trustee—Dispute—Arbitration.*]—A depositor in a savings bank cannot bring a suit against the trustees, Savings Bank Act, 1828 (c. 92), having established arbn. as the only mode of proceeding in disputes between depositors & the institution.—COOKE *v.* COURTOWN (LORD) (1844), 6 I. Eq. R. 266.—**IR.**

98 ii. ——————.]—Circumstances (*infra*) in which held pltf.'s only remedy by proceeding under the arbn. clauses of Savings Bank Acts, 1828 (c. 92), & 1844 (c. 83).—FITZGERALD *v.* ROWAN, No. **98 vi.**, *infra.*—**IR.**

98 iii —— —— ——.]—Depositors made claims for amounts due to them, before the passing of Savings Bank Act, 1844 (c. 83), but no reference was made till after the passing of that Act:—*Held:* the jurisdiction created by it superseded that created by Savings Bank Act, 1828 (c. 92).—COURTOWN *v.* GOFF (1851), 3 Ir. Jur. 182.—**IR.**

98 iv. ——————.]—M. brought an action against the trustees of a savings bank for payment of £50, which had been deposited in her name, & which she alleged the officials of the bank had paid away upon a forged order to another person. Defenders denied that the order was forged, or that they were responsible, even if it was. At the date when the action was brought M. had no funds at her credit in the books of the bank:—*Held:* the action was excluded by Trustee Savings Bank Act, 1863 (c. 87), s. 48.—MELROSE *v.* EDINBURGH SAVINGS BANK (1897), 24 R. (Ct. of Sess.) 483.—**SCOT.**

98 v. ——————*Validity of award.*]—A deficiency having arisen in the funds of a savings bank, P., the barrister-at-law appointed under Savings Bank Acts, issued a circular directed to A., & the other trustees & managers of the institution, requiring them to meet him. P. made an award that A. & the other trustees should be personally liable to pay B., a depositor, the amount of his claim, £27 9*s.* The award did not state when the deficiency in the funds of the savings bank arose, or that A. was then a trustee:—*Held:* (1) the circular was insufficient to enable the arbitrator to proceed *ex p.*; (2) the award, on the face of it, showed that the arbitrator had wholly mistaken & exceeded his jurisdiction; (3) the arbitrator was empowered to award a personal liability against the trustees, in favour of the depositors, & not merely against the institution itself, in cases coming within s. 14, but such award should be restricted to the proportion of the deficiency in such deposits occasioned by the default of the trustees.—LYNCH *v.* FITZGERALD (1850), 2 Ir. Jur. 268.—**IR.**

98 vi. —— *Notices of withdrawal of deposits—Money had & received.*]—Pltf. was a depositor, to the amount of £61 16*s.* 4*d.*, in the T. savings bank, of which deft. was the treasurer & one of the acting trustees. The last day on which the bank was open was Apr. 3, 1848. Notices for withdrawal of deposits had been given by several depositors. Pltf.'s notice was given on Apr. 3 & was not payable until the 17th. There were notices of other depositors, to the amount of £700, payable on Apr. 10, & there were other notices payable on the 17th. Between Apr. 10 & 17, deft., as treasurer, received £900:—*Held:* (1) there was no appropriation in law of any part of the £900 to pltf.'s use, & deft. was not liable, as treasurer, on the ground of specific appropriation; (2) the funds of the bank having been vested in deft. & other trustees, to the use of the institution & of the depositors, an action for money had & received to pltf.'s use did not lie.—FITZGERALD *v.* ROWAN (1855), 5 I. C. L. R. 1.—**IR.**

98 vii. —— *What defences may be pleaded.*]—In an action by a depositor against the treasurer for the amount of the deposits, deft., by leave of the ct., pleaded, (1) that he had not received money to pltf.'s use; (2) that, by the rule of the savings bank, he could only pay the money to the manager, & that he was ready to do this when the bank failed; (3) an award. A motion to strike out the second defence as embarrassing, & as not raising a material issue, or one distinct from that raised by the first defence was refused with costs.—FITZGERALD *v.* ROWAN (1854), 6 Ir. Jur. 281.—**IR.**

98 viii. —— —— *Application for leave to plead.*]—*Held:* an application for leave to plead the above pleas should be founded upon a verifying affidavit, inasmuch as the pleas introduced new matter.—FITZGERALD *v.* ROWAN (1854), 6 Ir. Jur. 269.—**IR.**

98 ix. —— *By several depositors.*]—The depositors in a savings bank have not a common interest in the funds, but have each severally a legal debt due to them by the trustees. They cannot sue as co-pltfs., or on behalf of themselves & other depositors.—COOKE *v.* COURTOWN (LORD) (1844), 6 I. Eq. R. 266.—**IR.**

98 x. —— *Expiration of term of office—No fresh election.*]—By regulations made under 6 Geo. 4, c. 4, the management of a savings bank was vested in a president & eight directors, to be chosen annually:—*Held:* the president & directors were the trustees under the Act, & they continued in office after the expiration of the year, none others having been chosen in their places, & were liable to pltf. for money deposited in the bank.—GILCHRIST *v.* WYER (1837), 2 N. B. R. (Ber.) [391], 249.—**CAN.**

f. *Action against president & directors—Joint & several liability.*]—A charitable institution for the relief of the poor appointed delegates to establish a savings bank. These delegates elected a president & directors who adopted a regulation prohibiting any profit to the officers of the institution. Deposits were received to be repaid with interest, & promissory notes were discounted upon the credit of individuals. Upon these discounts a percentage was taken by the directors, & a portion of the funds was appropriated to their own use for their services. The bank was ultimately closed as being insolvent, & a portion of the debts due as special deposits was bought up by the directors at a composition in the pound. In an action in *assumpsit* by one of the depositors:—*Held:* the president & directors were jointly & severally liable to such depositor.—PREVOST *v.* ALLAIRE (1861), 11 L. C. R. 293.—**CAN.**

Sect. 4.—*Trustee Savings Banks: Sub-sects.* 2, 3 & 4. *Sects.* 5 & 6.]

positors:—*Held:* (1) the remedy of the depositors against the trustees was not by action; (2) a *mandamus* should be granted to compel the trustees to appoint an arbitrator under 9 Geo. 4, c. 92, s. 45.—R. *v.* MILDENHALL SAVINGS BANK (TRUSTEES & MANAGERS) (1837), 6 Ad. & El. 953; 2 Nev. & P. K. B. 278; Will. Woll. & Dav. 526; 6 L. J. M. C. 136; 1 J. P. 323; 112 E. R. 364.

Annotations:—**Refd.** Prentice *v.* London (1875), L. R. 10 C. P. 679. **Mentd.** Timms *v.* Williams (1842), 3 Q. B. 413.

101. Surplus funds—Misapplication—Breach of trust.]—In pursuance of 9 Geo. 4, c. 92, the increased stock or fund of the A. Bank, up to Nov. 20, 1828, was ascertained & found to amount to £742 15*s.* 11*d.* One of the rules provided that no trustee nor any person having any control in the management of the institution (except the actuary) should derive any benefit from any deposit made therein. The trustees were owners of property in the town & county, & liable to be rated for the repairs of the bridge at A. Applt. was bridge-warden in 1828. At a meeting of the trustees it was resolved that £592 15*s.* 11*d.*, being surplus funds, be paid over to applt. & three other trustees for the purpose of paying the expense incident to widening the public bridge over the river at A.:—*Held:* a misapplication of the fund, & a breach of trust, & though the money was expended on the bridge, the parties to the payment were personally liable to refund it.—HOLMES *v.* HENTY (1836), 10 Bli. N. S. 255; 4 Cl. & Fin. 99; 6 E. R. 96, H. L.

Annotation:—**Mentd.** R. *v.* Fletcher (1862), Le. & Ca. 180, C. C. R.

102. —— Alteration of premises—Commissioners refusing to certify payment.]—A sum exceeding £500 was standing to the credit of a savings bank in the books of the Comrs. of National Debt. The trustees deemed the accommodation then existing in the banking premises insufficient & determined to enlarge the old premises. This required a sum of £500, & the trustees had no moneys available other than the surplus funds. They accordingly applied to the Comrs. for the withdrawal of £500 from the surplus funds. The Comrs. considered that the proposed extension was not required & refused to certify the payment. The trustees acted in good faith, but the fact that the expenditure was required had not been proved to the satisfaction of the Comrs.

A peremptory writ of *mandamus* commanding the Comrs. to sign a certificate for payment of £500 out of the surplus funds, & to pay that amount to the trustees, was refused, on the ground that it must be found as a fact that the money was required, & the trustees were not the exclusive udges of the question.—R. *v.* NATIONAL DEBT COMRS. (1870), 34 J. P. Jo. 116.

103. Liability for neglect of duty—Frauds by actuary—Insolvency of bank.]—The late actuary of a savings bank had for many years systematically defrauded the bank, which consequently became insolvent & was ordered to be wound up. The frauds of the actuary could not have been committed unless Savings Banks Act, 1863 (c. 14), & the rules of the bank, especially as regards checking the sums paid into & withdrawn from the bank & the auditing of accounts, had been constantly disregarded by the trustees & managers. The liquidator having made an application to have D., a former trustee & manager, settled in the list of contributories & declared liable for misfeasance:—*Held:* (1) D. was not liable to be placed on the list of contributories, but his neglect to enforce the observance of the rules was a misfeasance for which he was liable under s. 11 of the Act; (2) an inquiry should be directed, under Cos. Act, 1862 (c. 89), s. 165, what sum he ought to contribute in respect thereof to the assets of the co.—*Re* CARDIFF SAVINGS BANK, DAVIES' CASE (1890), 45 Ch. D. 537; 59 L. J. Ch. 450; 62 L. T. 628; 38 W. R. 571; 2 Meg. 136.

Annotations:—**Refd.** *Re* Cardiff Savings Bank, Bute's Case, [1892] 2 Ch. 100; *Re* Kingston Cotton Mill Co., [1896] 1 Ch. 331.

104. —— —— ——.]—The standard of duty for an unpaid trustee or manager of a savings bank under Savings Banks Act, 1863, cannot be placed higher than that of a director of a trading co.

In the winding-up of a savings bank, whose insolvency was caused by the frauds of the actuary, the liquidator sought to make B. liable as a trustee & manager. The father of B. had been president of the bank until his death in 1848. B. was then only six months old, but during the whole period of his minority his name was retained as president of the bank without his ever having been formally elected. He once, in the year 1869, attended a meeting of the bank & signed the minutes, but since then he had never attended any meeting of the bank, or taken any part in its management; but his name had always appeared in the copies of the rules, pass-books, & annual reports of the bank; & copies of the annual reports & circulars were sent to him, though he did not remember having received them. The ct. was satisfied that he was ignorant of the irregularities which had taken place in the management of the bank:—*Held:* B. not having attended the meetings & not knowing & having nothing to call his attention to the fact that the regulations were not being observed, could not be rendered liable. *Semble:* under the rules of the bank, the president must be regarded as one of the trustees & managers of the bank.—*Re* CARDIFF SAVINGS BANK, BUTE'S (MARQUIS) CASE, [1892] 2 Ch. 100; 61 L. J. Ch. 357; 66 L. T. 317; 40 W. R. 538; 8 T. L. R. 383; 36 Sol. Jo. 307.

SUB-SECT. 3.—OFFICERS.

105. Treasurer—Administration of estate of—Immediate payment of debt due.]—Under 3 Will. 4, c. 14, s. 28, the ct. will, on petition, order payment of a debt due to a savings bank, from the treasurer of such savings bank, out of the first moneys to be received, before any report made, in a suit for the administration of the estate of such treasurer, but the ct. will not make any order for the payment of the costs of the petition.—HATCH *v.* LEE (1841), 10 L. J. Ch. 223.

SUB-SECT. 4.—DEPOSITS.

106. Money deposited in name of another—Unauthorised withdrawal—Rights of depositor.]—A

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103 i. *Liability for neglect of duty.*]—Circumstances (*supra*) in which held deft. not guilty as trustee, he not having been guilty of any wilful neglect or default.—FITZGERALD *v.* ROWAN, No. **98 vi.**, *supra.*—IR.

PART I. SECT. 4, SUB-SECT. 4.

106 i. *Money deposited in name of another—By father for child under twelve years—Right of bank to accept.*]—A child's father deposited £334 in her name in a savings bank when she was still under twelve years of age, & the bank credited her with the amount:—*Held:* the bank was authorised by law to receive deposits from parents on behalf of their minor children.—SLABBER'S TRUSTEE *v.* NEEZER'S EXOR. (1895), 12 S. C. 163; 5 C. T. R. 189.—S. AF.

g. *Excessive deposits in fictitious names — Illegality — Forfeiture.*]—C. placed various sums of money on deposit in a savings bank in fictitious names with the knowledge of the officers of the bank. He had also deposits remaining in his own name. The deposits in the aggregate exceeded considerably £200, notwithstanding the Comrs. for the reduction of the National Debt had

deposited money in a savings bank in the name of B., & afterwards, without B.'s authority, received back the amount & delivered up the duplicate account book :—*Held :* B. still continued to be a depositor & was entitled to a *mandamus* to compel the bank to refer his claim to arbn. under 9 Geo. 4, c. 92, s. 45.—R. *v.* CHEADLE SAVINGS BANK (1834), 1 Ad. & El. 323, n. ; 3 Nev. & M. K. B. 418 ; 2 Nev. & M. M. C. 296 ; 3 L. T. M. C. 84 ; 110 E. R. 1228.

107. —— Intention to evade restrictions on amount of deposit—No trust.]—A., after depositing in his own name in a savings bank to the full extent allowed, by Savings Bank Act, 1828 (c. 92), made further deposits to another account in the name of himself & a sister, but nominally as trustee for her. The sister died, but A. still went on depositing to the same account & sometimes withdrawing sums until the account reached the full limit allowed. A. subsequently opened a third account in the name of another sister. He never informed his sisters of the existence of these accounts. By the terms of the Act of Parliament he retained control over both accounts. After A.'s death the moneys were claimed on behalf of the sisters :—*Held :* no trust was created, the probable intention for opening the accounts being to evade the provisions of the Act, limiting the amount to be deposited in one name.—FIELD *v.* LONSDALE (1850), 13 Beav. 78 ; 19 L. J. Ch. 560 ; 15 L. T. O. S. 452 ; 14 Jur. 995 ; 51 E. R. 30.

Annotation :—**Mentd.** London Corpn. *v.* Cox (1867), L. R. 2 H. L. 239, H. L.

108. Money deposited in name of club—Disputes among members—Appointment of arbitrator.]—Where a sum is deposited in the name of a benefit club in a savings bank, the bank have a right to be satisfied that parties claiming to have back the deposit really represent the club ; & where disputes had arisen among the members of the club, & appcts., who, it was said on one side, had been expelled by order of magistrates, claimed to be stewards of the club, & alleged that the order of magistrates was void, the ct. refused to grant a *mandamus* to appoint an arbitrator under 9 Geo. 4, c. 92, s. 45.

Where a number of individuals jointly deposit one sum in a savings bank, the whole, or a majority, must concur in applying for a *mandamus* to appoint an arbitrator.—R. *v.* WITHAM SAVINGS BANK (1834), 1 Ad. & El. 321 ; 3 Nev. & M. K. B. 416 ; 2 Nev. & M. M. C. 294 ; 3 L. J. M. C. 85 ; 110 E. R. 1228.

109. Wife's account—Claim by husband & wife—Appointment of arbitrator.]—A married woman made deposits in & drew out moneys from the T. savings bank, leaving a balance of £90 at the time when she abandoned her husband & went to live with some one else. The institution was called upon to pay the balance both by her & by her husband, but neither produced the cheque book, which, according to the rules, had to be produced before money could be paid out. The institution having refused to appoint an arbitrator, at the instance of the husband, under 9 Geo. 4, c. 92, s. 45, lest such appointment should operate as an acknowledgment that the husband was the depositor, a rule *nisi* for a *mandamus* to appoint was made absolute.—R. *v.* TRENTHAM SAVINGS BANK (1843), 2 L. T. O. S. 167 ; 7 J. P. 740.

See, now, Married Women's Property Act, 1882 (c. 75), s. 6.

110. —— Claim by husband & wife's next of kin—Appointment of arbitrator—Lapse of time.]—A married woman deposited money in a savings bank & died in 1826 leaving her husband surviving. The moneys were afterwards paid out to F., who claimed as exor. of the depositor's grandfather. One of the rules of the bank provided that in case any depositor should have been dead seven years, & the money not claimed within that time, the trustees should be entitled to hold it for the general purposes of the trusts. Upon a claim by the husband in 1838, the ct. refused to grant a writ of *mandamus* to compel the trustees & managers to appoint an arbitrator.—R. *v.* NORTHWICH SAVINGS BANK (1839), 9 Ad. & El. 729 ; 1 Per. & Dav. 477 ; 2 Will. Woll. & H. 84 ; 8 L. J. M. C. 24 ; 112 E. R. 1388 ; *sub nom.* LYON *v.* NORWICH SAVINGS BANK (TRUSTEES & MANAGERS), 3 J. P. 209.

SECT. 5.—SEAMEN'S AND NAVAL AND MILITARY SAVINGS BANKS.

See ROYAL FORCES ; SHIPPING & NAVIGATION.

SECT. 6.—POST OFFICE AND GOVERNMENT SAVINGS BANKS.

111. Savings bank book—Action of trover—Damages recoverable—Evidence as to payments of deposits.]—In an action of trover for a savings

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directed the trustees of any savings bank should not add interest to any annual account so long as it continued at or above £200 :—*Held :* (1) the deposits in the fictitious names were made illegally & in contravention of Trustee Savings Banks Act, 1863 (c. 87), s. 38 ; (2) there was no forfeiture of the deposits under the sect.—R. (COCHRANE) *v.* LITTLEDALE (1882), 10 L. R. Ir. 78 ; 12 L. R. Ir. 97.—**IR.**

k. *Instructions with deposit — Payment on presentation of pass-book—Rules of bank—Liability to refund.*]—Defts. associated themselves together to conduct a savings bank, but before they were organised under 4 & 5 Vict. c. 32, their treasurer received a deposit from B. of £75, which he swore was made by B. with the express understanding that any person producing his pass-book should be entitled to receive it. B. died, & the sum was paid to a relative, who presented the pass-book. The payment was made in pursuance of certain rules adopted by defts., but which were not filed according to the Act for some months after :—*Held :* such payment was unauthorised, & defts. were liable to B.'s administrator for the money.—HUNTER *v.* WALLACE (1856), 14 U. C. R. 205.—**CAN.**

l. —— *Testamentary disposition.*]—M. deposited money in a bank & wrote to the manager of the bank as follows : "Please put the amount of my deposit, $674.89, in the savings department of your bank in such a way that I can draw it during my life, & after my death it can only be drawn by E." The manager made the entry in the form of a credit to M. & E., "payable to either or survivor" :—*Held :* neither a *donatio mortis causâ* nor a gift *inter vivos,* & the bank was not a trustee.—SPRUCE *v.* EDWARDS, 25 C. L. T. 118.—**CAN.**

m. *Joint deposit account—Death of one depositor—Rights of survivor.*]—A testator during his lifetime signed the following document : "This is to certify that I transfer this money in my name, J. S. & M. S., in our savings bank account number s. 27 in your bank to the joint credit of myself, the sole survivor, & my daughter, M. S. to be drawn by either of us :"—*Held :* the daughter M. S. became entitled to the money so deposited absolutely in her own right on the death of her father.—SCHWENT *v.* ROETTER (1910), 16 O. W. R. 5 ; 21 O. L. R. 112.—**CAN.**

n. *Refusal to pay out — Measure of damages.*]—The damages recoverable by a non-trading depositor in the savings bank department of a bank, who has made his deposit subject to special terms, on the wrongful refusal of the bank to pay it to him personally, are limited to the interest on the money.—HENDERSON *v.* BANK OF HAMILTON (1894), 25 O. R. 641 ; *affd.* (1895), 22 A. R. 414.—**CAN.**

p. *Deceased depositor — Computation of interest.*]—Under Savings Bank Act of 1872 (36 Vict. No. 6), s. 3, all that can be deducted from the sum due to a deceased depositor, in order to calculate the amount of the sum deposited, is the interest accruing due or being earned in the year then current. When interest earned has been added to the amount deposited it ceases to be interest, & becomes part of the money deposited.—*Re* OEHLRICH (1902), S. R. Q. 13.—**AUS.**

PART I. SECT. 6.

q. *Payment on forged notice of withdrawal—Right of depositor to recover.*]—Government Savings Bank Act 1870 (34 Vict. No. 15), reg. 11, protects the bank where, in its ordinary course of business, it has paid out money on a forged notice of withdrawal to an unauthorised person on presentation of the depositor's book, the reg. being reasonable & *intra vires,* &

Sect. 6.—Post Office and Government Savings Banks. Sect. 7: Sub-sect. 1.]

bank book, pltf. is entitled to recover as damages the amount of money deposited in the bank, where the production of the book is a condition precedent to the right to receive the money from the bank & not merely the value of the book as so much paper.

Oral evidence of the practice of the bank in respect of the payment of deposits is admissible, although the rules of the bank are in writing.—WOODHOUSE *v.* WHITELEY (1866), 4 F. & F. 1086, N. P.

112. Deposit of pauper lunatic—Order of justices for seizure & sale—Expenses of maintenance—Lunacy Act, 1890 (c. 5), s. 299.]—Justices acting under the above sect. can make an order to seize money standing in the name of a pauper lunatic in the Post Office Savings Bank for the purpose of defraying the expenses of his maintenance.—*Re* BETHEL (1899), 80 L. T. 492; 63 J. P. 453; 19 Cox, C. C. 262.

Annotation:—**Mentd.** Hagmaier *v.* Willesden Overseers (1904), 90 L. T. 683.

SECT. 7.—PRIVATE AND JOINT-STOCK AND CHARTERED BANKS.

NOTE.—*The Acts referred to in this section are Country Bankers Act,* 1826 (*c.* 46), *Joint Stock Banks Act,* 1844 (*c.* 113), *& Joint Stock Banking Companies Act,* 1857 (*c.* 49), *& are herein referred to as* 1826 *Act,* 1844 *Act, &* 1857 *Act respectively.*

SUB-SECT. 1.—CONSTITUTION.

113. Partners—Change of—Notice to customers—Changing cheques.]—A change of partners in a banking house is sufficiently notified to the customers of the house by a change in the printed cheques.—BARFOOT *v.* GOODALL (1811), 3 Camp. 147, N. P.

114. —— —— Settlement of accounts.]—Where persons carry on business in the nature of a banking business, as, for instance, that of navy agents, & a change takes place in the house by the death or retirement of a partner, on taking the partnership accounts the rule in *Clayton's Case* (1816), 1 Mer. 572, will be held *primâ facie* to apply as well between the partners themselves as between the partners & third persons; & there must be strong evidence to rebut the presumption as to that mode of taking the partnership accounts.

A. & B. were partners as navy agents. A. becoming a lunatic, the partnership was dissolved, & the business was carried on upon the same terms by B. & C. B. died. The accounts of both partnerships were unsettled:—*Held:* the accounts of A. & B. must be taken on the foundation of the rule in *Clayton's Case,* although C., in order to establish an agreement to the contrary, set up certain affidavits made by B. in a suit brought against him by the committee of the lunatic, in which he alluded to an understanding between B. & C., which in some instances had been acted upon, that the advances made to the customers of their firm should be repaid before any portion of the moneys paid in by those customers was applied in liquidation of their debts due to the original firm.—TOULMIN *v.* COPLAND (1839), 3 Y. & C. Ex. 625; 9 L. J. Ex. Eq. 5; 3 Jur. 1048; 160 E. R. 851.

Annotation:—**Mentd.** Digby *v.* Boycatt (1845), 4 Hare, 444.

115. —— Liability of—One partner signing notes on behalf of firm.]—Where one of several partners in a bank signed the usual promissory notes, beginning with "I promise to pay to the bearer," for himself & the rest of the firm:—*Held:* an

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the loss falls on the depositor.—BRIMSON *v.* SUTTOR (1882), 3 N. S. W. 1.—**AUS.**

r. —— ——.] — Pltf., a post office savings bank depositor, had his deposit-book stolen, & by presentation at the General Post Office, Johannesburg, of the stolen deposit-book & a forged withdrawal form, payment out of money standing to his credit was made to K., thereafter convicted of the forgery & uttering. In an action to recover the money under Proclamation 33 of 1902:—*Held:* (1) reg. 24 thereunder, which purported to take away the depositor's right to repayment in the event of the fraudulent personation of a depositor, was *ultra vires;* (2) the proviso to Crown Liabilities Ordinance (51 of 1903), s. 1, was no answer to an action under the Proclamation; (3) pltf. was not precluded from recovering under the Proclamation by notice of the existence of an invalid regulation.—PAYNE *v.* A.-G. (1910), W. L. D. 251.—**S. AF.**

t. "*Dispute*" — *Refusal to pay — Conflicting claims—Reference to Attorney-General.*] — The exor. of a deceased depositor demanded payment of money deposited in the Govt. Savings Bank of N.S.W. by deceased. The exor., who was sole legatee under the will, was unable to produce the bank pass-book, since deceased's husband, in whose possession it was, refused to give it up, having claimed the money for his son. The bank refused payment without production of the pass-book, & the exor. brought an action for the recovery of the sum deposited:—*Held:* these facts showed that a "dispute" within Govt. Bank Act, 1906, No. 48, s. 76, had arisen, & as under that sect. the A.-G. was the proper tribunal to decide it, a stay of proceedings in the action should be granted.—O'CONNOR *v.* GOVERNMENT SAVINGS BANK COMRS. 1913), 13 S. R. N. S. W. 65.—**AUS.**

PART I. SECT. 7, SUB-SECT. 1.

v. *Commonwealth Bank of Australia —Contravention of Banks & Currency Act,* 1915 (*Vict. No.* 2618).]—An action will not lie against the above bank or its governor to recover penalties for failure to comply with s. 5 of the above Act.—BUTTERWORTH *v.* COMMONWEALTH BANK OF AUSTRALIA (1916), 22 C. L. R. 206.—**AUS.**

w. *Imperial Bank of Canada—Has right to purchase debentures of municipalities.*]—JONES *v.* IMPERIAL BANK OF CANADA (1876), 23 Gr. 262.—**CAN.**

x. *Bank of British North America — Entitled to sue in Upper Canada in corporate name.*]—BANK OF BRITISH NORTH AMERICA *v.* BROWNE (1850), 6 U. C. R. 490.—**CAN.**

z. *Hibernian Joint Stock Banking Company—Right to sue in name of secretary—Filing memorial of members.*]—A declaration stated pltf. to be the secretary of the above co., but did not aver that any registry as required by 5 Geo. 4, c. 159, had been made:—*Held:* the omission of such averment was immaterial.—FOTTRILL *v.* WILLANS (1848), 11 I. L. R. 482.—**IR.**

a. *Sale of bank—Retention of purchase-money as security against accounts —Interest.*]—A bank sold its business & assets to another bank under an agreement, which provided (*inter alia*) that the purchasing bank should retain a portion of the purchase-money as "security pending the taking over, realisation" or adjustment of certain accounts:—*Held:* on the construction of the agreement, the purchasing bank was entitled to hold the portion of purchase-money retained, as security not only against the amounts at which the accounts in question stood at the date of the purchase, but also against interest on such accounts, although the amount of any account might by the addition of such interest be increased above the amount in which it stood at the date of the purchase.—COLONIAL BANK OF NEW ZEALAND *v.* BANK OF NEW ZEALAND, [1896] 15 N. Z. L. R. 141.—**N.Z.**

b. *Sale of assets.*] — The M. Bank agreed with the O. Bank, which was in difficulties, to "purchase by way of discount & re-discount at the rate of 6 per cent. all the call & current loans & overdue debts of the O. Bank, it being understood that the M. Bank shall be entitled to the benefit & immediate transfer of all & every security & securities held for all or any of such loans & overdue debts," & "for the indirect benefit thereby accruing to the M. Bank it agrees to pay to the O. Bank, or to allow & credit it in the final adjustment of accounts, the sum of 150,000 dollars":—*Held:* not a sale by the O. Bank of the whole or part of its assets within Canadian Bank Act (R. S. C. 1906, c. 29), & not *ultra vires* & void as not having been carried out in the manner prescribed by the Act.—MCFARLAND *v.* BANK OF MONTREAL, [1911] A. C. 96; 80 L. J. P. C. 83; 103 L. T. 436; 27 T. L. R. 55, P. C.—**CAN.**

c. *Purchase of own shares — Illegality.*] —The purchase by a bank incorporated under Cos. Stat. 1864 (No. 190) of its own shares is illegal.—*Re* THE FEDERAL BANK OF AUSTRALIA, LTD. (1894), 20 V. L. R. 199.—**AUS.**

e. —— *Transfer for promissory notes—Illegality.*]—A bank used about $400,000 of its funds in purchasing its own shares, & divided them into seven equal blocks, which were held by directors, relatives & friends. Promissory notes were taken for the shares, the bank agreeing to indemnify the makers of the notes against any loss arising from the

action could be maintained against him alone without joining the other partners.—HALL *v.* SMITH (1823), 1 B. & C. 407; 2 Dow. & Ry. K. B. 584; 1 L. J. O. S. K. B. 142; 107 E. R. 151.

Annotations:—**Dbtd.** *Re* Clarke, *Ex p.* Buckley (1845), 14 M. & W. 469. I think *Hall* v. *Smith* cannot be supported (PARKE B.). **Consd.** Maclae *v.* Sutherland (1854), 3 E. & B. 1. Considering that the note in *Hall* v. *Smith* was signed by deft. expressly for himself & his two copartners jointly, there seems great difficulty in seeing how he could be considered by using the pronoun "I" to intend to create any separate liability (LORD CAMPBELL, C.J.). **Mentd.** *Re* Clarke, *Ex p.* Christie (1844), 3 Mont. D. & De G. 736.

116. —— —— ——.]—A., B., C., & D., carrying on business as bankers, a promissory note in the following form was signed by B.:—"I promise to pay the bearer on demand £5 value received. For A., B., C., & D.—B.":—*Held:* the holder of the note had not a separate right of action against the party so signing, but the firm were liable. —*Re* CLARKE, *Ex p.* BUCKLEY (1845), 14 M. & W. 469; 14 L. J. Ex. 341; 153 E. R. 559; *subsequent proceedings* 15 L. J. Bcy. 3.

Annotations:—**Expld.** Nicholls *v.* Diamond (1853), 9 Exch. 154. **Mentd.** Maclae *v.* Sutherland (1854), 3 E. & B. 1.

117. —— —— **Under 1826 Act.**]—A person at his death was member of a banking co. established under 1826 Act & subject to its liabilities. After the expiration of three years, a suit was instituted for the administration of his estate, & the common decree was made for taking an account of his debts. Persons who were creditors of the banking co. at testator's death claimed before the master:—*Held:* the remedies given by the Act were not cumulative, but substitutional for the prior liabilities of partners, & the claims were barred by the lapse of three years.—BARKER *v.* BUTTRESS (1843), 7 Beav. 134; 13 L. J. Ch. 58; 8 Jur. 89; 49 E. R. 1014.

Annotations:—**Consd.** *Re* North of England Joint Stock Banking Co., *Ex p.* Gouthwaite (1850), 20 L. J. Ch. 188. **Refd.** Heward *v.* Wheatley (1852), 5 De G. & Sm. 552.

118. —— **Authority of one to receive money for partnership.**]—One banker has authority to receive money for the banking partnership (ALDERSON, B.).—SIMS *v.* BRUTTON & CLIPPERTON (1850), 5 Exch. 802; 20 L. J. Ex. 41; 155 E. R. 351.

Annotations:—**Mentd.** Gordon *v.* James (1885), 53 L. T. 641; *Re* Somerset, Somerset *v.* Poulett, [1894] 1 Ch. 231, C. A.

119. —— **Rights of incoming—Indemnity against liability—Private loss.**]—A banker took three persons into partnership without an inquiry being made into the accounts, & gave them a charge on all his estates, by way of indemnity against all his liabilities at the time they entered into partnership:—*Held:* only an indemnity against what they should be called on to pay, on account of his liabilities, out of their private means, independently of the banking business.—GRYLLS *v.* GRYLLS, MANN *v.* KENDALL (1869), 18 W. R. 85.

Annotation:—**Mentd.** Shaw *v.* Brown (1881), 44 L. T. 339.

120. —— **Appropriation of payment—Debt due from bank—Common partner.**]—A., B. & C. entered into partnership, as bankers in London, & agreed that neither should engage in any other bank, except for the benefit of the whole. C., however, with the consent of A. & B., entered into the bank of D. & E. at Barton. C. died, when a balance of £6,633 was due to the London house from the Barton house. The London house continued to make advances to the Barton house, under the firm of C. D. & Co., till the balance in their favour amounted to £11,272, which, however, was afterwards reduced, by payments made generally, without any specific appropriation, to £4,304:—*Held:* (1) C. being a partner in both houses, no legal contract could exist between them in his life-time, & no part of the demand which accrued in that time could be recovered, either before or after his death; (2) the payments by the Barton house to the London house, after C.'s death, having been made generally, the latter was entitled to apply them in satisfaction of the debt due at C.'s death, & to recover the money advanced by them since his death.—BOSANQUET *v.* WRAY (1815), 6 Taunt. 597; 2 Marsh. 319; 128 E. R. 1167.

Annotations:—**Distd.** Bosanquet *v.* Woodford (1843), 5 Q. B. 310. **Expld.** Beecham *v.* Smith (1858), E. B. & E. 442. **Refd.** Mills *v.* Fowkes (1839), 5 Bing. N. C. 455. **Mentd.** Chitty *v.* Naish (1834), 2 Dowl. 511.

121. —— **Disability of spiritual persons.**]—*Held:* spiritual persons holding benefices could not legally be parties & members of a joint-stock banking co.—HALL *v.* FRANKLIN (1838), 3 M. & W. 259; 1 Horn & H. 8; 7 L. J. Ex. 110; 2 Jur. 97; 150 E. R. 1141.

Annotation:—**Mentd.** *Re* London & Eastern Banking Corpn., *Ex p.* Longworth's Exors. (1859), John. 465.

122. —— ——.]—In an action by a public officer of a banking co. on a bond given to the co., it appeared that a clergyman in orders was one of the partners of the co., which was contrary to 57 Geo. 3, c. 99, s. 3. The ct. granted a rule *nisi* calling on pltf. to show cause why the verdict should not be entered for deft.—MAUDE *v.* PIGOTT (1838), 2 J. P. 39.

See, now, Pluralities Act, 1838 (c. 106), ss. 1, 29; Trading Partnerships Act, 1841 (c. 14).

123. —— **Father & infant son—Right of father to sue alone.**]—A banking trade was carried on in the name of father & son, in whose joint names the accounts with the customers were headed in the banking books:—*Held:* the father could not sue alone for the balance of an account overdrawn by a customer, without giving distinct proof that the son, though proved to be a minor, had no property in the banking fund, or share in the business as a partner.—TEED *v.* ELWORTHY (1811), 14 East, 210; 104 E. R. 581.

Annotations:—**Mentd.** Wright *v.* Welbie (1819), 1 Chit. 49; Agacio *v.* Forbes (1861), 14 Moo. P. C. C. 160, P. C.

124. Banking company established under 1826 Act—Registered under 1857 Act—Stoppage—Pleading.]—In an action by a banking co., established under 1826 Act & suing as a co. registered under 1857 Act, s. 6, the ct. allowed deft. to plead (*inter alia*) (1) traverse of registration of co.; (2) traverse, that the co. were carrying on business as bankers until registration; (3) that before registration the co. had stopped payment & ceased to carry on business as bankers; (4) *nul tiel* corpn.; but the ct. refused to allow deft. also to plead that before registration the co. had lost their reserve fund & more than one-fourth of their paid-

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sale of the stock. Pltf., the curator of the bank, having sued a director for $33,110, on some of such notes:—*Held:* the notes were given for the purpose of recouping the bank the money which had been unlawfully & without authority employed in the purchase of the shares, & such money & such recoupment, & not merely the price of the shares, which was a purely collateral matter, formed the true consideration as between the bank & the makers of the notes, & pltf. given judgment.—MCMILLAN *v.* STAVERT (1913), 24 O. W. R. 936; 13 D. L. R. 761.—**CAN.**

f. *Loss of charter—On suspension of payment—President still liable to accept process.*]—BROOKE *v.* BANK OF UPPER CANADA (1867), 4 P. R. 162.—**CAN.**

g. *Annulment of charter.*]—The Minister of Justice is the only person who can seek to annul a bank charter on the ground of false pretences.—*Re* BANQUE DE ST. JEAN (1910), 17 R. L. N. S. 428. —**CAN.**

h. ——.]—Art. 978 C. P. confers no obligation upon the A.-G. of Canada to take proceedings to cancel the charter of a bank, when required to do so by a shareholder.—LAPIERRE *v.* BANQUE ST. JEAN (1910), 12 Q. P. R. 169.—**CAN.**

Sect. 7.—Private and joint-stock and chartered banks: Sub-sects. 1 & 2.]

up capital, whereby they ceased to carry on legally the business of bankers.—LIVERPOOL BOROUGH BANK *v.* MELLOR (1858), 3 H. & N. 551; 28 L. J. Ex. 78; 157 E. R. 588.

125. Company of more than six persons—Carrying on business of banking—Contravention of Bank Charter Act, 1844 (c. 32).]—A co., consisting of a large number of persons subscribing small sums, was formed for the purpose of buying land, erecting dwellings thereon, & allotting same to the subscribers. The allotment depended upon the result of a ballot. In connection with this co. there were established a bank for receiving the deposits of small capitalists & working men, upon the security of the property of the co., & as part of the same concern a bank in which the subscribers of the co. might place their savings for purchasing their land from the co.:—*Held:* the scheme was illegal, as being contrary to the above Act. *Qu.:* whether it was contrary to Lottery Acts.—O'CONNOR *v.* BRADSHAW (1850), 5 Exch. 882; 20 L. J. Ex. 26; 16 L. T. O. S. 237; 155 E. R. 386.

126. Power of banking company—To purchase own shares.]—A banking co. which is authorised by its memorandum & articles of assocn. to hold shares in joint-stock cos., & to make advances on the security of such shares, is not thereby empowered to purchase its own shares. Nothing but a direct authority given in plain terms to purchase its own shares can enable a co. to make a valid purchase of them.—*Re* LONDON, HAMBURG & CONTINENTAL EXCHANGE BANK, ZULUETA'S CLAIM (1870), 5 Ch. App. 444; 39 L. J. Ch. 598; 18 W. R. 778, L.J.

Annotations:—**Mentd.** *Re* Marseilles Extension Ry. Co., *Ex p.* Credit Foncier & Mobilier of England (1871), 7 Ch. App. 161, L.JJ.; Parker *v.* Lewis (1873), 28 L. T. 91.

127. —— To use names of trustees in legal proceedings—Authority of solicitor to enter appearance.]—The deed of settlement of a banking co. contained a proviso that, where property was vested in trustees, the ct. of directors should have power to direct any actions or suits to be commenced, prosecuted, or defended, on account of the property of the bank, & to direct the necessary parties to such actions or suits to carry them on or defend them, & that such parties should be indemnified out of the funds of the bank. H., in whom property was vested as one of the trustees of the bank, & who had executed the deed, was made co-deft., with two other trustees, in a suit by persons claiming the property adversely to the bank. The solrs. of the bank entered an appearance for H. without his knowledge:—*Held:* the provision in the deed of settlement operated as an authority to the bank to use the names of their trustees in any action or suit, & the solr. of the bank was entitled to enter an appearance for H., & conduct the defence for him. *Semble:* a trustee, in such circumstances, would be entitled to the costs of independent advice for his own security, if he required it, in putting in an answer or affidavit in the suit.—HEINRICH *v.* SUTTON (1871), 6 Ch. App. 220; 24 L. T. 530; 19 W. R. 515, L.JJ.

Annotations:—**Consd.** Willesford *v.* Watson (1872), 42 L. J. Ch. 90. **Refd.** Laskey *v.* Runtz (1908), 24 T. L. R. 496.

128. —— To pay pension for benefit of deceased officer's family.]—A resolution by a meeting of proprietors of a bank, authorising the directors to pay a half-yearly pension for five years for the benefit of the family of a deceased officer:—*Held: intra vires.*—HENDERSON *v.* BANK OF AUSTRALASIA (1888), 40 Ch. D. 170; 58 L. J. Ch. 197; 59 L. T. 856; 37 W. R. 332; 4 T. L. R. 734.

Annotation:—**Mentd.** *Re* Quebrada Ry. Land & Copper Co. (1889), 40 Ch. D. 363.

See, generally, COMPANIES.

Amalgamation of banks.]—*See* COMPANIES.

SUB-SECT. 2.—PUBLIC OFFICERS.

129. Action against—Member alleging fraud of directors.]—A. filed a bill against the public officer of a joint-stock bank, alleging that he had been induced to purchase five hundred shares in the bank by fraudulent representations made by the directors, in their reports, as to the prosperous state of the co.'s affairs, & praying for a declaration to that effect & that the purchase might be declared void, as between him & the co., & that the latter might repay him his purchase-money:—*Held:* as the litigation was between one member of the partnership as such, & the other members as such, the public officer was improperly made a party to it as representing the co.—SEDDON *v.* CONNELL (1840), 10 Sim. 58; 9 L. J. Ch. 341; 59 E. R. 534.

Annotation:—**Apld.** Harrison *v.* Brown (1852), 5 De G. & Sm. 728.

130. —— Plea of defendant's bankruptcy.]—In an action against the public officer of a banking copartnership, the ct. disallowed a plea of deft.'s bkpcy., on pltf. undertaking not to sue out execution personally against deft., his lands, or goods.—STEWARD *v.* DUNN (1843), 11 M. & W. 63; 2 Dowl. N. S. 742; 12 L. J. Ex. 213; 7 Jur. 178; 152 E. R. 716; *subsequent proceedings* (1844), 12 M. & W. 655.

Annotation:—**Refd.** Smith *v.* Goldsworthy (1843), 12 L. J. Q. B. 192.

See, further, BANKRUPTCY & INSOLVENCY.

131. Action by—Stoppage of payment by bank.]—A banking copartnership, established under 1826 Act, s. 9, began to carry on the trade & business of bankers, & issued notes accordingly, but subsequently stopped payment, & merely kept the establishment open for the purpose of paying their

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PART I. SECT. 7, SUB-SECT. 2.

129 i. *Action against—Pleading.*]—A declaration against the public officer of a banking co., sued as a nominal deft. by virtue of Companies Act, must show a cause of action against the co. It is not enough, even after verdict, that the declaration alleges that deft. is indebted "as such manager, etc."—TURTON *v.* JACKSON, Mac. 877.—N.Z.

129 ii. ——.]—A creditor of a banking co. formed under Banking Act, 1825 (c. 42), after the co. stopped payment, filed a bill on behalf of himself & all other creditors, etc., against one of the public officers, as sole deft. The bill prayed that in pursuance of 38 Geo. 2, c. 14, their demand might be paid out of the society's personal estate, & by the society, if the estate proved insufficient, & an account of the personal estate:—*Held:* deft. sufficiently represented the shareholders, & the prayer for an account of the personal estate of the partnership was sufficient, since the bill stated it was sufficient to pay the debts.—FAWCETT *v.* HODGES (1841), 3 I. Eq. R. 232; Fl. & K. 100; *overd.* O'FLAHERTY *v.* MCDOWELL (1857), 6 H. L. Cas. 142, H. L.—IR.

129 iii. ——.]—A declaration described deft. as "one of the public officers of certain persons united in co-partnership, for the purpose of carrying on the trade & business of bankers in Ireland, according to the statutable enactments in that case made & provided, under the style & firm of the A. & C. Bank of Ireland, & in that behalf duly nominated & appointed as such public officer," etc.:—*Held:* bad, for not stating that the copartnership was then carrying on, or had carried on, the trade & business of bankers.—MAY *v.* HODGES (1843), 5 I. L. R. 584.—IR.

129 iv. —— *Malicious arrest & imprisonment.*]—Banking Act, 1825, has made no change in the general law as affecting an action against a banking co. in the name of their public officer, for malicious arrest & imprisonment, beyond allowing the co. to be sued in the name of the public officer.—REID *v.* MITCHELL (1842), 4 I. L. R. 322.—IR.

131 i. *Action by—Stoppage of payment by bank.*]—In an action brought by the official manager of a joint stock bank against a cashier for a balance in his hands at the time of the stopping of

notes & winding up the affairs of the concern :—*Held :* they still continued to be a banking co-partnership, within the Act, so as to be entitled to sue by their public officer.—DAVIDSON *v.* COOPER (1843), 11 M. & W. 778 ; 12 L. J. Ex. 467 ; *affd.* (1844), 13 M. & W. 343, Ex. Ch.

Annotations :—**Consd.** Roe *v.* Fuller (1852), 7 Exch. 220. **Mentd.** Parry *v.* Nicholson (1845), 2 Dow. & L. 640 ; Hall *v.* Bainbridge (1848), 12 Q. B. 699 ; Agricultural Cattle Insce. *v.* Fitzgerald (1851), 16 Q. B. 432 ; Burchfield *v.* Moore (1854), 3 E. & B. 683 ; Fazakerly *v.* M'Knight (1856), 26 L. J. Q. B. 30 ; Croockewit *v.* Fletcher (1857), 1 H. & N. 893 ; Green *v.* Attenborough (1864), 34 L. J. Ex. 88, Ex. Ch. ; Bank of Hindostan, China & Japan *v.* Smith (1867), 36 L. J. C. P. 241 ; Aldous *v.* Cornwell (1868), L. R. 3 Q. B. 573 ; Hirschmann *v.* Budd (1873), 28 L. T. 602 ; Robinson *v.* Mollett (1875), L. R. 7 H. L. 802, H. L. ; Vance *v.* Lowther (1876), 24 W. R. 372 ; Suffell *v.* Bank of England (1882), 9 Q. B. D. 555, C. A. ; Roots *v.* Williamson (1888), 38 Ch. D. 485 ; Barnes *v.* Richards (1902), 71 L. J. K. B. 341.

132. —— Proper person to sue — Bank suing shareholder.]—A co. of persons, established for the purpose of carrying on the business of bankers under 1826 Act, in an action against a shareholder for the recovery of a debt, or for enforcing any claim or demand due to the copartnership, are bound to sue in the name of one of their public officers, & are not at liberty to sue in the names of the covenantees named in the deed of copartnership.—CHAPMAN *v.* MILVAIN (1850), 5 Exch. 61 ; 1 L. M. & P. 209 ; 19 L. J. Ex. 228 ; 15 L. T. O. S. 7 ; 14 Jur. 251.

Annotations :—**Expld. & Distd.** Beardshaw *v.* Londesborough (1851), 2 L. M. & P. 560. **Apld.** Coe *v.* Wise (1866), 7 B. & S. 831, Ex. Ch. **Refd.** O'Flaherty *v.* McDowell (1857), 6 H. L. Cas. 142, H. L. ; Cobham *v.* Holcombe (1860), 8 C. B. N. S. 815 ; R. *v.* Pritchard (1861), 7 Jur. N. S. 557, C. C. R. **Mentd.** Bell *v.* Fisk (1852), 12 C. B. 493.

133. —— Description—Pleading.]—In an action brought in the name of the public officer of a banking copartnership co., established under 1826 Act, it is not necessary to allege in the declaration that pltf. is a member of the co., that he is resident in England, or that he has been duly registered as required by s. 4 ; it is sufficient to describe pltf. as one of the public officers of the co. duly appointed.—SPILLER *v.* JOHNSON (1840), 6 M. & W. 570 ; 8 Dowl. 368 ; 9 L. J. Ex. 175 ; 4 Jur. 367 ; 151 E. R. 539.

Annotation :—**Refd.** Christie *v.* Peart (1841), 10 L. J. Ex. 195.

134. —— —— ——.]—In an action brought by the public officer of a joint-stock banking co-partnership, established under 1826 Act, it is sufficient to state in the declaration that pltf. is the manager of a joint-stock copartnership established for the purpose of banking, & that he has been duly named & appointed as nominal pltf. on behalf of the copartnership, under the Act, without stating expressly that he has been named as manager, or that the copartnership has been established, under the Act.—CHRISTIE *v.* PEART (1841), 7 M. & W. 491 ; 9 Dowl. 291 ; 10 L. J. Ex. 195 ; 151 E. R. 859.

135. ——————.]—The declaration described pltf. as one of the public officers of certain persons united in copartnership for the purpose of carrying on the trade or business of bankers in England, according to 1826 Act. The declaration contained a count for work & labour done by the copartnership as the bankers of deft., & for commission due in respect thereof :—*Held :* looking at the whole record, it sufficiently appeared that the copartnership were carrying on business as bankers under the Act.—DAVIDSON *v.* BOWER (1842), 4 Man. & G. 626 ; 2 Dowl. N. S. 115 ; 5 Scott, N. R. 538 ; 12 L. J. C. P. 110 ; 6 Jur. 538 ; 134 E. R. 257.

Annotation :—**Mentd.** Ness *v.* Bertram (1849), 4 Exch. 195.

136. —— —— ——.]—A declaration in debt by the public officer of a banking co. described pltf. as "one of the registered public officers for the time being of etc., who now sues as such public officer as aforesaid," etc., & stated that deft. had by the writ been summoned to answer pltf. as such public

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payment by the bank, deft. pleaded that the bank, having stopped payment, had no right of action, & pltf. had no right of action :—*Held :* pltf. entitled to sue, even though he should hold the money on trust after its recovery.—M'DOWELL *v.* O'CONNELL (1857), 9 Ir. Jur. (2 Ir. Jur. N. S.) 463.—**IR.**

132 i. —— *Public officer of English company—Action in Ireland—Pleading.*]—Country Bankers Act, 1826 (analogous to Banking Act, 1825), is a public Act, & s. 10 extends to actions brought in Ireland as well as in England ; & the public officer of an English co. established under that stat. may, as such, bring actions in Ireland for debts due to the co., without specially setting out the stat. in the declaration.—WRIGHT *v.* MURPHY (1841), 4 I. L. R. 258.—**IR.**

133 i. —— *Description—Pleading.*]—A declaration commencing thus : "J. T., one of the public officers of the society or co-partnership called the B. banking co., who sues on behalf of the society according to the stat. in such case made & provided," & in which the causes of action were averred to have accrued, & the promises to have been made, "to pltf.," although the breach was stated to be pltf.'s damage "as such public officer :"—*Held :* bad for not showing that the co. was so constituted as to enable pltf. to sue on its behalf, pursuant to Banking Act, 1825 (c. 42), & the words, "as such public officer," could not be rejected as surplusage, so as to sustain the action as one brought in pltf.'s own right.—THOMPSON *v.* KELLY (1843), 6 I. L. R. 32.—**IR.**

133 ii. ——————.]—A summons & plaint by one of the public officers of the B. bank, who, "as such public officer," sued therein as nominal pltf. on behalf of the banking copartnership, complained that deft. was "indebted to the copartnership" for "money lent by pltf. to deft.," & for "money paid by pltf. for deft., at his request," & pltf. prayed judgment "as such public officer :"—*Held :* bad for alleging the money to have been lent & paid by pltf. in his individual capacity, & not by or on behalf of the banking copartnership.—MURRAY *v.* COMYN (1859), 11 I. C. L. R. 239.—**IR.**

133 iii. ——————.]—A declaration under County Bankers Act, 1826 (c. 46), s. 9, stated that H., "pltf. in this suit, one of the public officers of certain persons carrying on the business of bankers in England, in copartnership, under the name, style, & firm of the Y. Banking Co., according to the form of the stat. in such case made & provided, & who has been & is registered at the Stamp Office, London, pursuant to the stat., to sue & be sued on behalf of the copartnership, & who, as such public officer, duly registered, sues as nominal pltf. on behalf of the copartnership," etc., & concluded, "& thereupon pltf., as such public officer, for & on behalf of the copartnership, by virtue of the stat., brings his suit," etc. :—*Held :* (1) there was no necessity to aver that the public officer had been nominated by the co., registration under the stat. being proof both of nomination & appointment ; (2) the mode of pleading was not altered by 7 & 8 Vict. c. 113.—HOWARD *v.* LOVE (1847), 10 I. L. R. 505.—**IR.**

133 iv. —— *Embarrassing defence.*]—To an action by the official manager of a joint-stock bank against the acceptor of a bill indorsed to the bank, with a count for money lent, deft. pleaded that a previous action was brought "against deft. for the same cause" in the Ct. of Exch., "for the benefit of the bank, by S., a public officer of the bank, which action is still pending." The ct. set aside the defence as embarrassing.—M'DOWELL *v.* DAVYS (1859), 8 I. C. L. R. Ap. xlii.—**IR.**

133 v. —— *Two or more public officers.*]—The privilege of suing in the name of any one of their public officers, given by Banking Act, 1825 (c. 42), s. 10, to banking cos. established pursuant to that Act, does not authorise the institution of a suit in the names of two or more public officers.—THOMSON *v.* BIRNIE (1840), 2 I. L. R. 234.—**IR.**

133 vi. —— ——.]—It is irregular to sue in the names of two public officers of a banking co. ; but the ct. will, even after appearance, amend the writ by striking out the name of one of the public officers.—GRIMSHAW *v.* BOWDEN (1847), 11 I. L. R. 399.—**IR.**

k. *Assent to deed for benefit of creditors—Executed without authority—Binding on bank.*]—A joint-stock banking co. :—*Held :* bound by a trust deed for the benefit of creditors, from the conduct of their public officer & others in assenting to it, though neither the co. nor directors had given any authority to execute it, & the arrangement was an improvident one for them.—DUDGEON *v.* O'CONNELL (1849), 12 I. Eq. R. 566.—**IR.**

m. *Promissory note made to — Outlawry of officer—Note indorsed to official manager—Right of indorsee to sue.*]—A promissory note was made to S., the public officer of a joint-stock bank, as such public officer, & for a debt due to the bank. S. was outlawed upon an indictment for misdemeanour, & after the outlawry, & while it was in force, he indorsed the note to M., the official manager of the bank, under Winding-up Acts :—*Held :* M. had no title to sue upon the note.—M'DOWELL *v.* BERGIN (1861), 12 I. C. L. R. 391.—**IR.**

Sect. 7.—Private and joint-stock and chartered banks: Sub-sects. 2 & 3.]

officer :—*Held :* it sufficiently showed pltf. to have been the public officer at the time of the commencement of the action.

The declaration recited 1826 Act as "an Act of Parliament made & passed in the 7th year of the reign etc., for (amongst other things) the better regulating copartnerships of bankers in England": —*Held :* a sufficient recital of the Act.—ESDAILE *v.* MACLEAN (1846), 15 M. & W. 277 ; 16 L. J. Ex. 71 ; 153 E. R. 854.

Annotations :—**Mentd.** Clark *v.* Woods (1848), 2 Exch. 395 ; Miller *v.* Hay (1848), 3 Exch. 14.

137. —— Denial of existence of bank at commencement of suit.]—In an action by the public officer of a banking copartnership, the ct. allowed a plea which denied that the copartnership were, at the commencement of the action, carrying on the trade & business of bankers, in addition to pleas of the general issue, & of accord & satisfaction.—ROE *v.* FULLER (1852), 7 Exch. 220 ; 21 L. J. Ex. 104 ; 18 L. T. O. S. 260 ; 155 E. R. 924.

138. —— Liable to answer interrogatories.]—*Held :* under C. L. P. Act, 1854 (c. 125), s. 51, interrogatories might be administered to the public officer suing on behalf of a banking co., carrying on business in copartnership, under 1826 Act.—M'KEWAN *v.* ROLT (1859), 4 H. & N. 738 ; 28 L. J. Ex. 380 ; 33 L. T. O. S. 240 ; 5 Jur. N. S. 714 ; 7 W. R. 601 ; 157 E. R. 1032.

See, generally, DISCOVERY, INSPECTION, & INTERROGATORIES.

139. —— Against directors — Losses and unauthorised speculations—Bank ceasing to carry on business—Parties.]—A joint-stock banking co., subsisting under 1826 Act, having become insolvent, & ceased to carry on business, the public officer instituted a suit, charging certain of the directors, as defts., with losses during the time when the business was carried on, by reason of unauthorised speculations in shipping & collieries, & of a fraudulent transaction by a deed of arrangement with a debtor to the co., who was also made deft., & praying relief in respect of all the matters, & particularly to have the deed set aside :—*Held :* (1) the suit was properly instituted by the public officer, although the co. had ceased to carry on business, & it was not necessary to make the directors & trustees, who were not charged with the improper transactions & fraud, parties ; (2) it appearing that the manager was mixed up in the transactions, it was necessary to make him a party.—HARRISON *v.* BROWN (1852), 5 De G. & Sm. 728 ; 64 E. R. 1318.

140. —— Removal of officer—Judgment entered & execution issued in name of successor.]—A *cognovit* having been given in an action brought by the public officer of a banking co., under 1826 Act, by which it was provided that, upon default in payment of a sum of money, pltf. should be at liberty to enter up judgment, & issue execution :—*Held :* sufficient to authorise signing judgment in the name of another public officer, upon a suggestion of the removal of original pltf. being entered.

In an action brought by such public officer, judgment having been entered, & execution issued in his name, after he had ceased to be such officer, the ct. permitted a suggestion of his removal & the name of another officer to be entered *nunc pro tunc* upon the roll, & the judgment of *ca. sa.* to be amended by the insertion of the fresh officer's name without costs, though the party had been arrested, & had applied to set aside the proceedings for irregularity.—WEBB *v.* TAYLOR (1843), 13 L. J. Q. B. 24 ; 2 L. T. O. S. 106 ; 8 Jur. 39.

141. —— Death after issue of writ of ca. sa.—Abatement of action.]—The public officer of a banking co., who was pltf. in an action, died after the issuing of a writ of *ca. sa.*, but before its execution :—*Held :* it was not necessary to bring a *sci. fa.* ; & deft. was not entitled to be discharged on the ground that the action had abated. *Semble :* if there was no registered officer of the co. after the death of pltf., deft. might apply to the ct. to have one appointed in order to give deft. a discharge.—TODD *v.* WRIGHT (1847), 16 L. J. Q. B. 311 ; 11 Jur. 471.

142. —— Death after issue joined — No formal suggestion of death.]—A. sued as public officer of a banking co. under 1826 Act, & 1857 Act, but died after issue joined. The *Nisi Prius* record was made up from the plea-roll, as though A. was alive. The *venire* had been awarded accordingly as between A. & defts., & no entry was made on the plea-roll of the death of A., or of the appointment of another public officer. After the *Nisi Prius* record was so made up, a memorandum was entered upon it, stating the fact of the death of A., & that B., another public officer of the copartnership, had been appointed to continue the proceedings, but this was not stated by way of suggestion to the ct., nor was it followed by any statement of confession by defts., or a *nient dedire :* &, after such entry had been made, the cause was entered for trial as "B. *v.* (Defts.)," & was tried by the jury returned on the *venire* in the cause of "A. *v.* (Defts.)." Three defts. appeared at the trial, under protest, the fourth had suffered judgment by default, & a verdict was found for pltf. :—*Held :* the entry so made upon the *Nisi Prius* record was irregular, & did not authorise the trial in the name of B. as pltf. *Qu. :* whether a formal suggestion of the death of A. would have been traversable.—BARNEWALL *v.* SUTHERLAND (1850), 9 C. B. 380 ; 1 L. M. & P. 159 ; 19 L. J. C. P. 290 ; 15 L. T. O. S. 7 ; 14 Jur. 720 ; 137 E. R. 940.

Annotations :—**Mentd** Paterson *v.* Ironside (1850), 14 Jur. 722, n. ; Pell *v.* Linnell (1868), L. R. 3 C. P. 441.

143. Enforcing judgment against — Execution — Sci. fa.]—Where pltf. obtains judgment against the public officer of a joint-stock banking copartnership, pursuant to 1826 Act, s. 9, he may issue execution against deft. without first suing out a *sci. fa.*—HARWOOD *v.* LAW (1840), 7 M. & W. 203 ; 8 Dowl. 899 ; H. & W. 57 ; 10 L. J. Ex. 30 ; 4 Jur. 1137 ; 151 E. R. 739.

Annotations :—**Refd.** Myers *v.* Rawson (1860), 5 H. & N. 99. **Mentd.** Ransford *v.* Bosanquet (1842), 12 Ad. & El. 813, Ex. Ch. ; Dodgson *v.* Scott (1848), 2 Exch. 457 ; Bank of England *v.* Johnson (1849), 3 Exch. 598.

144. Evidence — Proof of appointment — Stamp office returns.]—To entitle a banking co. to sue by its public officer pursuant to 1826 Act, it is sufficient if, in the return made to the Stamp Office, he be described as A. B. Esq. of, etc., a "public officer" of the copartnership ; at least in the absence of proof that he had any specific office, it will not be presumed that he was more than an officer appointed for the purpose of suing & being sued. The right of such co. to sue by its public officer is not defeated if it appear that, in the return to the Stamp Office, the places of abode of one or more partners are omitted, there being no evidence that the return varies in this respect from the co.'s books. If such proof were given :—*Semble :* the return, if correct as to the public officers, would still be sufficient to maintain the action.—ARMITAGE *v.* HAMER (1832), 3 B. & Ad. 793 ; 1 L. J. K. B. 217 ; 110 E. R. 291.

Annotation :—**Mentd.** Wills *v.* Murray (1850), 4 Exch. 843.

145. —— —— ——.]—In an action brought by a public officer on behalf of a banking co., the return to the Stamp Office is not the only admissible evidence of his being one of the public officers, but it may be proved *aliunde.*—EDWARDS *v.* BUCHANAN (1832), 3 B. & Ad. 788 ; 1 L. J. K. B. 217 ; 110 E. R. 288.

Annotations :—**Refd.** Steward *v.* Dunn (1844), 12 M. & W. 655. **Mentd.** Fletcher *v.* Crosbie (1841), 11 L. J. Ex. 16 ; R. *v.* Carter (1844), 1 Car. & Kir. 741.

146. —— Continuation of office—Presumption in absence of contrary evidence.]—The office of public registered officer of a banking copartnership not being an annual office, a person once appointed to such an office is presumed to continue in it until the contrary be shown ; & a return made to the Stamp Office in Mar., 1841, verified by affidavit, stating a person to be a public officer of the co. :—*Held :* evidence of his being so in Nov., 1842.—STEWARD *v.* DUNN (1844), 12 M. & W. 655 ; 1 Dow. & L. 642 ; 13 L. J. Ex. 324 ; 2 L. T. O. S. 423 ; 8 Jur. 218 ; 152 E. R. 1361.

Annotations :—**Consd.** Powles *v.* Page (1846), 3 C. B. 16. **Refd.** Harvey *v.* Scott (1847), 11 Q. B. 92 ; *Re* Fenwick, *Ex p.* Brown (1849), 13 L. T. O. S. 468.

147. —— Lists of proprietors filed at Stamp Office after expiration of time fixed by statute.]—In a *sci. fa.* against proprietors, on a judgment against a public officer, of a banking co., under 1826 Act :—*Held :* lists of the proprietors filed at the Stamp Office, but not within the time limited by the Act, were not receivable in evidence as against pltf., to show that at a given time the garnishees were not proprietors.—PRESCOTT *v.* BUFFERY (1845), 1 C. B. 41 ; 135 E. R. 450.

148. Bankruptcy—Suing out fiat—Against member of bank—Form of affidavit.]—*Held :* 1826 Act & Joint Stock Banks Act, 1838 (c. 96), were to be taken together, & the public officer of a banking co. was authorised to sue out a fiat in bkpcy., against one of the members of the co.

The affidavit of a public officer stated " that he was a registered officer, duly authorised to sue on behalf of the co., united for the purpose of carrying on business, pursuant to the Act of Parliament," without stating that he was duly nominated, or that the co. were then actually carrying on business : —*Held :* this was a sufficient allegation in the affidavit of the officer's authority, & the co. were then in fact carrying on business.—*Re* HALL, *Ex p.* HALL (1838), 3 Deac. 405 ; 1 Mont. & Ch. 365 ; 8 L. J. Bcy. 5 ; *subsequent proceedings* (1839), 8 L. J. Bcy. 57.

Annotations :—**Mentd.** *Re* Caldecott, *Ex p.* Davidson (1841), 1 Mont. D & De G. 648 ; *Re* Saunders, *Ex p.* Treherne (1860), 30 L. J. Bcy. 6, L.JJ.

149. —— Proving in—Averment of authority.]—Proof of debt by a public officer of a banking co. must aver that he is authorised to make the proof. —*Re* DOBBS, *Ex p.* COUNTY OF GLOUCESTER BANK (1866), 15 L. T. 53.

See, further, BANKRUPTCY & INSOLVENCY.

150. Action by manager—Not being public officer —Pleading.]—Pltf. sued as the payee of a note made payable on demand to " the Manager of the National Provincial Bank of England," but did not sue as public officer :—*Held :* (1) upon proof that he was in fact the manager & that a demand had been duly made on behalf of the bank, pltf. was entitled to recover ; (2) in the absence of a plea that the bank was established under 1826 Act, & that pltf. was not the public officer, it was not necessary for pltf. to show that he was, nor competent to deft. to show that he was not such public officer.—ROBERTSON *v.* SHEWARD (1840), 1 Man. & G. 511 ; 1 Scott, N. R. 419 ; 133 E. R. 434.

151. Warrant of attorney given to trustees of bank —Judgment entered in name of public officer—Debt due to copartnership.]—Where a warrant of attorney is given to three trustees of a joint-stock bank, to secure a debt due to the copartnership, the judgment thereon is properly entered up in the name of the public officer for the time being.—BELL *v.* FISK (1852), 12 C. B. 493 ; 138 E. R. 999.

152. Amalgamation of banks—Guarantee given before—Right of public officer to sue.]—In 1833, a joint-stock bank was established under 1826 Act, by the name of M. & H. District Banking Co. In 1836 A. & Co., bankers, relinquished their business in favour of, & all took shares in, the co., & it was subsequently agreed that the title of the bank should thenceforth be W. R. Union Banking Co., that the capital should be increased by the creation of new shares, & that additional directors should be appointed :—*Held :* the public officer of W. R. Union Banking Co. might, notwithstanding the change of name, & the accession of new proprietors, maintain an action on a guarantee given to M. & H. District Banking Co., before their junction with A. & Co., for advances made by them.—WILSON *v.* CRAVEN (1841), 8 M. & W. 584 ; 10 L. J. Ex. 448 ; 151 E. R. 1171.

153. Public officer within jurisdiction—Liability of shareholders to be sued—Debt due from copartnership.]—The creditor of a banking copartnership, established & carrying on business under 1826 Act, cannot sue an individual member of the co. for his debts, but must proceed against the public officer, pursuant to s. 9, at least, where it appears that there is a public officer, & that he is within the jurisdiction.

A plea to an action against an individual member of the co. stated that the causes of action accrued against a certain banking copartnership established under the above Act, & not otherwise, of which copartnership deft. was a member, that the causes of action accrued against deft. as such member & not otherwise, that B. & D. had been duly appointed, & registered pursuant to the Act, as public officers of the copartnership, to sue & be sued on behalf of same, & that such persons, so being, & being duly nominated & appointed & registered as such public officers, at the time of the commencement of the suit, were living & resident in England, & within the jurisdiction of the ct. :—*Held :* (1) a good answer to the action ; (2) the plea, taking it altogether, sufficiently alleged that the two persons therein mentioned actually were public officers of the co.—STEWARD *v.* GREAVES (1842), 10 M. & W. 711 ; 2 Dowl. N. S. 485 ; 12 L. J. Ex. 109 ; 6 Jur. 1116 ; 152 E. R. 658.

Annotations :—**Consd.** Davison *v.* Farmer (1851), 6 Exch. 242 ; O'Flaherty *v.* McDowell (1857), 6 H. L. Cas. 142, H. L. **Refd.** Smith *v.* Goldsworthy (1843), 4 Q. B. 430. **Mentd.** Beech *v.* Eyre (1843), 5 Man. & G. 415 ; R. *v.* Carter (1845), 1 Den. 65 ; Bank of England *v.* Johnson (1849), 18 L. J. Ex. 238 ; Chapman *v.* Milvain (1850), 5 Exch. 61 ; Beardshaw *v.* Londesborough (1851), 11 C. B. 498 ; Reddish *v.* Pinnock (1854), 10 Exch. 213 ; Fell *v.* Burchett (1857), 7 E. & B. 537 ; *Re* London & Eastern Banking Corpn. (1858), 2 De G. & J. 484, L.C.

SUB-SECT. 3.—DIRECTORS.

See, generally, COMPANIES.

154. Misrepresentation in report—No knowledge of falsity.]—The directors of a joint-stock banking co.

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146 i. *Evidence—Continuation of office — Presumption in absence of contrary evidence.*] — When a party has been appointed the public officer of a banking copartnership, pursuant to Banking Act, 1825 (c. 42), & has acted as such after the certificate of his appointment is out of force, & when it appears that no other appointment has been registered according to the Act, the ct. will consider that there is sufficient evidence to go to a jury of his continuance as such public officer.—DURAND *v.* POTTER (1841), 1 Leg. Rep. 224 ; Long. & T. 253.—**IR.**

PART I. SECT. 7, SUB-SECT. 3.

n. *Authorising manager to accept bill of exchange per pro. — Quorum.*] — Action against the acceptor of a bill of exchange, purporting to be accepted " *per pro,* the T. joint stock bank, K., manager." The judge told the jury that if they believed that K., as manager of the bank, signed the bill by direction of S., & that S. was a director at the time, the acceptance was binding on the

Sect. 7.—Private and joint-stock and chartered banks: Sub-sect. 3.]

published a report, representing the flourishing state of the bank, which was calculated to induce parties to purchase shares. The representation was false, but not false within the knowledge of the directors, who published it without any intention to deceive:—*Held:* they were not liable for loss sustained by the purchase & retention of shares on the faith of the report, though the jury found them guilty of gross negligence in publishing it.—TAYLOR *v.* ASHTON (1843), 11 M. & W. 401; 12 L. J. Ex. 363; 7 Jur. 978; 152 E. R. 860.

Annotations:—**Consd.** Derry *v.* Peek (1889), 14 App. Cas. 337, H. L. **Mentd.** Gerhard *v.* Bates (1853), 2 E. & B. 476; Denton *v.* G. N. Ry. Co. (1856), 5 E. & B. 860; Eastwood *v.* Bain (1858), 28 L. J. Ex. 74; Higgins *v.* Samels (1862), 2 John. & H. 460; *Re* Agra & Masterman's Bank, *Ex p.* Asiatic Banking Corpn. (1867), 16 L. T. 162, L.JJ.; Joliffe *v.* Baker (1883), 11 Q. B. D. 255; Ryan *v.* Oceanic Steam Navigation Co., O'Connell *v.* Same, Scanlon *v.* Same, O'Brien *v.* Same, [1914] 3 K. B. 731, C. A.

155. Incomplete number of—Compromise of debt—Whether company bound.]—The deed of a joint-stock banking co. contained provisions that the directors should be not fewer than five nor more than seven, that three or more should constitute a board, & be competent to transact all ordinary business, & that the directors should have power to compromise debts, etc. Agents might be appointed by the directors to draw & accept bills, etc., without reference to the directors. The number of directors became less than five; four directors, being the whole number then existing, executed a deed compromising a large debt due to the bank, taking from debtor a mining concern, & covenanting with him on behalf of the co. to indemnify him against certain bills of exchange. In an action of covenant by debtor for not indemnifying him:—*Held:* such covenant did not bind the co., for this was not ordinary business, & no smaller number than five directors was competent under the deed to transact it. *Qu.:* whether a board of three directors could transact even ordinary business unless it was a board of three out of five directors.—KIRK *v.* BELL (1851), 16 Q. B. 290; 117 E. R. 890.

Annotations:—**Dbtd.** Forbes *v.* Marshall (1855), 25 L. T. O. S. 147. I am not satisfied with & cannot concur in *Kirk* v. *Bell* (MARTIN, B.). **Consd.** *Re* Alma Spinning Co. (1880), 16 Ch. D. 681. **Distd.** York Tram. Co. *v.* Willows (1882), 8

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bank:—*Held:* having regard to the fact that the bill was accepted *per pro.* & that the deed of partnership required three directors to form a ct., & empowered the ct. of directors to make regulations respecting the accepting of bills, the direction was wrong.—EYRE *v.* M'DOWELL (1863), 14 I. C. L. R. 314; 8 Ir. Jur. N. S. 383.—**IR.**

o. *Cancellation of bond.*]—A bond may be given up to be cancelled by the president & directors of a banking corpn., without the appointment of an attorney.—BANK OF UPPER CANADA *v.* WIDMER (1831), 2 O. S. 222.—**CAN.**

q. *Election of—Right of president to vote.*]—The president of the Bank of Upper Canada, not being an officer of the bank within 6 Vict. c. 27, s. 16, may vote by proxy at the annual election of directors.—R. *v.* BANK OF UPPER CANADA (1849), 5 U. C. R. 338.—**CAN.**

s. —— *Enquiry into by court.*]—The Superior Ct., or a judge in vacation, has the power to inquire, on petitions presented for that purpose, into the validity of the election of a bank director, inasmuch as an incorporated bank must be considered as a public corpn.—HENRY *v.* SIMARD (1866), 16 L. C. R. 273.—**CAN.**

t. *Engaging in usurious transactions—Individual liability.*]—The directors & manager of an incorporated bank are liable individually to make good any loss accruing to the bank by their infringing the stat. against usury.—DRAKE *v.* BANK OF TORONTO (1862), 9 Gr. 116.—**CAN.**

v. *Fraudulent sale of shares—Absence of quorum.*]—The deed of a banking co. provided that three directors were necessary to constitute a "Ct. of Directors," & that such of the original shares as had not been subscribed for might be sold by the "Ct. of Directors," but that the purchaser of them should not be considered as their proprietor until he had paid for them. Three directors were appointed. One having died, & another ceased to act, S. alone remained director. He ordered a large number of unappropriated shares to be entered in the name of F., a nominal party, & having circulated false balance sheets of the bank, sold them to G. & others as original shares on which dividends had been paid, the transfer deeds from F. being signed by S. & two others, not directors:—*Held:* (1) the issuing of the shares by S. was *ultra vires* & void; (2) in any case the contract was vitiated by the fraud.—*Re* GINGER (1856), 8 Ir. Jur. 373.—**IR.**

w. *Liability for neglect of duty—Improper advances—Pleading.*]—Relevant allegations in an action against directors of a banking co. for negligence in allowing the whole management to fall into the hands of a manager who had made improper advances, & for fraudulent concealment of losses leading to dissolution of the co., or alternatively for gross negligence in failing to ascertain & disclose such losses.—WESTERN BANK *v.* BAIRDS (1862), 24 Dunl. (Ct. of Sess.) 859.—**SCOT.**

x. —— —— *Shareholder acting as director.*]—By the contract of copartnery of a joint-stock banking co. it was declared that no shareholder could be legally a director who resided more than ten miles distant from the head office, & that a director ceased to be one if he had not attended a meeting of directors for six months. In an action by the bank against a shareholder, who had been elected & occasionally acted as a director, for loss said to have been caused by his gross negligence:—*Held:* defender, having assumed the position of a director, & acted as such, could not plead these clauses of the contract in bar of the action.

In an action by a joint stock banking co. against a director, pursuer alleged that defender had grossly neglected his duty in having permitted improper advances to be made by the manager:—*Held:* (1) with regard to alleged losses by advances on accounts-current, closed at the time when defender ceased to be a director, pursuer had set forth a case sufficiently relevant to be admitted to probation; (2) defender could not be made liable for losses on advances on accounts-current to those persons to whom the bank had continued to make advances after he had left office; (3) any liability, which defender might have incurred in allowing advances by way of discounts on bills, had been extinguished by the subsequent actings of the bank in renewing the bills & in making new advances; (4) any liability for losses by certain insurance policies had been extinguished by the sale of the policies by the bank, without notice to defender.—WESTERN BANK OF SCOTLAND *v.* BAIRD'S TRUSTEE (1872), 11 Macph. (Ct. of Sess.) 96.—**SCOT.**

y. *Making false return—Evidence.*]—The president of a bank was tried for having wilfully made a false & deceptive return to the Govt. respecting the affairs of the bank. On the trial, other returns, made both before & after that in respect to which the indictment was laid, were received in evidence without the jury having been cautioned:—*Held:* there must be a new trial.—R. *v.* LOVITT (1907), 2 E. L. R. 384; 41 N. S. R. 240.—**CAN.**

154 i. *Misrepresentation in report—No knowledge of falsity.*]—Pltf. sued deft. as director of a bank, alleging that in a report made to the shareholders, & a statement accompanying it, deft. falsely & fraudulently misrepresented the condition of the bank, thereby inducing pltf. to believe it sound & to purchase stock:—*Held:* (1) there was no evidence of false statements knowingly made by deft. with a fraudulent intent; (2) the report was not a representation within C. S. U. C. c. 44, s. 10, so as to require it to be signed by deft.; (3) if the statements were false & fraudulent, deft. would be liable, although they were made to the stockholders, for they were intended & used for public information.—PARKER *v.* MCQUESTEN (1872), 32 U. C. R. 273.—**CAN.**

154 ii. —— *Pleading.*]—Action against bank directors to compel them to relieve pltf. of the loss & damage he had sustained from having purchased stock of the co., on the ground that he had been deceived by false & fraudulent representations & reports of the directors as to the solvency of the bank. Circumstances in which averments as to particular debts set forth by the directors in their reports, etc., as being good, whereas they must have known they were bad, were held defective from want of specification, & a new record ordered to be prepared.—INGLIS *v.* DOUGLAS (1860), 32 Sc. Jur. 450.—**SCOT.**

z. *Notice to one director—Whether notice to bank.*]—Notice to one director of a bank is notice to all & through them to the members constituting the bank.—BROWN *v.* NORTON (BANK OF AUSTRALIA, CHAIRMAN) (1845), Res. & Eq. Jud. 43.—**AUS.**

a. —— —— *Compromise of prosecution.*]—A cheque was given as a compromise of a criminal prosecution brought against deft. & six other bank directors:—*Held:* the bank had no knowledge of the compromise, as the personal knowledge of the president could not be opposed to the bank, & the bank was not bound by the acts of the president in his individual capacity, & had no cognisance of the pretended compromise at the time the money was paid.—BANK OF MONTREAL *v.* RANKIN (1881), 4 L. N. 302.—**CAN.**

b. —— —— *Prior unregistered deed—Fraudulent concealment.*]—Notice, to one of the directors of a bank, of a prior unregistered deed, is not notice to the board of directors so as to bind the shareholders where such director has not communicated his knowledge, & the existence of the prior unregistered deed has been fraudulently concealed, the director being himself a party to the fraud.—*Re* BURMESTER (1859), 9 I. Ch. R. 41; Drury *temp.* Nap. 559.—**IR.**

Q. B. D. 685, C. A. **Refd.** New Sombrero Phosphate Co. *v.* Erlanger (1877), 5 Ch. D. 73, C. A.; *Re* Bank of Syria, [1900] 2 Ch. 272. **Mentd.** Halifax Sugar Refining Co. *v.* Francklyn (1890), 59 L. J. Ch. 591.

156. Borrowing money—Discontinuance of bank—Liability of bank to repay loan.]—By a deed of settlement, a joint-stock banking co. was established as a bank of issue & deposit at Sydney, in New South Wales. The deed contained clauses conferring powers upon the directors "for the better management of the concerns of the co., etc.," whereby it was declared that they should have, & be expressly invested with, "full power & authority to superintend, order, conduct, regulate, & manage all & singular the affairs & business of the co., to the best of their discretion & judgment, under & subject to the provisions thereafter contained." Such board of directors were further empowered to "devise & make such provisions, rules, orders & regulations, touching the government, carrying on, & management of the affairs of the co., same not being repugnant to the general rules & regulations therein contained, as they should think expedient." In 1843, the banking co. became involved in pecuniary difficulties, whereupon the directors at Sydney applied to the A. Bank for a loan, & borrowed from that bank, at various times, the sum of £154,000, for which the directors gave their promissory note. Upon the negotiation of this loan, the directors of the banking co. entered into an agreement with the A. Bank, whereby they stipulated that the banking co. should cease to be a bank of issue, deposit & discount, & should become a loan co., & that no transfer of shares or stock should be made without the consent of the A. Bank; they also agreed to wind up & get in their capital as a loan co. Payment of the note for £154,000 was refused by the shareholders of the banking co., on the ground that the stipulations contained in the agreement were *ultra vires* the directors. In an action brought by the A. Bank on the promissory note against the chairman of the banking co.:—*Held:* (1) the directors of the banking co. had the powers of managing partners in an ordinary banking partnership, &, amongst these, was the power of borrowing money for the purpose of discharging the existing liabilities of the co. till the assets should be realised, & of discontinuing the co. if they thought such conduct essential to the interests of the shareholders; (2) the circumstances of the engagements of the directors to repay the loan being accompanied by other stipulations, some of which were *ultra vires*, did not discharge the co. from liability to repay the loan, as the only effect of those stipulations was that they could not be enforced.—BANK OF AUSTRALASIA *v.* BREILLAT (1847), 6 Moo. P. C. C. 152; 13 E. R. 642, P. C.

Annotations:—**Refd.** Bute *v.* Mason (1849), 7 Moo. P. C. C. 1, P. C.; Lindus *v.* Melrose (1858), 3 H. & N. 177, Ex. Ch. **Mentd.** Maclae *v.* Sutherland (1854), 3 E. & B. 1.

157. —— From company—Company's lien on borrower's shares sufficient security.]—Clause 15 of the arts. of assocn. of a limited banking co. provided that the co. should have a paramount lien on all the shares held by any shareholder for all his debts to the co., & empowered the directors, in case of non-payment of any such debt, or in the event of the bkpcy. of the shareholder, to sell his shares, & apply the proceeds in discharge of his debt. Clause 98 empowered the directors to lend the funds of the co., or give credit, with or without security, & provided that no advances without security should be made or credit given to any director:—*Held:* the lien given by clause 15 was a security within clause 98, & a loan might be made to a director without any other security than the lien, if the board considered his shares to be of sufficient value.—*Re* NATIONAL BANK OF WALES, LTD., [1899] 2 Ch. 629; 68 L. J. Ch. 634; 81 L. T. 363; 48 W. R. 99; 15 T. L. R. 517; 43 Sol. Jo. 705, C. A.; *affd. sub nom.* DOVEY *v.* CORY, [1901] A. C. 477, H. L.

Annotations:—**Mentd.** Merchants' Fire Office *v.* Armstrong (1901), 17 T. L. R. 709, C. A.; Bond *v.* Barrow Hæmatite Steel Co., [1902] 1 Ch. 353; Schulze *v.* Bensted (1915), 7 Tax Cas. 30; Ammonia Soda Co. *v.* Chamberlain, [1918] 1 Ch. 266, C. A.

158. Promissory notes—Deed of settlement—Liability of shareholders.]—The directors of an unincorporated & unregistered joint-stock banking co., called the R. Bank of A., made & issued promissory notes in the following form:—"We, directors of the R. Bank of A., for ourselves & the other shareholders of the co., jointly & severally promise to pay" . . . "for value received on account of the co." (Signed) "A. Chairman, B. & C. Directors":—*Held:* assuming that the parties signing were authorised to sign promissory notes on account of the partnership, this form of note showed sufficiently an intention to bind the partnership jointly, & though the attempt to bind the shareholders severally was *ultra vires*, & void, yet the shareholders were bound jointly.

An action was brought on the notes; they were at five years' date; & attached to each were coupons for half-yearly interest at the rate of 5 per cent. till the principal sum would become due. They were issued through a broker, employed by the directors; & pltfs. paid him the full value. In the advice notes from the broker to pltfs. the transaction was called a sale of debentures. The money thus raised was employed as capital, in starting branches of the bank abroad. The deed of the co. authorised the establishment of branches of the bank in all places east of the Cape of Good Hope, & gave very full powers to the directors to manage the whole concern:—*Held:* the deed authorised the directors to issue notes, & borrow money, as they had done, for the purpose of starting the branches.—MACLAE *v.* SUTHERLAND (1854), 3 E. & B. 1; 23 L. J. Q. B. 229; 22 L. T. O. S. 254; 18 Jur. 942; 2 W. R. 161; 2 C. L. R. 1320; 118 E. R. 1038.

Annotations:—**Distd.** Lindus *v.* Melrose (1858), 3 H. & N. 177, Ex. Ch. **Refd.** *Re* Joint-Stock Cos. Winding-up Acts, 1848 & 1849, & Royal Bank of Australia, *Ex p.* Walker (1854), 23 L. T. O. S. 74 **Mentd.** Gardner *v.* Walsh (1855), 1 Jur. N. S. 828; *Re* Boyd, *Ex p.* Wryghte (1856), 26 L. J. Bcy. 33; Lindus *v.* Melrose (1857), 2 H. & N. 293.

159. *S. P. Re* JOINT-STOCK COMPANIES WINDING-UP ACTS, 1848 & 1849, AND ROYAL BANK OF AUSTRALIA, *Ex p.* WALKER (1854), 23 L. T. O. S. 74; 2 W. R. 383.

160. —— —— ——.]—The directors of a joint-stock bank issued instruments in the following form: "U. Bank Post Bill.—At sixty days after sight of this our first bill of exchange (second & third of the same tenor & date not paid), We promise to pay on account of the proprietors of the U. Bank of C., to the order of L. & Co., the sum of co.'s rupees, ten thousand. Value received (Signed) R., G., directors." By their deed of settlement the business of the co. was to consist in issuing promissory notes, payable to bearer on demand, for any sum not less than eight co.'s rupees, & not exceeding one thousand, & bills of exchange payable at such time after date or sight as the directors should fix, to parties who should require same & deposit the amount of such bills in the bank, & in all other branches of business usually transacted by bankers in C. It was also provided that no promissory notes or bills of exchange should be issued otherwise than of the description & in the manner above mentioned. In an action by an indorsee of the above instrument against a shareholder in the bank:—*Held:* (1) the directors had power to bind the shareholders by issuing instruments of that description; (2) they were in a form which bound

Sect. 7.—Private and joint-stock and chartered banks: Sub-sect. 3.]

the shareholders; (3) they were substantially made in the name of the partnership firm.—FORBES *v.* MARSHALL (1855), 11 Exch. 166; 24 L. J. Ex. 305; 25 L. T. O. S. 147; 3 W. R. 480; 3 C. L. R. 933; 156 E. R. 788.

Annotation:—**Apld.** Gordon *v.* Sea, Fire & Life Assce. Soc. (1857), 26 L. J. Ex. 202.

161. Agreement as to remuneration of officer—Deed of settlement.]—The governing body of a joint-stock co. have no right to do acts out of the common routine of the co.'s business except such as they are authorised by their deed of settlement to do.

Where, in pursuance of a prior contract, the directors of a co. by deed agree to give to a general manager a remuneration which may by possibility be payable after the cessation of the concern, such instrument is not only proper but valid, under the deed of settlement, where it gives the directors power to pay & allow to the general manager, etc., such remuneration as they shall think proper, & to confirm all acts done by persons acting as directors in the formation of the co. A sum of money secured annually for a fixed number of years to an officer of a joint-stock banking co., which may exceed in time the duration of the co., is not in the nature of a superannuation allowance.—WILKINS *v.* ROEBUCK (1858), 6 W. R. 644.

162. Undertaking to pay money to bank—Joint & several liability—Material alteration of document—Discharge of director.]—Several directors of a banking co., amongst whom was deft., signed a document whereby they severally undertook to pay a sum of money to the bank, the intention, however, being that they should only be bound each for a proportion thereof. The deft. & some others paid their proportion, & the secretary then struck out their names without the knowledge of deft., being under the impression that the legal effect of the document was what had been intended. An action was brought against deft. on this document to cover the whole amount secured:—*Held:* the document was in the custody of the bank as distinguished from the individual directors, & the above material alteration discharged deft.—BANK OF HINDOSTAN, CHINA, & JAPAN *v.* SMITH (1867), 36 L. J. C. P. 241; 16 L. T. 518.

See, generally, GUARANTEE.

163. Continuance of business at loss—With assent of shareholders.]—The deed of settlement of a banking co. provided that if at any time the losses of the co. should have exhausted the whole of the surplus fund, & also one-fourth of the paid-up capital of the co., the directors should, as soon as possible, call a special general meeting of the proprietors, & submit to it a full statement of the affairs of the co., & if it should appear at such meeting that the losses of the co. had exhausted the surplus fund & also one-fourth of the paid-up capital, the co. was to be dissolved. Losses having been incurred to the extent of more than one-fourth of the paid-up capital, a special meeting was called in 1842, at which it was resolved that the co. should go on, & from that time till 1863 the co. continued to be carried on, the directors issuing favourable balance-sheets & declaring dividends. Further capital was lost, but no meeting was called again, & when the co. was wound up, in 1863, the debts very considerably exceeded the assets. Upon a bill filed by the official liquidator, seeking to make the directors liable for the losses subsequently incurred:—*Held:* as the shareholders were aware of the position of affairs when it was resolved to continue the bank, the directors were not liable for not calling another meeting & stopping the concern.—TURQUAND *v.* MARSHALL (1869), 4 Ch. App. 376; 38 L. J. Ch. 639; 20 L. T. 766; 33 J. P. 708, L.C.

Annotations:—**Expld.** Overend & Gurney Co. *v.* Gibb (1872), L. R. 5 H. L. 480, H. L. **Refd.** Parker *v.* Lewis (1873), 28 L. T. 91; Leeds Estate Building & Investment Co. *v.* Shepherd (1887), 36 Ch. D. 787. **Mentd.** *Re* Mercantile Trading Co., Stringer's Case (1869), 4 Ch. App. 475, L.JJ.; Salisbury *v.* Met. Ry. Co. (1870), 22 L. T. 839; *Re* National Bank of Wales, [1899] 2 Ch. 629, C. A.

164. Resolution to wind up company—Acceptance of bill of exchange by director after liquidation.]—A resolution to wind up a banking co. voluntarily was confirmed on Nov. 22, & advertised in the *London Gazette* on the 26th. On the 24th one of the directors, who had been appointed one of the liquidators, accepted, as director, a bill of exchange on the bank. This bill was afterwards indorsed for value to a person who had no notice that the bank was in liquidation:—*Held:* the bill was not a bill of the co., & the holder could not prove against the co. for the amount.—*Re* LONDON & MEDITERRANEAN BANK, BOLOGNESI'S CASE (1870), 5 Ch. App. 567; 40 L. J. Ch. 26; 18 W. R. 876, L.J.

Annotation:—**Distd.** *Re* Oriental Bank Corpn., *Ex p.* Guillemin (1884), 28 Ch. D. 634.

165. Fraudulent breach of trust—Judgment that directors guilty—Reversal of judgment—Liability of individual directors.]—In Dec., 1865, I. Co. guaranteed the subscription of forty thousand shares in L. Co., & the payment of £5 per share thereon to the N. Bank. L. Co. then applied to the bank to discount the promissory notes of I. Co. for £200,000, which the bank agreed to do upon the undertaking of L. Co. that until the amount of the notes should be paid to the bank there should stand to the credit of L. Co. an amount equal to the sum which might remain unpaid on the notes, & that if the notes were not paid at maturity, the bank should pay same out of the balance standing to the credit of L. Co., & cancel the notes. The bank thereupon discounted the notes. I. Co. thus fulfilled its guarantee, & L. Co. obtained a settling day on the Stock Exchange. The notes were not paid at maturity & the bank repaid itself out of the balance standing to the credit of L. Co. In Feb., 1869, a decree was made in a suit by a shareholder in L. Co. against the directors of that co. & the bank that the directors had been guilty of a breach of trust, & that the bank, having been participators in that breach of trust, must refund the £200,000. In July, 1869, an agreement between the official liquidator of L. Co. & the bank for the compromise of the latter's liability under the decree was confirmed by the ct. Subsequently the bank filed a bill against three of its directors to make them refund the amount which the bank had paid & might have to pay under the compromise, & it was held that the directors were liable to refund the amount. From that decision the directors appealed, & before judgment was given the Ct. of Appeal reversed the decree made in Feb., 1869:—*Held:* as the decision on which the compromise was based was wrong, & the bank was not really liable to pay that which they had been decreed to pay, the directors were not liable to make good the amount paid by the bank under the compromise.—PARKER *v.* LEWIS (1873), 8 Ch. App. 1035; 43 L. J. Ch. 281; 29 L. T. 199; 21 W. R. 928, L.JJ.

Annotation:—**Mentd.** Mercantile Investment & General Trust Co. *v.* River Plate Trust Loan & Agency Co. (1894), 70 L. T. 131.

166. Making private profit—Sale of shares—Liability to refund.]—M., V., L., & H. were four of the directors of the N. Bank. A resolution was passed by the directors to increase the capital of the bank by the issue of twenty thousand new shares, to be offered in the first instance to the holders of the old shares at a premium, the shares not taken up by them to be offered at an increased premium to

other persons. The directors entered into an arrangement with S. that he should take up all the shares not taken up by the old shareholders, & the result was that more than ten thousand of the new shares were allotted to S. The arrangement with S. was not disclosed to the shareholders. S. was unable to take up the shares, & authorised the directors to transfer some of them to other persons, at the same price as that at which he was to have taken them, & four thousand three hundred of the shares were transferred to M., V., L., & H., who sold them at a profit, the shares being then at a higher premium than at the time of issue :—*Held :* M., V., L., & H. were bound to refund to the bank all the profits they had made on the resale of the four thousand three hundred shares.—PARKER *v.* MCKENNA (1874), 10 Ch. App. 96 ; 44 L. J. Ch. 425 ; 31 L. T. 739 ; 23 W. R. 271, L.C. & L.JJ.

Annotations :—**Distd.** Municipal Freehold Land Co. *v.* Pollington (1890), 2 Meg. 307. **Expld.** Percival *v.* Wright, [1902] 2 Ch. 421. **Refd.** *Re* Canadian Oil Works Corpn., Hay's Case (1875), 10 Ch. App. 593, L.JJ. ; Nant-y-glo & Blaina Ironworks Co. *v.* Tamplin (1876), 35 L. T. 125 ; Bagnall *v.* Carlton (1877), 6 Ch. D. 371, C. A. ; *Re* Postlethwaite, Postlethwaite *v.* Rickman (1888), 59 L. T. 58 ; Salford Corpn. *v.* Lever (1890), 25 Q. B. D. 363 ; Williams *v.* Scott, [1900] A. C. 499, P. C. ; Armstrong *v.* Jackson, [1917] 2 K. B. 822. **Mentd.** National Bank of Australasia *v.* United Hand-in-Hand & Band of Hope Co. (1879), 4 App. Cas. 391, P. C. ; *Re* West Jewell Tin Mining Co., Weston's Case (1879), 48 L. J. Ch. 425, C. A. ; Hopkinson *v.* Lovering (1883), 11 Q. B. D. 92 ; *Re* Fitzroy Bessemer Steel, etc., Co. (1884), 50 L. T. 144 ; Guy *v.* Churchill & Sim (1886), 2 T. L. R. 855 ; Delves *v.* Gray, [1902] 2 Ch. 606.

167. Guarantee of interest—Debentures of another company.]—The directors of a joint-stock bank, the deed of settlement of which gave them extensive powers to carry on the business of bankers, & to act in such a manner as might appear to them best calculated to promote the interest of the bank, have, when the formation of another co. is of importance to the bank, power to guarantee the payment of interest on debentures of that co. issued for the purpose of forming it.—*Re* WEST OF ENGLAND BANK, *Ex p.* BOOKER (1880), 14 Ch. D. 317 ; 49 L. J. Ch. 400 ; 42 L. T. 619 ; 28 W. R. 809.

168. Payment of dividends out of capital—Guarantee given to avoid recourse to surplus funds.]—Circumstances in which it was held that as a guarantee was expressly given by directors of a bank to avoid having recourse to the reserve fund, which was applicable to making good losses, there had been no payment of dividends out of capital, & there was no claim against the directors on the grounds of misfeasance.—*Re* STAFFORDSHIRE JOINT STOCK BANK (IN LIQUIDATION) (1891), 7 T. L. R. 489.

169. —— Assent to advances on improper security—Reliance on judgment of chairman & general manager.]—A director of a joint-stock banking co., in assenting to the payment of dividends out of capital & to advances on improper security, honestly relied on the judgment, information, & advice of the chairman & general manager of the bank, by whose statements he was misled & whose integrity, skill, & competence he had no reason for suspecting :—*Held :* he was not negligent of his duties as director & was not liable in the winding-up.—DOVEY *v.* CORY, [1901] A. C. 477 ; 70 L. J. Ch. 753 ; 85 L. T. 257 ; 17 T. L. R. 732 ; 50 W. R. 65 ; 8 Mans. 346, H. L.

Annotations :—**Folld.** Lucas *v.* Fitzgerald (1903), 20 T. L. R. 16. **Refd.** Exploring Land & Minerals Co. *v.* Kolckmann (1905), 94 L. T. 234, C. A. ; Prefontaine *v.* Grenier, [1907] A. C. 101, P. C. ; Ammonia Soda Co. *v.* Chamberlain, [1918] 1 Ch. 266, C. A. **Mentd.** Bond *v.* Barrow Haematite Steel Co., [1902] 1 Ch. 353 ; *Re* Crichton's Oil Co., [1902] 2 Ch. 86, C. A. ; *Re* Welsbach Incandescent Gas Light Co., [1904] 1 Ch. 87, C. A.

170. Director also partner in trading firm—Retirement of member of firm—Not notice of dissolution of firm to bank.]—A., B., C., & D., who carried on business under the firm of G., P., & Co., in 1840 opened an account with a banking co. established under 1826 Act, & 5 & 6 Vict. c. 85. In 1842 A. retired from the firm, but this fact was not advertised in the *London Gazette*, nor was any alteration made in the pass-book :—*Held :* the mere fact of D., one of the firm of G., P., & Co., being also a director of the banking co. (but having as such no share in the management of or interference in the banking accounts), did not amount

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168 i. *Payment of dividends out of capital—Without knowledge or consent of members.*]—The directors of a joint-stock co. are responsible toward the co., its shareholders & creditors, for every damage resulting from the payment of a dividend diminishing the co.'s capital, when such payment has been made without the agreement & consent given, in knowledge of the matter, by the co., its shareholders & creditors respectively ; & they are responsible for all damage they may have caused by their fault to third parties who, to inform themselves upon the condition of the co. & the value of its shares, have been deceived by fictitious dividends, & who have bought shares at exaggerated prices.—LA BANQUE D'EPARGNE DE MONTREAL *v.* GEDDES (1890), 19 R. L. 684 ; 6 M. L. R. 243 ; 13 L. N. 267.—**CAN.**

c. *Placing bank's shares.*] — The articles of assocn. of a banking co. authorised the directors to manage the business of the co., & to pay all expenses incurred in getting up the co. ; they also provided that the co. should not commence business until 20,000 shares should be allotted :—*Held :* the directors had power to authorise the manager to employ a broker to place the shares for the purpose of fulfilling this condition.—STRONG *v.* LAND CREDIT BANK OF AUSTRALASIA (1878), 4 V. L. R. 24.—**AUS.**

d. *Power to make calls — Quorum.*] — In Mar., 1874, three of the directors of a bank appointed I. a director to fill a vacancy, & in Sept., 1874, a call was made by four directors, one of whom was I., who seconded the resolution :—*Held :* although I. was not legally a director under Dominion Act, 1871 (c. 5), the call was valid, three of the directors who made it being legally qualified.—BANK OF LIVERPOOL *v.* BIGELOW (1878), 3 R. & C. 236.—**CAN.**

f. *President of bank also president of printing company—Acceptance of transfer of claim due printing company—Right of bank to recover.*]—Where the president of a printing co., who was also president of a bank, accepted transfer of a claim due the printing co. by writing *sous seing preve* without setting forth any agency in the matter :—*Held :* the transferee had accepted for himself, & the bank could not recover.—CITY BANK *v.* WHITE (1873), 17 L. C. J. 141 ; 17 L. C. J. 335. —**CAN.**

h. *Provisional directors — Paying commission on sales of shares.*]—*Held :* the powers of the bank, & of the provisional directors acting for it, depended entirely upon Bank Act, & the provisional directors had no power to authorise payment, out of the funds of the bank, of commissions to persons who obtained subscriptions for shares of the capital stock, & were liable, in the winding-up of the bank, upon the ground of breach of trust or misfeasance, to pay to the liquidator the sums which had improperly been paid under their authority.—*Re* MONARCH BANK (1910), 17 O. W. R. 901 ; 2 O W. N. 436 ; 22 O. L. R. 516.—**CAN.**

j. *Action against — Indemnity for costs.*]—A managing director of a joint-stock corpn., who has been proceeded against jointly & severally with it for things done in the ordinary course of the bank's business, while having the right to defend individually, cannot charge the bank with the expenses incurred by reason of such individual defence.—PRÉFONTAINE *v.* LA BANQUE DU PEUPLE (1898), Q. R. 14 S. C. 515.—**CAN.**

k. —— *Deed of settlement — Containing condition precedent.*]—A member of a joint-stock banking co. formed under Banking Act, 1825 (c. 42), filed a bill against the governor & board of management for an account of the co.'s dealings, an inquiry into the manner of conducting the election of officers, & for an injunction to restrain the board of management from continuing the business until further order, but the bill did not pray a dissolution. There was a provision in the deed that in case of any difference amongst the parties a case should be laid before counsel, which pltf. had not done. Upon this ground, & also upon a strong opinion that the ct. had not jurisdiction in the case unless all the shareholders were made parties, the injunction was refused.—SUGRUE *v.* HIBERNIAN BANK (BOARD OF MANAGEMENT), 2 Ir. L. Rec. 1st Ser. 285.—**IR.**

m. *Discovery & injunction against—Directors resident abroad & not parties.*]—A petition was filed against the directors of a joint-stock bank, who all resided out of the jurisdiction, for a discovery in aid of a defence to an action at law by the public officer against pltf., & for an injunction to restrain the action. The injunction was refused because the directors were not parties to the record at law. *Semble :* the residence of the directors abroad, & the want of power to compel a discovery from them, would be sufficient ground for refusing the injunction.—HENDRIE *v.* THOMPSON (1850), 1 I. Ch. R. 278.—**IR.**

Sect. 7.—Private and joint-stock and chartered banks: Sub-sects. 3 & 4, A.]

to notice, actual or constructive, to the bank of the dissolution, so as to discharge A. in respect of a debt subsequently accruing, a banking co. so established differing in this respect from an ordinary trading partnership.—POWLES *v.* PAGE (1846), 3 C. B. 16; 15 L. J. C. P. 217; 7 L. T. O. S. 257; 136 E. R. 7.

Annotations:—**Consd.** *Re* Carew's Estate Act (1862), 31 Beav. 39. **Mentd.** *Re* Fenwick, *Ex p.* Brown (1849), 13 L. T. O. S. 468; Swift *v.* Winterbotham & Goddard (1873), L. R. 8 Q. B. 244.

171. Retirement—Cancellation of shares—Validity.]—The deed of settlement of a joint-stock banking co. contained a stipulation that, in all cases not provided for by that or any supplemental deed of settlement, the directors might act in such manner as to promote the interests & welfare of the co.:—*Held:* this clause did not enable the directors to cancel the shares of a retiring director, so as to exempt him from responsibility, & on the co. being wound up upwards of ten years after such a cancellation, the retiring director was properly placed upon the list of contributories.—*Re* ST. MARYLEBONE JOINT STOCK BANKING CO., STANHOPE'S CASE (1850), 3 De G. & Sm. 198; 19 L. J. Ch. 389; 15 L. T. O. S. 2; 14 Jur. 610; 64 E. R. 443.

Annotations:—**Distd.** *Re* Royal Bank of Australia, Cockburn's Case (1850), 4 De G. & Sm. 177. **Apprvd.** *Re* St. Marylebone Joint Stock Banking Co., Walker's Case (1856), 8 De G. M. & G. 607, L.JJ. **Apld.** *Ex p.* London & Colonial Co., Tooth's Case (1868), 19 L. T. 599. **Refd.** Haddon *v.* Ayers (1858), 5 Jur. N. S. 408.

172. —— —— ——.]—On the retirement of S., a director of a joint-stock banking co., the board of directors passed a resolution to take back his shares at par, & that he should retire & be indemnified in a form thereafter to be prepared. The co. was subsequently ordered to be wound up & the ct. decided that the transactions on the retirement of S. were invalid, & that he was a contributory. Before the winding-up, W., another director, had paid money to satisfy the claims of creditors, & the master made a call upon all the contributories for the payment of such money to the exor. of W., but that order was discharged, so far as respected S.:—*Held:* the retirement & cancellation of his shares having been declared invalid, S. was not entitled to any indemnity, & must contribute towards the call.—*Re* ST. MARYLEBONE JOINT STOCK BANKING CO., WALKER'S CASE (1856), 8 De G. M. & G. 607; 26 L. J. Ch. 261; 28 L. T. O. S. 151; 2 Jur. N. S. 1216; 5 W. R. 26; 44 E. R. 524, L.JJ.

173. —— Before execution of deed of settlement—Validity.]—A banking co. was projected in June, 1836, & A. was one of the promoters & directors. The bank commenced business on Sept. 9. On Sept. 24, it was agreed between A. & the other directors that A. should retire from the co. On Oct. 18, the first signature was affixed to the deed of settlement, which however was dated in Aug. By that deed it was declared that all the acts done by the directors previous to the execution of the deed should be ratified. On Oct. 25, A.'s retirement from the co. was advertised in the *Gazette.* In 1841 the co. broke up, & was afterwards ordered to be wound up:—*Held:* A. was not a contributory.—*Re* ST. MARYLEBONE JOINT STOCK BANKING CO., BUSK'S CASE (1850), 3 De G. & Sm. 267; 19 L. J. Ch. 391; 15 L. T. O. S. 390; 14 Jur. 947; 64 E. R. 473; *affd.* (1852), 21 L. J. Ch. 688, L.C.

174. Resignation—Power of board to accept—Relinquishment of shares.]—The deed of settlement of a joint-stock bank provided that the directors should have power to enter into any contract with any persons respecting any matter in which the co. might be interested, & afterwards to release & discharge the terms of such contract. It also empowered them to purchase shares in the co., & hold them as part of its property:—*Held:* the directors were empowered to accept the resignation of one of their body, & afterwards to release him from the acceptance of certain shares which he had taken, & to restore to him a promissory note which he had given in respect of them, the resignation & the relinquishment of the shares being altogether distinct transactions, & no fraud being suggested.—*Re* ROYAL BANK OF AUSTRALIA, COCKBURN'S CASE (1850), 4 De G. & Sm. 177; 20 L. J. Ch. 137; 16 L. T. O. S. 167; 15 Jur. 28; 64 E. R. 787.

Annotations:—**Consd.** Bargate *v.* Shortridge (1855), 3 Eq. Rep. 605, H. L. **Mentd.** *Re* Athenæum Life Assce. Soc., Richmond's Case & Painter's Case (1858), 4 K. & J. 305.

175. Negligence of cashier—Irregular overdrafts—Liability of superior officer.]—The collapse of a bank was due to overdrafts which the cashier, the principal executive officer of the bank under the directors, whose accounts had been duly audited by a board of auditors duly appointed & entirely independent of the directors, had irregularly & improperly allowed to certain customers:—*Held:* a charge of negligence could not be established against the president of the bank simply by reason of his having in good faith failed to detect the cashier's concealment of such overdrafts.—PRÉFONTAINE *v.* GRENIER, [1907] A. C. 101; 76 L. J. P. C. 4; 95 L. T. 623; 23 T. L. R. 27; 13 Mans. 401, P. C.

SUB-SECT. 4.—SHAREHOLDERS.

A. Proceedings against.

176. Action—Debt due from banking company].—A creditor of a banking co., incorporated under 1844 Act, cannot maintain an action against a shareholder for the debt. His remedy is by action against the corpn. & execution in the statutable mode.—FELL *v.* BURCHETT (1857), 7 E. & B. 537; 26 L. J. Q. B. 223; 29 L. T. O. S. 77; 3 Jur. N. S. 388; 5 W. R. 520; 119 E. R. 1345.

177. Scire facias—Proper mode of proceeding—Suggestion on roll.]—The proper course of proceeding under 1826 Act, s. 13, is by *scire facias,* & not by suggestion on the roll.—CROSS *v.* LAW

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174 i. *Resignation—Transfer of shares—Validity.*]—The deed of partnership of a joint-stock bank provided that a director of the co. might resign his office by giving one month's notice in writing to the "ct. of directors," that three directors should be necessary to constitute a "ct.," & that every director should hold a certain number of shares. K., V., & S. constituted the "ct." K. tendered, by letter to S. alone, his resignation, & from that time, Mar. 22, 1855, ceased to act as director. On Mar. 29 K. transferred all his shares to S., but the formalities required upon a transfer of shares were not observed:—*Held:* K. was bound to have complied with all the formalities of the deed, & his resignation & transfer were invalid.—*Ex p.* KENNEDY (1856), 2 Ir Jur. 278.—**IR.**

PART I. SECT. 7, SUB-SECT. 4.—A.

177 i. *Scire facias—Proper mode of proceeding.*]—When judgment has been obtained against the public officer of a joint-stock banking co. under Banking Act, 1825 (c. 42), s. 18, & it is sought to recover the amount of the judgment from any of the members of such co., the proper mode of proceeding against them is by *scire facias.*

Where the persons proceeded against were members of such co. when the judgment was obtained, & still continued so, the order for leave to issue the *scire facias* will be absolute in the first intance.—MAY *v.* HODGES (1842), 4 I. L. R. 245; 2 Leg. Rep. 108; Jebb & B. 129.—**IR**

177 ii. —— *Conditions of issue.*]—Although an official manager has been appointed, under Winding-up Acts, over a banking co. governed under Banking Act, 1825, the ct. will not refuse to allow execution of *scire facias* against the shareholders, unless there is a reasonable

(1840), 6 M. & W. 217; 8 Dowl. 789; 9 L. J. Ex. 193; 4 Jur. 802; 151 E. R. 388.

Annotations:—**Follid.** Whittenbury *v.* Law (1840), 6 Bing. N. C. 345. **Apprvd.** Eardley *v.* Law (1840), 12 Ad. & El. 802. **Refd.** Harwood *v.* Law (1840), 8 Dowl. 899; Dodgson *v.* Scott (1848), 2 Exch. 457.

178. *S. P.* RANSFORD *v.* BOSANQUET (1842), 2 Q. B. 972; 12 Ad. & El. 813; 2 Gal. & Dav. 324; 12 L. J. Ex. 489; 113 E. R. 1022, Ex. Ch.

Annotations:—**Follid.** Whittenbury *v.* Law (1840), 6 Bing. N. C. 345. **Refd.** Eardley *v.* Law (1840), 10 L. J. Q. B. 46: Wingfield *v.* Barton (1842), 7 Jur. 258; Dodgson *v.* Scott (1848), 2 Exch. 457; Curlewis *v.* Mornington (1858), 27 L. J. Q. B. 269.

See, now, R. S. C., Ord. 42, r. 23 (*d*).

179. —— —— **Not named on record.**]—In an action against the public officer of a joint-stock co., execution under 1826 Act, against a partner not named in the record, can be obtained only upon a *scire facias.*—WHITTENBURY *v.* LAW (1840), 6 Bing. N. C. 345; 8 Scott, 661; 4 Jur. 485; 133 E. R. 133.

Annotations:—**Refd.** Eardley *v.* Law (1840), 5 J. P. 46; Dodgson *v.* Scott (1848), 2 Exch. 457. **Mentd.** Hitchings *v.* Kilkenny Ry. Co., *Re* Emery (1850), 20 L. J. C. P. 31.

180. —— **Issue of concurrent writs—Pleading.**]—*Held:* the only mode of taking an objection that pltf., who had obtained judgment against the public officer of a banking co., had sued out, & was proceeding upon, separate concurrent writs of *scire facias* against different persons who were members of the co. at the time the judgment was obtained, was, by plea in abatement that another writ was pending, & a plea which stated that several other such writs were pending, was bad for multiplicity. *Qu.:* whether such objection was a good objection.—ESDAILE *v.* LUND (1844), 12 M. & W. 607; 1 Dow. & L. 565; 13 L. J. Ex. 117; 2 L. T. O. S. 370; 8 Jur. 109; 152 E. R. 1341.

181. —— —— ——.]—It is not a good plea in abatement to a declaration in *scire facias* against a member of a joint-stock banking co., on a judgment obtained against the public officer of such co., under 1826 Act, that a concurrent writ of *scire facias* has been sued out on the same judgment against another member of the co.—NUNN *v.* LOMER (1849), 3 Exch. 471; 18 L. J. Ex. 247; 13 Jur. 236; 154 E. R. 930.

See, now, R. S. C., Ord. 21, r. 20.

182. —— **Former members—1826 Act, s. 13.**]—Judgment was obtained against the public officer of a joint-stock banking co. on Oct. 7, 1846, & on the following day a *fi. fa.* issued against him, which proved unproductive. No further steps were taken until 1849, when an application was made for a *scire facias* against the members at the time of the contract, on affidavit that before the judgment all the shareholders who possessed any available property, except two, had ceased to be shareholders, & that the new shareholders were possessed of no property:—*Held:* a rule should be refused, for though a creditor of a banking copartnership was not bound to proceed at any particular time on his judgment against the public officer, yet whenever he issued execution he ought to endeavour to make it available against all the then members of the copartnership.

A member of a banking copartnership sold his shares before the date of the contract on which the co. was sued, & his name was omitted in the return made to the Stamp Office, a wrong form of sched. having been adopted:—*Held:* the question as to his being a shareholder at the time of the contract was a matter to be tried on a *scire facias.*

A *fi. fa.* issued against a public officer, who was also a member of the co.:—*Held:* it was a question to be tried, whether it issued against him as a member for the time, or merely nominally against him as public officer. *Semble:* a *scire facias* for execution against members at the time of the contract ought to state the prior execution against those who were members at the time of the execution.—BANK OF ENGLAND *v.* JOHNSON (1849), 3 Exch. 598; 18 L. J. Ex. 238; 12 L. T. O. S. 533; 154 E. R. 983.

Annotation:—**Refd.** Devereux *v.* Kilkenny & G. S. & W. Ry. Co., *Re* Emery (1850), 5 Exch. 834.

183. —— —— **Necessity of execution against present members.**]—Where pltf. has recovered judgment & sued out a fruitless execution against a public officer of a banking co., the ct. will not give to pltf. leave to proceed against former members by *scire facias,* unless it is made to appear that he has really & *bonâ fide* attempted to enforce the judgment against the members for the time being.—EARDLEY *v.* LAW (1840), 12 Ad. & El. 802; Arn. & H. 53; 4 Per. & Dav. 379; 10 L. J. Q. B. 46; 5 J. P. 46; 113 E. R. 1018.

Annotations:—**Apld.** Dodgson *v.* Scott (1848), 2 Exch. 457. **Follid.** Bank of England *v.* Johnson (1849), 3 Exch. 598.

184. *S. P.* FIELD *v.* MACKENZIE (1847), 4 C. B. 705; 2 New Pract. Cas. 296, 416; 16 L. J. C. P. 203; 9 L. T. O. S. 247; 11 Jur. 714; 136 E. R. 685.

185. —— —— ——.]—In proceeding under 1826 Act, s. 13, the proper course for pltf., who has recovered judgment against the public officer of a banking co., to pursue is in the first instance to issue writs against those persons who are at that time members of the co.; but pltf. may proceed against the other classes which the Act renders

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prospect of the creditors being paid by the proceedings in Ch. Such order will be only conditional in the first instance.—CARROLL *v.* KENNEDY (1856), 2 Ir. Jur. 15.—**IR.**

177 iii. —— *Pleading.*]—To a *scire facias* sued out against deft. on a judgment obtained against the public officer of a banking co., deft. pleaded (1) she was not at any time, nor was she then, nor had she ever been, a member of the society; (2) payment; & (3) the judgment was had & obtained, & was kept on foot & suffered to be & remain in force, by the fraud & covin of pltf. & the public officer:—*Held:* (1) the first plea was bad; (2) the third plea was bad for duplicity.—NEALE *v.* M'DONALD (1843), 6 I. L. R. 163.—**IR.**

177 iv. —— *Stoppage of payment by bank.*]—In a *scire facias* against a shareholder of a joint-stock banking co., upon a judgment obtained against the public officer under Banking Act, 1825, deft. pleaded that the bank was one within 33 Geo. 2, c. 14, &, being in debt, had stopped payment, & that its property & effects were under the administration of the Ct. of Ch., but without stating the nature of the administration proceeding:—*Held:* in the absence of such a statement, it could not be assumed that the property was being administered under 33 Geo. 2, c. 14, so as to raise the question whether that Act was repealed by 1825 Act, & the liability of the co.'s property to be applied in a ct. of equity, under the former Act, for the benefit of the creditors, afforded no defence to a proceeding at law, under the latter Act.—CARROLL *v.* KENNEDY (1856), 6 I. C. L. R. 6.—**IR.**

177 v. —— *Breach of agreement to compel non-subscribing shareholders to contribute.*]—By an arrangement for winding up the affairs of a banking co., which had stopped payment, the assets were assigned to T., a shareholder, & to S., who undertook its liabilites. It was part of the arrangement that S. should obtain a judgment against the public officer, to be used only to compel non-subscribing shareholders to contribute. S. became bkpt., & his assignee issued a *scire facias* against T. On a bill by T. to restrain him:—*Held:* the judgment being a contrivance to compel the non-subscribing shareholders indirectly to pay what they, if sued directly, might possibly have equities to resist, the ct. would not relieve one party to such contrivance against the other, though suing in breach of faith.—TAYLOR *v.* CAMPBELL (1847), 10 I. Eq. R. 249.—**IR.**

182 i. —— *Former members.*]—Where an arrangement had been entered into by a committee of several members of a banking co., for the purpose of collecting contributions to discharge the debts of the co., the ct. refused to allow a *scire facias* to issue against a former member of the co., who was alleged to be a member for the time being, but whose name did not appear on the register.—SUTHERLAND *v.* HODGES (1843), 6 I. L. R. 292.—**IR.**

182 ii. —— *Service.*]—Under C. L. P. Act, 1853, writs of *scire facias* against members of a joint-stock banking co., upon a judgment recorded against its public officer, must be served personally as ordinary writs of summons & plaint.—BERGIN *v.* PEPPER (1857), 7 I. C. L. R. 45.—**IR.**

Sect. 7.—Private and joint-stock and chartered banks: Sub-sect. 4, A.]

liable in case he can satisfy the ct., with a reasonable degree of certainty, that the execution previously issued would be ineffectual.—DODGSON *v.* SCOTT (1848), 2 Exch. 457; 6 Dow. & L. 27; 5 Ry. & Can. Cas. 654; 17 L. J. Ex. 321; 11 L. T. O. S. 292; 12 Jur. 521; 154 E. R. 571.

Annotations:—**Apld.** Heward *v.* Wheatley, *Ex p.* Wilson (1852), 5 De G. & Sm. 552; O'Flaherty *v.* McDowell (1857), 6 H. L. Cas. 142, H. L. **Refd.** Bank of England *v.* Johnson (1849), 18 L. J. Ex. 238; Devereux *v.* Kilkenny & G. S. & W. Ry. Co., *Re* Emery (1850), 5 Exch. 834. **Mentd.** Davis *v.* Morris (1883), 10 Q. B. D. 436.

186. —— —— —— Proof of membership.]—To obtain a *scire facias* against former members of a banking copartnership, under 1826 Act, ss. 12, 13, it is enough to show that executions, after *scire facias*, have been issued against several of the present partners, & *nulla bona* returned, that reasonable inquiry has been made as to the solvency of all, & that there is, on such inquiry, ground for believing that execution would not be effectual against any. On this last point a *primâ facie* case is sufficient. To prove that a party, against whom such application is made, was a shareholder at a given time, it is enough to produce certified Stamp Office returns made, under ss. 4 & 5, by a person styling himself "cashier" of the co.

A party was named as a shareholder in one of such returns, but, in the next return exhibited to the ct., being of the same year, his name did not appear. On pltf.'s part, affidavit was made of belief that the last mentioned return was incorrect in omitting the name, & that the party continued a member beyond the time when it was made:—*Held:* sufficient ground for presuming that he did so continue, the party himself making affidavits in answer, & not stating any time when, or manner in which, he ceased to be a member, though he denied generally having been a member when the contracts sued upon were made, & some of these were made before & some after the second return.—HARVEY *v.* SCOTT (1847), 11 Q. B. 92; 2 New Pract. Cas. 407; 17 L. J. Q. B. 9; 10 L. T. O. S. 131; 12 Jur. 12; 116 E. R. 410.

Annotations:—**Refd.** Burns *v.* Scott, *Re* Brooke (1848), 11 L. T. O. S. 241. **Mentd.** Dodgson *v.* Scott (1848), 2 Exch. 457; Davis *v.* Morris (1883), 10 Q. B. D. 436.

187. —— —— Abandonment on payment of costs—Right to reissue.]—A rule to issue a *scire facias*, upon a judgment recovered against the public officer of a joint-stock banking co., was obtained against a former member of the co. under 1826 Act, s. 13. The rule was afterwards enlarged, & was finally abandoned on payment of the costs by pltf.:—*Held:* pltf. was not to be precluded from coming again to the ct. for leave to issue such *scire facias*. *Semble:* the general rule, that a matter could not be agitated twice, did not apply to the case of an application to issue a *scire facias* upon fresh materials.—DODGSON *v.* SCOTT (1848), 2 Exch. 457; 6 Dow. & L. 27; 5 Ry. & Can. Cas. 654; 17 L. J. Ex. 321; 11 L. T. O. S. 292; 12 Jur. 521; 154 E. R. 571.

Annotations:—**Mentd.** Bank of England *v.* Johnson (1849), 18 L. J. Ex. 238; Devereux *v.* Kilkenny & G. S. & W. Ry. Co., *Re* Emery (1850), 5 Exch. 834; Heward *v.* Wheatley, *Ex p.* Wilson (1852), 5 De G. & Sm. 552; O'Flaherty *v.* McDowell (1857), 6 H. L. Cas. 142, H. L.; Davis *v.* Morris (1883), 10 Q. B. D. 436.

188. —— Debt due from one bank to another—Members of both banks.]—Judgment was entered up by a banking co. against the public officer of another banking co. under 1826 Act, ss. 9, 12, & a *scire facias* issued for the purpose of having execution, under s. 13, against individual members. One of the alleged members obtained a rule *nisi* for setting aside the warrant of attorney, & the ct. ordered an issue to be tried upon the question whether the shareholders of the latter co. were indebted to the former in any, & what, sum:—*Held:* defts. on such issue could not object that some parties on the record were members of both cos.—BOSANQUET *v.* WOODFORD (1843), 5 Q. B. 310; 1 Dav. & Mer. 419; 13 L. J. Q. B. 93; 2 L. T. O. S. 227; 8 Jur. 242; 114 E. R. 1266.

Annotation:—**Mentd.** R. *v.* Stainforth (1847), 3 New Sess. Cas. 53.

189. —— Deceased member—Executor receiving dividends—Conditions in deed of settlement.]—The deed of settlement of a joint-stock banking copartnership provided that the exor. of a deceased shareholder should not be a member of the co. in respect of such shares, but should be at liberty to sell the shares, or at his option to become a member on complying with certain provisions, & that, if he did not elect to become a member, he was not to be entitled to any dividend accruing due after testator's death:—*Held:* the exor. of a deceased shareholder who received a dividend which accrued due after the death of his testator, but had not complied with the provisions of the deed of settlement, was not a member for the purpose of execution against him by *scire facias* on a judgment against the public officer of the co.—NESS *v.* ARMSTRONG (1849), 4 Exch. 21; 18 L. J. Ex. 473; 13 L. T. O. S. 403; 13 Jur. 876; 154 E. R. 1105.

Annotations:—**Apld.** Dodgson *v.* Bell (1850) 5 Exch. 967. **Distd.** Straffon's Exors.' Case (1852), 1 De G. M. & G. 576, L. C.; Heward *v.* Wheatley (1853), 3 De G. M. & G. 628, L.JJ. **Refd.** Powis *v.* Butler (1858), 3 C. B. N. S. 645; Houldsworth *v.* Evans (1868), L. R. 3 H. L. 263, H. L.

190. —— —— Liability of estate.]—A testator was a shareholder in a joint-stock banking co., carrying on business under 1826 Act prior to Apr., 1847, until his death in Dec. in the same year. In Apr., 1847, a creditor of the banking co. became such, & so continued long after testator's death. In 1849 the creditor obtained judgment against the public officer of the co. for his debt. Under a decree for the administration of testator's estate the creditor, after he had obtained his judgment, brought in his claim against testator's estate:—*Held:* as it was not suggested that the banking co. had ceased to carry on business, or that there had been any attempt to enforce the judgment against the present shareholders, who were primarily liable, the creditor had not made out a case to charge testator's assets, which were liable only in the second degree, & the petition must be dismissed.—HEWARD *v.* WHEATLEY, *Ex p.* WILSON (1852), 5 De G. & Sm. 552; 21 L. J. Ch. 854; 19 L. T. O. S. 293; 16 Jur. 1132; 64 E. R. 1239; *subsequent proceedings* (1853), 3 De G. M. & G. 628, L.JJ.

191. —— Married woman member—Liability of husband.]—A married woman, with the consent of deft., her husband, purchased, with the proceeds of her separate estate, shares in a joint-stock banking co., & was registered as owner. Her husband received some dividends, & signed receipts as the agent of his wife; he also attended a meeting of the co., at which none but shareholders were entitled to be present. The co.'s deed of settlement provided that the husband of any female shareholder should not be a member in respect of such shares, but should be at liberty to sell them, or at his option to become a member on complying with certain requisitions, which deft. did not do:—*Held:* deft. was not a member for the purpose of execution by *scire facias* on a judgment against the public officer.—NESS *v.* ANGAS (1849), 3 Exch. 805; 6 Dow. & L. 645; 18 L. J. Ex. 470; 13 L. T. O. S. 166; 13 Jur. 874; 154 E. R. 1070.

Annotations:—**Apld.** Ness *v.* Armstrong (1849), 4 Exch. 21. **Consd.** Dodgson *v.* Bell (1850), 5 Exch. 967, Ex. Ch. **Distd.** Straffon's Exors.' Case (1852), 1 De G. M. & G. 576,

L.C.; Heward *v.* Wheatley (1853), 3 De G. M. & G. 628, L.JJ. **Refd.** Dalton *v.* Midland Counties Ry. Co. (1853), 13 C. B. 474; Powis *v.* Butler (1858), 3 C. B. N. S. 645.

192. —— —— ——.]—Deft.'s wife before her marriage became an original shareholder in a banking copartnership, & after her marriage, but without deft.'s knowledge, she received dividends & paid calls in her maiden name, & in that name was returned to the Stamp Office as a shareholder, but never executed any deed of settlement. Deft. was aware that his wife was a shareholder, but never interfered in the matter, & when applied to for a call said he would have nothing to do with it. The deed of settlement provided that the husband of any female shareholder should not be a member in respect of such shares, but might either dispose of the shares so vested in him, or at his option become a member on complying with certain requisitions:—*Held:* deft. was not a member of the co. for the purpose of execution against him by *scire facias* on a judgment against the public officer.—DODGSON *v.* BELL (1850), 5 Exch. 967; 1 L. M. & P. 812; 20 L. J. Ex. 137; 16 L. T. O. S. 240; 155 E. R. 421, Ex. Ch.

193. Execution—Application for—Defect in description in notice—Affidavit of identity—1844 Act, s. 13.]—In the notice of the intended application against a shareholder of a bank under 1844 Act the party was described as "John Marshall." In the memorial last filed he was described as "John S. Marshall." There was an affidavit of identity:—*Held:* the notice was sufficient.—THOMSON *v.* HARDING (ROYAL BRITISH BANK OFFICIAL RECEIVER) (1857), 1 C. B. N. S. 555; 140 E. R. 227.

194. —— —— **Notice of application against two persons—Application against one.**]—It is no objection to the notice of an intention to apply for execution under 1844 Act, s. 13, that it intimates an intention to move against two persons, & the application is confined to one.—DOSSETT *v.* HARDING (ROYAL BRITISH BANK OFFICIAL RECEIVER) (1857), 1 C. B. N. S. 524; 26 L. J. C. P. 110; 3 Jur. N. S. 140; 140 E. R. 214.

Annotations:—**Folld.** Powis *v* Harding (1857), 1 C. B. N. S. 533; Fry *v.* Russell (1858). 3 C. B. N. S. 665. **Apprvd.** Oakes *v.* Turquand (1867), L R. 2 H. L. 325, H. L. **Refd.** Powis *v.* Butler (1858), 3 C. B. N. S. 645.

195. —— —— **Plea of fraud of directors—Defective memorial.**]—To an application for execution against a shareholder of a joint-stock bank under 1844 Act, s. 10, it is no answer that he was induced by the fraud of the directors to purchase the shares, & that, as soon as he discovered the fraud, & before the application, he repudiated the shares.

The provisions of ss. 16, 17, as to the memorial of shareholders, are merely directory, & a person whose name is on the memorial is liable as a shareholder, notwithstanding the memorial is not in the form prescribed by that Act.—DANIELL *v.* ROYAL BRITISH BANK (OFFICIAL MANAGER) (1857), 1 H. & N. 681; 3 Jur. N. S. 119; 156 E. R. 1375.

Annotation:—**Folld.** *Re* Overend, Gurney, *Ex p.* Oakes & Peek (1867), L. R. 3 Eq. 576.

196. *S. P.* POWIS *v.* HARDING (1857), 1 C. B. N. S. 533; 26 L. J. C. P. 107; 3 Jur. N. S. 138; 140 E. R. 217.

Annotation:—**Folld.** *Re* Overend, Gurney, *Ex p.* Oakes & Peek (1867), L. R. 3 Eq. 576.

197. *S. P.* HENDERSON *v.* ROYAL BRITISH BANK (1857), 7 E. & B. 356; 28 L. T. O. S. 286; 3 Jur. N. S. 111; 5 W. R. 286; 119 E. R. 1279.

Annotations:—**Folld.** Daniell *v.* Royal British Bank (1857), 1 H. & N. 681; Dossett *v.* Harding (1857), 1 C. B. N. S. 524; Powis *v.* Harding (1857), 1 C. B. N. S. 533; *Re* Overend, Gurney, *Ex p.* Oakes & Peek (1867), L. R. 3 Eq. 576. **Refd.** Stone *v.* City & County Bank, Collins *v.* City & County Bank (1877), 3 C. P. D. 282, C. A.

198. —— **Order for—Creditor fulfilling conditions—Discretion of court—1844 Act, s. 13.**]—A judgment creditor of a joint-stock bank, who has fulfilled the necessary conditions, is entitled as of right to an order of the ct. under 1844 Act, s. 13, for execution against a shareholder; & the ct. has no discretion to withhold such order, even where it appears that the co. is being wound up, & that the official manager has large assets in his hands.—MORISSE *v.* ROYAL BRITISH BANK (1856), 1 C. B. N. S. 67; 26 L. J. C. P. 62; 3 Jur. N. S. 137; 140 E. R. 27; *sub nom.* MORRIS *v.* ROYAL BRITISH BANK, 28 L. T. O. S. 124; 5 W. R. 138.

Annotations:—**Refd.** Edwards *v.* Kilkenny & G. S. W. Ry. Co., *Re* Butterworth (1857), 26 L. J. C. P. 224; Scott *v.* Uxbridge & Rickmansworth Ry. Co. (1866), L. R. 1 C. P. 596; Shrimpton *v.* Sidmouth Ry. Co. (1867), L. R. 3 C. P. 80; R. *v.* Oxford (1879), 4 Q. B. D. 245; Julius *v.* Oxford (1880), 5 App. Cas. 214, H. L.

199. —— —— **Whether proof in bankruptcy of company condition precedent—1844 Act, s. 13.**]—A judgment creditor of a joint-stock banking co. may proceed to execution against a shareholder by *scire facias*, the summary remedy given by the above sect., c. 13, being cumulative. 7 & 8 Vict. c. 111, s. 10, does not render proof of the debt in bkpcy. a condition precedent to the right of pltf. to maintain the *scire facias*, but only prohibits the issuing of execution on the judgment in *scire facias* till after such proof.—CLEEVE *v.* HARWAR, WILDE *v.* STANNER (1857), 1 H. & N. 873; 29 L. T. O. S. 12; 3 Jur. N. S. 190; 5 W. R. 368; 156 E. R. 1454.

200. —— **Issue of—Executors of deceased member.**]—Pltf. obtained a judgment against the official manager of a bank under 1844 Act. W., deceased, was returned as a shareholder in previous memorials, & in the last filed memorial after his decease his name was inserted:—*Held:* pltf. was not entitled to issue execution under the judgment against the exors. of W.—POWIS *v.* BUTLER (1858), 4 C. B. N. S. 469; 27 L. J. C. P. 249; 4 Jur. N. S. 614; 6 W. R. 549; 140 E. R. 1167, Ex. Ch.; *affg.* 3 C. B. N. S. 645.

Annotations:—**Folld.** Fry *v.* Russell (1858), 3 C. B. N. S. 665. **Mentd.** Wolverhampton New Waterworks *v.* Hawkesford (1859), 29 L. J. C. P. 121.

201. Charging shares—Whether banking company is "public company."]—Deft. held shares in the U. Bank, & judgment having been obtained in an action against him, a judge at chambers made an order, under Judgments Act, 1838 (c. 110), s. 14, charging such shares with the judgment debt. On application to set aside such order, it appeared that the bank consisted of a great number of shareholders, & was carried on pursuant to the terms of a deed of settlement, by which it was provided that the shares should not be transferred except by the consent of the directors, & also that if any order or decree was made against any proprietor by which his shares became charged, they were to be forfeited to the co. The co. was not registered under 7 & 8 Vict. c. 110, but was entitled to sue & be sued by a public officer under 1844 Act, s. 47, and 1826 Act:—*Held:* it being doubtful whether the co. was a public co. or not, the order ought not to be set aside.—GRAHAM *v.* CONNELL (1850), 1 L. M. & P. 438; 19 L. J. Ex. 361; 15 L. T. O. S. 282; *subsequent proceedings, sub nom.* MACINTYRE *v.* CONNELL (1851), 1 Sim. N. S. 225.

Annotations:—**Consd.** Nicholls *v.* Rosewarne (1859), 6 C. B. N. S. 480. **Apld.** *Ex p.* Holden (1863), 13 C. B. N. S. 641.

202. Registration of judgment—Obtained against copartnership.]—*Semble:* a judgment against a

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193 i. *Execution—Application for.*]—Application for liberty to issue execution against B., as one of the shareholders of the A. Bank, or to issue a *scire facias* against him, granted.—NORTHERN BANKING CO. *v.* AGRICULTURAL BANK (1840), 1 Leg. Rep. 37.—IR.

202 i. *Registration of judgment—Obtained against official manager.*]—A creditor having obtained a judgment against the official manager of a banking co., registered an affidavit of the judgment

Sect. 7.—Private and joint-stock and chartered banks: Sub-sect. 4, A. & B.]

banking copartnership established under 1844 Act cannot be registered so as to affect the estate of a shareholder against whom no judgment has been obtained.—HARRIS *v.* ROYAL BRITISH BANK (1857), 2 H. & N. 535; 27 L. J. Ex. 1; 30 L. T. O. S. 123; 157 E. R. 220.

203. Action in England on judgment—Obtained against chairman in Australia.]—The members of a banking co. formed for the purpose of carrying on business in a colony, & authorised to sue & be sued in the name of its chairman, are not discharged from liability on judgments obtained in the colony against the chairman, by reason of their having been resident in England, not being served with process, & having received no notice of the proceedings.—BANK OF AUSTRALASIA *v.* HARDING (1850), 9 C. B. 661; 19 L. J. C. P. 345; 14 Jur. 1094; 137 E. R. 1052.

Annotations:—**Consd.** Copin *v.* Adamson, Copin *v.* Strachan (1874), L. R. 9 Exch. 345. **Expld.** Risdon Iron & Locomotive Works *v.* Furness, [1906] 1 K. B. 49, C. A. **Mentd.** Bank of Australasia *v.* Nias (1851), 16 Q. B. 717; Kelsall *v.* Marshall (1856), 1 C. B. N. S. 241; Barber *v.* Lamb (1860), 8 C. B. N. S. 95; De Cosse Brissac *v.* Rathbone (1861), 6 H. & N. 301; Thelwall *v.* Yelverton (1864), 16 C. B. N. S. 813; Godard *v.* Gray (1870), L. R. 6 Q. B 139; *Re* Trufort, Trafford *v.* Blanc (1887), 36 Ch. D. 600.

204. —— ——.]—By an act of the Colonial Legislature of New South Wales, it was provided that a banking co. should sue & be sued in the name of its chairman, & that execution on any judgment against the co. might be issued against the property of any member for the time being, in like manner as if such judgment had been obtained against such member personally. In *assumpsit* against a member of the co. on a judgment obtained in the colony against the chairman:—*Held:* judgment recovered in an action against the chairman, after service of process on the chairman, had the same effect beyond the territory of the colony which it would have had if deft. had been personally served with process, &, he being a party to the record, the recovery had been personally against him.—BANK OF AUSTRALASIA *v.* NIAS (1851), 16 Q. B. 717; 20 L. J. Q. B. 284; 16 L. T. O. S. 483; 15 Jur. 967; 117 E. R. 1055.

Annotations:—**Consd.** Kelsall *v.* Marshall (1856), 1 C. B. N. S. 241; Reimers *v.* Druce (1857), 23 Beav. 145; Risdon Iron & Locomotive Works *v.* Furness, [1906] 1 K. B. 49, C. A. **Refd.** Thompson *v.* Bell (1854), 3 E. & B. 236; Copin *v.* Adamson, Copin *v.* Strachan (1874), L. R. 9 Exch. 345. **Mentd.** Barber *v.* Lamb (1860), 8 C. B. N. S. 95; Castrique *v.* Behrens (1861), 3 E. & E. 709; Lang *v.* Purves (1862), 15 Moo. P. C. C. 389, P. C.; Philpott *v.* Adams (1862), 7 H. & N. 888; Scott *v.* Pilkington (1862), 2 B. & S. 11; Simpson *v.* Fogo (1863), 1 Hem. & M. 195; Vanquelin *v.* Bouard (1863), 15 C. B. N. S. 341; Godard *v.* Gray (1870), L. R. 6 Q. B. 139; Ellis *v.* M'Henry (1871), L. R. 6 C. P. 228; Ochsenbein *v.* Papelier (1873), 8 Ch. App. 695, L.C. & L.J.; Abouloff *v.* Oppenheimer (1882), 10 Q. B. D. 295, C. A.; Voinet *v.* Barrett (1885), Cab. & El. 554; *Re* Trufort, Trafford *v.* Blanc (1887), 36 Ch. D. 600; Vadala *v.* Lawes (1890), 25 Q. B. D. 310, C. A.; Robinson *v.* Fenner, [1913] 2 K. B. 835.

205. —— Obtained against secretary in India.]—To enable a bank to sue & be sued in the name of their secretary or treasurer, it was enacted that all actions, etc., against the co. should be brought against the secretary or treasurer for the time being as nominal deft., that a memorial of the names, etc., of the directors, secretary, & treasurer, & of the several persons members & proprietors of the bank, should be inrolled in the manner therein mentioned, & that every judgment, etc., in any action, suit, or proceeding in India against the secretary or treasurer should, subject to the express provisions of the Act, "have the like effect & operation upon & against the property & funds of the bank, as if such judgment, etc., had been made or pronounced against all its members, & as if all the members had been parties before the ct. to such action, suit, & proceeding, & as if the Act had not passed." The Act then provided that, in case execution upon any judgment in such action, etc., obtained against the secretary or treasurer, should be ineffectual for obtaining satisfaction against the funds of the bank, execution might issue against proprietors for the time being, &, that proving ineffectual, then against persons who were proprietors at the time of the contract, provided that no such execution should issue against any other person than the actual party to the suit, without leave of the ct. in which the action was brought:—*Held:* there was nothing in the Act to prevent a creditor, having obtained a judgment against the secretary of the bank in India, from enforcing it by action against a shareholder in this country, the special provisions as to execution merely regulating the mode of procedure in India, & that the non-inrolment of a memorial in pursuance of the Act was no answer to an action upon such judgment.—KELSALL *v.* MARSHALL (1856), 1 C. B. N. S. 241; 26 L. J. C. P. 19; 2 Jur. N. S. 1142; 5 W. R. 114; 140 E. R. 100.

206. Action for money had & received—Plea of non-joinder of others — Evidence of defendant being shareholder.]—To an action of *assumpsit* for money had & received, deft. pleaded in abatement that the promises in the declaration mentioned were made by him jointly with certain other persons (thirteen in number, naming them) who were still living, etc. Replication, that the promises were not made by deft. jointly with the other persons in the plea mentioned. The particulars of demand stated that the action was brought to recover "cash deposited or received by deft. as pltf.'s banker." At the trial, pltf. began, & called a witness, who proved that she had a banking account, on which a balance was due to her to the amount stated in the particulars, with a banking co. called the Isle of Man Joint Stock Bank, which had since become insolvent, & in which the persons mentioned in the plea, & others also, were shareholders. The witness was cross-examined as to the state of the banking account, & not as to the fact of deft.'s being also a shareholder, but pltf. gave no affirmative evidence to prove that he was one:—*Held:* that fact was sufficiently admitted by the pleadings & proceedings at the trial to entitle pltf. to recover.—CRELLIN *v.* CALVERT, CRELLIN *v.* BROOK (1845), 14 M. & W. 11; 14 L. J. Ex. 375; 5 L. T. O. S. 75; 9 Jur. 810; 153 E. R. 368.

207. Proceedings in bankruptcy or debt due from banking partnership — No judgment against partnership.]—A shareholder in a joint-stock banking copartnership established under 1826 Act cannot be proceeded against in bkpcy. upon a debt due from the copartnership, where no judgment has been obtained against the public officer of the copartnership, although the business has been relinquished, & an order has been obtained to wind up the affairs of the co. under 11 & 12 Vict. c. 45, prior to the proceedings in bkpcy. The rule is the same, although there be not any public officer of the co.—DAVISON *v.* FARMER & GRACE (1851), 6 Exch. 242; 20 L. J. Ex. 177; 15 J. P. 691; 155 E. R. 531.

Annotations:—**Folld.** O'Flaherty *v.* McDowell (1857), 6 H. L. Cas. 142, H. L. **Mentd.** Mather *v.* Brown (1876), 1 C. P. D. 596.

See, generally, BANKRUPTCY & INSOLVENCY.

against the real estate of a former shareholder in the co., without having issued a *scire facias* against him:—*Held:* a ct. of equity ought to give relief against such registration of the affidavit, as being a cloud on the shareholder's title to his lands.—HONE *v.* O'FLAHERTIE (1859), 9 I. Ch. R. 119; Drury *temp.* Nap. 505; *affd.* 9 I Ch. R. 497.—IR.

B. Transfer of Shares.

See, generally, COMPANIES.

208. Right to transfer—Approval by directors—Reasonable exercise of power.]—By the deed of settlement of a banking co. it was declared that no person should be entitled to become a transferee of a share unless he was approved by the ct. of directors:—*Held:* the directors must exercise their power reasonably, & would be controlled by a ct. of equity. *Qu.:* whether it was a reasonable ground of objection that the proposed transferee was the nominee of a rival bank with which the shares had been deposited as security.—ROBINSON *v.* CHARTERED BANK OF INDIA (1865), 35 Beav. 79; L. R. 1 Eq. 32; 13 L. T. 454; 14 W. R. 71; 55 E. R. 824.

Annotations:—**Distd.** *Re* Gresham Life Assce. Soc., *Ex p.* Penney (1872), 8 Ch. App. 446, L.JJ. **Apld.** Moffatt *v.* Farquhar (1878), 7 Ch. D. 591. **Refd.** *Re* Bell, *Ex p.* Hodgson (1891), 65 L. T. 245. **Mentd.** Evans *v.* Davis (1878), 10 Ch. D. 747.

209. —— —— Irregular mode of transfer—Effect in equity.]—A banking co. was established under 1826 Act. By the deed of settlement of the co. it was declared that no transfer of shares should be permitted, except upon notice to the directors, & on the consent thereto of a board of directors, such consent to be signified by a certificate in writing signed by three directors at the least. If such consent was refused, the shareholder might require the directors to buy his shares at the market price of the day. After a consent given the name of the transferee was entered in the share register book, & the entry there was conclusive against him. No shareholder could compel an inspection of the books of the co. S. was a shareholder; he desired to transfer his shares to different individuals, & he sent the proper notices to the directors; he received back consents signed by three directors, on which he completed the transfers; the transferees' names were entered in the share register book; & the returns made to the Stamp Office under the Act omitted the name of S. from the list of shareholders, & inserted it in the list of those who had ceased to be shareholders. The transferees afterwards received the regular notices of meetings, etc. The directors subsequently sought to impeach these transfers, on the ground that the notices had never been submitted to a "board of directors," nor the consents given by such "board," but that the consents had merely been examined by the managing director alone, then signed by him, & afterwards signed by two other directors. This mode of transacting the business of the co. had existed ever since the formation of the co.:—*Held:* the directors could not set up their own want of observance of the formalities required by the deed as a ground on which to fix S. with liability as a continuing shareholder, & their course of dealing bound them, & he was released.—BARGATE *v.* SHORTRIDGE (1855), 5 H. L. Cas. 297; 3 Eq. Rep. 605; 24 L. J. Ch. 457; 25 L. T. O. S. 204; 3 W. R. 423; 10 E. R. 914, H. L.

Annotations:—**Expld.** Green *v.* Nixon (1857), 23 Beav. 530. **Apld.** *Re* British Provident Life & Fire Assce. Soc., Lane's Case (1863), 3 New Rep. 50. **Refd.** Eastern Counties Ry. Co. *v.* Hawkes (1855), 5 H. L. Cas. 331, H. L.; Prince of Wales Assce. *v.* Harding (1858), E. B. & E. 183; Grady's Case (1863), 1 De G. J. & Sm. 488; *Re* Barned's Banking Co., *Ex p.* Contract Corpn. (1867), 36 L. J. Ch. 732; Fountaine *v.* Carmarthen Ry. Co. (1868), L. R. 5 Eq. 316; Spackman *v.* Evans (1868), L. R. 3 H. L. 171, H. L.; Murray *v.* Bush (1873), L. R. 6 H. L. 37, H. L. **Mentd.** *Re* Royal British Bank, *Ex p.* Walton & Hire (1857), 5 W. R. 637; Woodhams *v.* Anglo-Australian & Universal Family Life Assce. (1864), 2 De G. J. & Sm. 162; *Re* Smith, Knight, *Ex p.* Weston (1868), 38 L. J. Ch. 49; *Re* Land Credit Co. of Ireland, *Ex p.* Overend, Gurney (1869), 4 Ch. App. 460, L.JJ.

See, now, Judicature Act, 1873 (c. 66), s. 25 (11).

210. —— —— —— Effect at law.]—On the facts set out in No. 209, *ante:*—*Held:* there was no such consent to the transfer by "a board of directors," as required by the deed of settlement, & this irregular mode of transfer, though adopted for some years, was wholly ineffectual, & deft. remained liable as a shareholder.—BOSANQUET *v.* SHORTRIDGE (1850), 4 Exch. 699; 19 L. J. Ex. 221; 20 L. J. Ex. 57; 14 Jur. 71; 154 E. R. 1395.

Annotations:—**Distd.** Straffon's Exors.' Case (1852), 1 De G. M. & G. 576, L.C. **Mentd.** Burmester *v.* Norris (1851), 12 L. J. Ex. 43; East Anglian Ry. Co. *v.* Eastern Counties Ry. Co. (1851), 11 C. B. 775; *Re* Pierse (1854), 24 L. T. O. S. 192; Bargate *v.* Shortridge (1855), 3 Eq. Rep. 605, H. L.

211. —— —— Notice of transfer.]—By the deed of settlement & charter of a bank it was provided that, upon a transfer of shares taking place, seven days' previous notice in writing of the proposed transfer, specifying the various particulars, should be given to the directors before any transfer could be made, & that after the consent of the directors had been given, the transfer should be executed & delivered to the secretary to be registered, whereupon a new certificate was to be delivered to the transferee. The co. had departed from this form, & the usual practice had been for the secretary to deliver out a blank form of transfer without any previous notice, & when returned filled up & executed, it was registered, & new certificates handed to the transferee. Certain shareholders who had executed the transfer, but whose transfers had not been registered, objected to being placed upon the list of contributories, on the ground that the consent of the directors had been practically dispensed with in all previous transfers:—*Held:* although the seven days' notice had been waived for the sake of facilitating transfers, the consent of the directors was necessary, which consent was proved by the registry on the books of the co.; & consequently the objecting shareholders were liable as contributories.—*Re* ROYAL BRITISH BANK, *Ex p.* WALTON, *Ex p.* HUE (1857), 26 L. J. Ch. 545; 29 L. T. O. S. 322; 3 Jur. N. S. 853; 5 W. R. 637.

Annotation:—**Refd.** Remfrey *v.* Butler (1858), E. B. & E. 887.

212. Refusal by bank to transfer—Affidavit by executor—Liability of bank for costs.]—If a banking co. refuse to transfer shares in the co. purchased by exors. with the assets of their testator in the name of a party entitled to the dividends for life, after an affidavit made by the exors., in conformity with 48 Geo. 3, c. 149, they do so at the peril of costs.—HENNELL *v.* STRONG (1856), 25 L. J. Ch. 407.

213. —— Lien on shares—Refusal justified.]—A banking co., by its articles of assocn., had a first

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PART I. SECT. 7, SUB-SECT. 4.—B.

208 i. *Right to transfer—Transfer in bank books.*]—Any party having an interest in any share of the capital stock of the Bank of Montreal may transfer the same by notarial transfer or in any other lawful way, but transfers in the books of the bank must be made according to 19 Vict., amending the Acts of incorporation of the bank.—BANK OF MONTREAL *v.* HENDERSON (1870), 14 L. C. J. 169.—**CAN.**

n. *Sale or transfer—Consent of parties—Registration in bank books.*]—The sale or transfer of bank stock is completed by the consent of the parties & the formalities required by Bank Act, ss. 43 *et seq.*, respecting the capacity of the seller, & the registration in the books of the bank only apply to the relationship between the shareholders & the bank.—BESSETTE *v.* BRIEN (1911), Q. R. 21 K. B. 132.—**CAN.**

213 i. *Refusal by bank to transfer—Lien on shares—Refusal justified.*]—Under 30 Vict. c. 18, the directors of the Commercial Bank are justified in refusing to enter in their books assignments of bank shares owned by parties in debt to the bank. The bank has a lien on such shares until the liabilities are discharged.—DICKINSON (TRUSTEE OF MCLEA'S INSOLVENT ESTATE) *v.* COMMERCIAL BANK DIRECTORS (1869) 5 Nfld. L. R. 289.—**NFLD.**

213 ii. —— —— *Shares held as administrator—Transfer to trustee.*]—Defts., a banking co. prior to the year 1889, were incorporated by a private Act of Parliament. The articles of assocn. provided that the bank should have a first lien upon all the shares

Sect. 7.—Private and joint-stock and chartered banks: Sub-sect. 4, B. & C.]

& paramount lien on all the shares of any shareholder for all moneys due to the co. from him alone, or jointly with any other person, & the co. might decline to register any transfer of shares whilst the shareholder making same was, either alone or jointly with any other person, indebted to the co. on any account whatsoever. P., a shareholder in the bank, was indebted to it on three bills of exchange. Before those bills became due they were renewed by the bank taking from P. three others. It did not appear whether the bank retained the former bills or not. Before the second bills were due, P. transferred his shares for value to H. P. signed the transfer in blank, & afterwards suspended payment. H. subsequently requested the bank to register the transfer, which they refused to do, on the ground (*inter alia*) that they had a lien on the shares of P. for their debt:—*Held:* at the time when the bank refused to register the transfer, they had a lien on the shares of P. for his debt then due to them, & were justified in their refusal to make the registration.—*Re* LONDON, BIRMINGHAM & SOUTH STAFFORDSHIRE BANKING CO., LTD. (1865), 34 Beav. 332; 5 New Rep. 351; 34 L. J. Ch. 418; 12 L. T. 45; 11 Jur. N. S. 316; 13 W. R. 446; 55 E. R. 663.

See, also, Nos. 219, 220, *post*,

214. Liability after assignment—No new return—Delay in deed of transfer.]—A. appeared, by the return under 1826 Act, to be a shareholder of a banking co. up to Nov., 1838. He then agreed to assign his shares to B., who was appointed by the co. a director in respect of those shares. In Feb., 1839, the co. indorsed bills to petitioners. No new return was made under s. 8, & not till Mar. was the deed of transfer executed between A. & B.:—*Held:* A. continued a partner to the world until Mar., & was liable to payment of the bills.—*Re* PHILLIPS, *Ex p.* PRESCOTT (1839), Mont. & Ch. 611, Ct. of R.

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registered in the name of each member for his debts & liabilities to the co., &, further, that "every person, who accepts any share in the co. & whose name is entered on the register, & no other person, shall for the purposes of these articles be deemed to be a member, & no notice of any trust express implied or constructive shall be entered in the register or be receivable by the co., nor shall the co. be in any manner bound thereby." In 1889 the co. became registered as a limited co. under Cos. Act, 1864. In 1884 certain shares in the co. in the estate of a deceased person S. were transferred into the name of H., & stood in the register book of the co. in the name of H., together with an entry opposite H.'s name in the words "administrator of S. deceased." Upon the registration of the bank as a limited co., the administrator was entered upon the register then compiled, in his own name as owner of the shares, but that register did not disclose that H. in fact held the shares as administrator. In 1892 pltf. was appointed trustee of the estate, & the administrator H. signed a transfer of the shares to him in due form, & he forwarded the transfer to the co. & applied to be registered. The co. refused to register pltf. on the ground that they held a lien over the shares standing in H.'s name, because he had become indebted to the bank on his own account:—*Held:* defts. had no lien over the shares, & pltf. was entitled as damages to the value of the shares at the time of defts.' refusal to register him.—MCLAUGHLIN *v.* BANK OF VICTORIA, LTD. (1894), 20 V. L. R. 433.—**AUS.**

213 iii. —— *Resolution of shareholders.*]—In an action against applt., a shareholder, to recover a call, he defended on equitable grounds, that before call or notice thereof he made a transfer of the shares to a person authorised & qualified to receive same, & he & the transferee did all things necessary for the valid & final transferring of the shares, but pltfs., without legal excuse & without reason, refused to record such transfer, or to register same in the books of the bank. At a special general meeting of the shareholders of the bank, it had been resolved that a loan should be obtained to enable the bank to carry on business, & "that the shareholders agree to hold their shares without assigning them until the principal & interest due on such loan shall be fully paid." Deft. was not present when the resolution was passed. Subsequently to the resolution, & prior to the transfer of deft.'s shares, a large number of other shares had been transferred in the books of the bank:—*Held:* deft. could not be deprived of his legal right under Banking Act (34 Vict. c. 5) to transfer his shares, & to have the transfer recorded in the books of the bank, & the plea was a good equitable defence to the action.—SMITH *v.* BANK OF NOVA SCOTIA (1882), 8 S. C. R. 558.—**CAN.**

213 iv. —— ——.]—Pltf., the holder of a number of shares in the L. Bank, sold same to S. & forwarded to him a power of attorney authorising the registry of the transfer. At the same time he forwarded to the manager of the bank his stock certificates to be cancelled on the transfer being registered & notified the bank of the transfer. S. paid the consideration for the shares, & forwarded the transfer to the manager, whom he requested & authorised to register his acceptance. The bank declined to register the transfer until after payment of a certain loan which had been procured in pursuance of a resolution passed at a meeting of shareholders at which pltf. was present, & which purported to bind the shareholders to hold their shares without assigning them until the principal & interest due on such loan had been fully paid:—*Held:* there being evidence that the loan was effected on other security than the resolution, & that the resolution was never acted upon, pltf. was not deprived by the passage of the resolution of the legal right to transfer his shares & to have the transfer registered in the books of the bank.—BARSS *v.* BANK OF NOVA SCOTIA (1885), 6 R. & G. 254; 6 C. L. T. 443.—**CAN.**

213 v. —— *Contingent liabilities—No assent of directors—Bye-laws of bank.*]—Deft., the registered owner of shares in the U. Bank, by order requested the manager to transfer the shares to the savings bank. This order was not complied with because (1) deft.'s promissory notes were held by the U. Bank, & the shares were not transferred in order that if the notes were dishonoured, the shares would be there to respond; (2) to constitute a valid transfer the assent of two directors was necessary under a bye-law of the bank:—*Held:* (1) the bank had no power to hold the shares except for a liability actually due & existing; (2) the above bye-law was void in law, & a remedy existed for the savings bank against the U. Bank.—AINSWORTH *v.* CUSACK (1859), 4 Nfld. L. R. 352.—**NFLD.**

213 vi. —— *Transferor paying calls—Indemnity from transferee.*]—The transferor of shares, where registration of the transfer is lawfully refused by the directors of the co., is entitled to recover from the transferee the amount of subsequent calls which he has been compelled to pay. Such liability of the transferee is not affected by Bank of New Zealand Share Guarantee Act, 1894, s. 4, or Bank Directors & Shares Transfer Act 1894, s. 2, where the shares were Bank of New Zealand shares, & were transferred subsequently to the passing of the said stats.—KEBBELL *v.* OLLIVIER (1900), 19 N. Z. L. R. 462.—**N.Z.**

214 i. *Liability after assignment—No consent of directors.*]—Shares of pltf. bank were transferred to resps., who immediately transferred them to other persons. The bank officials purported to accept & register the transfer to resps., but to reject the transfer from them. Neither transfer was approved by the directors or authorised in writing by the president as required by Bank of New Zealand Share Guarantee Act, 1894, s. 4, the then directors & president being in London. The bank having sued for a call, resps. denied they were shareholders when the call was made:—*Held:* even if the requirements of the above sect. could be waived, there was no waiver, & no facts existed which would estop resps. from setting up the sect.—BANK OF NEW ZEALAND *v.* LOGAN (1899), 18 N. Z. L. R. 117; 18 N. Z. L. R. 641.—**N.Z.**

214 ii. —— *No transfer in bank books.*]—The exors. of C.'s estate invested funds in bank stock in their own names, but for the benefit of the estate. After their death their representatives agreed to transfer the stock to C.'s widow, & the certificates were handed over to her, & she afterwards received the dividends, but no transfer was made in the bank books as required by its charter & bye-laws:—*Held:* the exors. were properly placed on the list of contributories for the stock standing in their names on the register, & not C.'s name.—*Re* WESTMORLAND BANK, PRESIDENT, ETC., *Ex p.* ALLISON (1869), 12 N. B. R. (Han.) 514.—**CAN.**

214 iii. —— ——.]—An insurance co. took as security for a loan to a bank a transfer of shares of the bank. The loan was repaid before the insolvency of the bank, but the shares, though retransferred by the co., were not accepted in the books of the bank, as required by the Bank Act:—*Held:* the co. not liable to contribute in the winding up of the bank in respect of such shares.—*Re* CENTRAL BANK, N. A. LIFE INSURANCE CO.'S CASE (1890), 30 C. L. T. 275.—**CAN.**

214 iv. —— *Within month before suspension.*]—H. acquired bank shares within one month before the suspension of the bank. The transferors had also acquired the shares within the month:—*Held:* the transferors should be placed on the list as well as H.—*Re* CENTRAL BANK, J. D. HENDERSON'S CASE (1889), 17 O. R. 110.—**CAN.**

214 v. —— ——.]—R. S. C., c. 120, ss. 70, 77, make liable as contributories all those who have held bank shares at any time within one month before suspension of the bank.—*Re* CENTRAL BANK OF CANADA, BAINES' CASE (1889), 16 A. R. 237; 16 O. R. 293.—**CAN.**

214 vi. —— *Irregular mode of transfer.*]—A. agreed to sell his shares in a joint-

215. —— Shareholder's name in Stamp Office returns — Subsequent transfer.] — A shareholder whose name is properly inserted in the last return or memorial filed at the Stamp Office cannot get rid of his liability under 1844 Act, s. 21, by a subsequent *bonâ fide* transfer of his shares.—DOSSETT *v.* HARDING (1857), 1 C. B. N. S. 524; 140 E. R. 214.

Annotations :—**Folld.** Powis *v.* Harding (1857), 1 C. B. N. S. 533; Fry *v.* Russell (1858), 3 C. B. N. S. 665. **Refd.** Powis *v.* Butler (1858), 3 C. B. N. S. 645: *Re* Overend, Gurney, Oakes *v.* Turquand, Peek *v.* Turquand (1867), L. R. 2 H. L. 325, H. L.

216. —— Losses prior to transfer—Statute of Limitations.]—A deed of settlement establishing a banking co. contained a clause exonerating the transferor of shares from all liabilities in respect of his shares subsequently to the transfer, with a proviso that nothing contained in such clause should extend to release the transferor from his proportion of losses sustained by the co. up to the time of transfer. A winding-up order having been obtained :—*Held :* the transferors of shares were liable for the losses which accrued prior to their transfers.

One transfer of shares took place twenty-three years, a second nine years, & a third five years, before the winding up :—*Held :* the liabilities were specialty debts, & Stat. Limitations applied only in the case of the first transfer.—*Re* PORTSMOUTH BANKING CO., HELBY'S, STOKES' & HORSEY'S CASES (1866), L. R. 2 Eq. 167; 14 L. T. 47; 14 W. R. 417.

See, generally, LIMITATION OF ACTIONS.

217. Transfer of shares as security—Deed not executed—Liability to obligations.]—The deed of a joint-stock bank provided that any person to whom shares had been transferred, & who should not execute the deed within six months, should, as to all obligations & penalties arising in respect of such shares, be deemed a member of the co., but not as respects the profits. *Qu. :* whether a person to whom shares had been transferred as a security, & who had not executed the deed, was liable as a member of the co. under such provisions.—CHRISTY *v.* PIDGEON (1847), 9 L. T. O. S. 79.

Under Leeman's Act.]—*See* COMPANIES; STOCK EXCHANGE.

C. Other Cases.

218. Residence in England not essential.]—It is not at all essential that the shareholders in a joint-stock bank should all reside in England. *Semble :* it is not essential that any six of them should.—R. *v.* BEARD (1837), 8 C. & P. 143.

Annotations :—**Mentd.** Chapman *v.* Milvain (1850), 5 Exch. 61; R. *v.* Pritchard (1861), Le. & Ca. 34, C. C. R.

219. Debts due to banking company—Bank's lien on shares & dividends.]—The deed of settlement of a banking copartnership provided "that the directors should have a lien on the shares & stock of every shareholder, for debts due from him to the co.," & that "the directors might cancel & declare forfeited or sell the shares of such shareholder, or otherwise deal with same as the case might require, for obtaining payment of such debts" :—*Held :* the bank had a lien, not only on the shares, but also on

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stock bank to B., the shares to be transferred by A. to C., who was to hold same as trustee for B., but charged with the purchase-money & interest at 5 per cent., payable half-yearly, until the principal was fully paid. The shares were transferred by A. to C., but the deed of settlement required a notice of all proposed transfers to be left at the office of the directors, which was not done. The assignment not having been registered when the first dividend after the transfer became due, A. received it & retained the surplus on account of another debt due to him by B. A subsequent dividend was received by C., & paid over by him to A., who appropriated it as he had done with the former dividend :—*Held :* A. was properly included in the list of contributories. *Semble :* non-compliance with the formal conditions required by the deed of settlement of a co. for transfer of the shares does not vitiate a transfer by a shareholder.—*Re* TIPPERARY J. S. BANK, *Ex p.* SCULLY (1856), 6 I. Ch. R. 72; 1 Ir. Jur. 434; *revsd.* (1857), 6 I. Ch. R. 524; 2 Ir. Jur. 450.—**IR.**

214 vii. —— ——.[—A director of a joint-stock banking co. sold shares to another director, but the transfer was not made with the formality required by the partnership deed :—*Held :* it was invalid, & the transferor was rightly placed upon the list of contributories in respect of his shares.—*Ex p.* KENNEDY (1856), 6 I. Ch. R. 121.—**IR.**

214 viii. —— *Shares transferred to bank —Transferor's name fraudulently replaced on register.*]—A., a shareholder in the A. Bank, sold, in 1837, his shares to the co., who entered the sale in their books. The printed deed of transfer required by law was filled up & executed by pltf., but not by any of the trustees of the bank, & no memorial of transfer was executed. In the register, filed in Nov., 1837, A.'s name appeared as having ceased to be a partner, & it was omitted in the annual register of shareholders filed in the years 1838, '39, '40, '41, & '42. In 1843 A.'s name was again replaced on the register of shareholders, in pursuance, as alleged by A., of a fraudulent arrangement between the bank & B., in order to make A. liable. B. having obtained judgment against the bank, sued out a *scire facias* thereon against A. as a shareholder. A perpetual injunction was granted to restrain B. from proceeding at law against A. upon the *scire facias,* & to restrain the bank from placing A.'s name on the next ensuing annual register.

Banking Act, 1825 (c. 42), does not prevent a co. from buying up the shares of an individual member, & although they dispense with the form of transfer directed by the Act, the sale will be binding as between them & the vendor.—TAYLOR *v.* HUGHES (1844), 7 I. Eq. R. 529.—**IR.**

p. *Notice of trust — Registration of transfer in breach of trust.*]—Resp. bank (incorporated by 18 Vict. c. 202) registered an absolute transfer of its shares, which had been executed by trustees & exors. under a will to one of the residuary legatees, regardless of a provision in the will directing the substitution of the legatee's lawful issue at his death, & the transferee disposed of the shares so as to defeat the rights of the issue :—*Held :* such registration, unless with actual knowledge of a breach of trust, was not wrongful, having regard to s. 36 of the Act. Circumstances which were held insufficient to affect the bank with knowledge of the trusts sought to be enforced.—SIMPSON *v.* MOLSON'S BANK, [1895] A. C. 270; 64 L. J. P. C. 51; 11 R. 427, P. C.—**CAN.**

PART I. SECT. 7, SUB-SECT. 4.—C.

219 i. *Debts due to bank—Bank's lien on shares.*]— *Held :* the bank entitled to retain stock of an insolvent proprietor, for payment of debts due to the bank by a co. of which he was a partner, against the trustee on bkpt. estate.—HOTCHKIS *v.* ROYAL BANK OF SCOTLAND (1797), 3 Pat. App. 618, H. L.—**SCOT.**

219 ii. —— *Death of shareholder—Sums payable under reconstruction scheme.*]—Sums payable in respect of bank shares under a scheme of reconstruction of the bank are debts due by deceased under Administration & Probate Act, 1890, s. 97.—MASTER IN EQUITY *v.* PEARSON (1896), 75 L. T. 526, P. C.—**AUS.**

q. *Shares purchased on condition — Non-fulfilment of condition—Payment in instalments.*]—Deft. subscribed for stock in pltf. bank on strength that pltfs. would open a branch at S. This pltfs. did, but discontinued it in a few months from lack of business. The stock was to be paid for in monthly instalments of $10 per share, commencing thirty days after allotment, & continuing at intervals of thirty days till paid :—*Held :* such an arrangement not *ultra vires* under Bank Act, ss. 37 & 38.—FARMERS BANK *v.* BLOW (1909), 13 O. W. R. 1041; 18 O. L. R. 530.—**CAN.**

s. *Purchase of share — To bring action against bank.*]—Pltf., in order to qualify himself to sue as a shareholder of a bank, purchased one share of the stock thereof, which he swore he paid for with his own money & bought of his own motion, for the purpose of testing the legality of a transaction into which the bank was about to enter :—*Held :* pltf. had a *locus standi* in ct., although the circumstances were suspicious.—JONES *v.* IMPERIAL BANK OF CANADA (1826), 23 Gr. 262.—**CAN.**

t. *Westmorland Bank — Liability of stockholders.*]—The stockholders of the above bank, by their charter, in addition to the liability of the stock held by them for payment of the debts of the bank, are liable in their private & individual capacity for an amount equal to the sum of their stock.—MCKENZIE, WESTMORLAND BANK CURATOR *v.* WISWELL (1869), 12 N. B. R. (1 Han.) 511.—**CAN.**

u. *Liability for wages of employees—Employed by committee of shareholders.*]—*Held :* deft. sued jointly with others as a member of a committee was not responsible for the salary of a person employed by the committee, under a joint-stock banking charter, prior to the time of his becoming a stockholder in the bank, & a member of the committee.—MINGAYE *v.* BURTON (1860), 10 C. P. 60.—**CAN.**

w. *Rectification of register of members —Bill in equity—Mandamus.*]—The summary process provided by 25 & 26 Vict. c. 89, s. 55, for rectification of the register of members, is not available in

Sect. 7.—Private and joint-stock and chartered banks: Sub-sect. 4, C.; sub-sect. 5.]

the dividends of a shareholder who had overdrawn his account, & he could not recover such dividends as money had & received to his use.—HAGUE *v.* DANDESON (1848), 2 Exch. 741; 17 L. J. Ex. 269; 154 E. R. 689.

220. —— —— Payments to shareholders on transfer of business.]—The articles of a bank provided that the bank should have a permanent lien upon shares of members for money due from them to the co. The bank being in liquidation, an agreement was entered into with another co. for the sale & transfer to it of the business & assets of the bank. The agreement provided that the purchasing co. should pay to each shareholder of the bank, who did not wish to take shares in the new co., £2 for each share he held in the bank. L., who held six hundred & five shares in the bank, & was at the time largely indebted to it, did not subscribe for shares in the new co., having shortly before executed an inspectorship deed under Bkpcy. Act, 1861 (c. 134): —*Held:* the lien given by the articles on L.'s shares extended to the money which the new co. was to pay him for them under the agreement.—*Re* GENERAL EXCHANGE BANK, *Re* LEWIS (1871), 6 Ch. App. 818; 40 L. J. Ch. 429; 24 L. T. 787; 19 W. R. 791, L.JJ.

Annotations:—**Folld.** Everitt *v.* Automatic Weighing Machine Co., [1892] 3 Ch. 506; *Re* National Bank of Wales, [1899] 2 Ch. 629, C. A.; Hopkinson *v.* Mortimer, Harley, [1917] 1 Ch. 646.

See, also, No 213, *ante.*

SUB-SECT. 5.—WINDING UP.

See, generally, COMPANIES.

221. Company formed & registered under Joint Stock Companies Act, 1856 (c. 47)—Not banking company—1857 Act & Joint Stock Banks Act, 1858 (c. 91).]—A co., called "The District Savings Bank," was registered in 1858, under the 1856 Act, with limited liability, but was never registered under 1857 & 1858 Acts relating to banking cos., & its shares were of £1 each. Its objects were to receive deposits, to grant loans on security, & to conduct the business of emigration agents. Money could not be drawn out by cheques payable on demand, but could only be withdrawn after notice, & the co. kept banking accounts, with two banks in London:—*Held:* it was not a banking co., & the Ct. of Ch. had no jurisdiction to make

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respect to banks constituted under Banking Act, 1871, & the remedy so readily provided under the English procedure is attainable in Nova Scotia only by bill in equity, or, perhaps, in some cases by writ of mandamus.—BANK OF NOVA SCOTIA *v.* SMITH (1883), 4 R. & G. 146; *revsd.* on other grounds 8 S. C. R. 558.—**CAN.**

x. *Bank books—Right of stockholder to inspect.*]—A stockholder merely as such has no right to inspect the stock or other books of the bank, nor will the ct. grant a mandamus for that purpose, although they have the power, unless some special ground be disclosed sufficient to warrant it.—*Re* BANK OF UPPER CANADA *v.* BALDWIN (1829), Dra. 55.—**CAN.**

PART I. SECT 7, SUB-SECT. 5.

y. *Company formed under Joint-Stock Companies Act,* 1844—*Registered under Companies Act,* 1862 (*c.* 89)—*Not unregistered company under Indian Companies Act,* 1866 (*X. of* 1866).]—A joint-stock banking co., established by deed & Royal Charter in England under 1844 Act with agencies in different parts of the world, & registered under 1862 Act, but not under any Indian Act, having its principal place of business in London, though having a principal branch in Calcutta in which the other branches in India are subordinate, is not such a co. as can be wound up as an "unregistered co." under 1866 Act, but should be wound up by the Ct. of Ch., & an order of the Ct. of Ch. under 1862 Act winding up the co. in England has the effect of winding up all branches of the co. in India & elsewhere.—*Re* INDIAN COMPANIES ACT (1866), 1 Ind. Jur. N. S. 335.—**IND.**

z. *Preliminary proceedings.*]—Winding-up Act (47 Vict. c. 39), ss. 2, 3, do not apply to banks, but an insolvent bank, whether in process of liquidation or not at the time it is sought to bring it under the Winding-up Act, must be wound up with the preliminary proceedings provided for by 45 Vict. c. 23, ss. 99—120, as amended by 47 Vict. c. 39, s. 2.—MOTT *v.* BANK OF NOVA SCOTIA (1887), 14 S. C. R. 650.—**CAN.**

a. *Claim by banking partner—Complete solvency—Taking of accounts.*]—Though, on general principles, the claim of a partner against a joint banking concern must, in course of winding-up proceedings, be postponed to those of outsiders, there may be cases in which the complete solvency of the bank is admitted & a partner might sue, like any other customer, for the taking separately of his private account as a customer & for the recovery of the balance found standing to his credit. Relief in such a case will only be refused when a partial account will work injustice to the other partners.—MOHAHEO PROSAD SAHU *v.* GAJADHAR PROSAD SAHU (1912), 16 C. W. N. 897.—**IND.**

b. *Holder without notice of breach of trust—Liable to contribute.*]—*Re* ONTARIO BANK, BARWICK'S CASE (1911), 19 O. W. R. 686; 2 O. W. N. 1352.—**CAN.**

c. *Transfer ultra vires—Liability to contribute.*]—H., having been placed on the list of contributories, appealed on the ground that the transfer of his shares was a fraudulent transaction, in view of R. S. C., c. 120, s. 45, since the bank was trafficking in its own shares for the purpose of enhancing the market price of its shares, & took applt.'s notes in payment for his shares, undertaking not to enforce them, but to deliver them up upon a resale being effected, which transactions were *ultra vires* of the bank: —*Held:* no defence as against the liquidators, who represented the creditors as well as the bank.—*Re* CENTRAL BANK, J. D. HENDERSON'S CASE (1889), 17 O. R. 110.—**CAN.**

d. *Calls — Offer in compensation — Claims against bank purchased after winding up.*]—A shareholder of a bank cannot offer in compensation of calls on stock after its suspension claims against the bank which he has purchased since the suspension.—GILMAN *v.* COURT (1882), 13 R. L. 619.—**CAN.**

e. —— —— *Deposit.*]—A depositor who is also a shareholder of a bank in liquidation under Banking Act & which was insolvent when it suspended payment, is not entitled to offer the amount of his deposit in compensation of calls made upon his stock by the liquidators under the double liability clause of Banking Act (34 Vict. c. 5), s. 58.—EXCHANGE BANK *v.* BURLAND (1885), 8 L. N. 18.—**CAN.**

g. *Invalid acquisition of shares — Liability of holder to contribute.*]—A promissory note given by a subscriber for bank shares for the 10 per cent. required by Bank Act to be paid in money is not a compliance with the stat., & such subscriber does not validly acquire any shares & is not liable as a contributory in winding-up proceedings.—*Re* CENTRAL BANK, *Ex p.* BURK (1890), 30 C. L. T. 343.—**CAN.**

h. *Crown's right to priority.*]—The Crown is bound by the two Codes of Lower Canada & can claim no priority except what is allowed by them. Being an ordinary creditor of a bank in liquidation, it is not entitled to priority of payment over their other ordinary creditors.

By the true construction of Civil Procedure Code, art. 611, the intention of the Legislature was that "in the absence of any special privilege, the Crown has a preference over unprivileged chirographic creditors for sums due to it by deft. being a person accountable for its money."—EXCHANGE BANK OF CANADA *v.* R. (1886), 11 App. Cas. 157; 55 L. J. P. C. 5; 54 L. T. 802, P. C.—**CAN.**

k. —— *Acceptance of dividends—Waiver.*]—*Held:* (1) the Crown claiming as a simple contract creditor had a right to priority over other creditors of equal degree; (2) the Crown had not waived its right to be preferred by the form in which the claim was made, & by the acceptance of two dividends.—R. *v.* BANK OF NOVA SCOTIA (1885), 11 S. C. R. 1.—**CAN.**

m. —— *Not applicable to deposit of suitor's money by Master in Equity.*]—Money held by the Master in Equity under an order of the ct. in an administration action, & placed by him upon deposit receipts in a bank under an order made in the action, does not constitute such money Crown money, so as to entitle the Crown to priority over the other creditors of the bank in winding-up proceedings.—R. *v.* BANK OF VICTORIA (1895), 21 V. L. R. 32.—**AUS.**

n. —— *Not applicable to deposit by receiver appointed by court.*]—Where money has been deposited in a bank by a receiver appointed by the ct. in an action, this does not constitute such money Crown money, so as to entitle the Crown to priority over other creditors of the bank in winding-up proceedings.—MCMECKAN *v.* AITKEN (1895), 21 V. L. R. 65.—**AUS.**

p. —— *As against holders of bank notes.*]—The holders of notes of an insolvent bank, being accorded a special privilege by 43 Vict. c. 22, s. 12, take precedence of the Crown.—R. *v.* EXCHANGE BANK OF CANADA (1886), M. L. R. 1 Q. B. 302; 9 L. N. 130; *& see* (1886), 11 App. Cas. 157, at p. 159, H. L.—**CAN.**

r. —— —— *Deposit with Minister of Finance—Whether money of Crown.*]—The Crown's right to payment in full of a claim against the assets of an insolvent bank in priority to all other credi-

an order for winding it up.—*Re* DISTRICT SAVINGS BANK, LTD., *Ex p.* COE (1861), 3 De G. F. & J. 335; 31 L. J. Bcy. 8; 5 L. T. 566; 10 W. R. 138; 45 E. R. 907, L.JJ.

222. Stoppage of payment—Fresh registration—Voluntary winding up—Order by court.]—In 1836 a joint-stock banking co., having a capital of fixed amount, divided into shares of fixed amount, was constituted under 1826 Act by deed of settlement. It carried on business on Aug. 17, 1857, when 1857 Act was passed, but on Nov. 26, 1857, it stopped payment. At a meeting of the co. held on the 26th of the following month it was resolved that the co. should be registered under 1857 Act, & such registration was accordingly effected on Dec. 30, 1857. At a subsequent meeting of the co., held on Jan. 22, 1858, it was resolved that the co. should be forthwith dissolved under the provisions of its deed of settlement, & that it should be voluntarily wound up, & liquidators for that purpose were appointed at that meeting:—*Held:* (1) notwithstanding the co. had stopped payment before it was registered, it fell within 1857 Act, & the ct. had power to make an order approving of such voluntary winding up; (2) in the circumstances an order should be made for winding up by the ct.—*Re* NORTHUMBERLAND & DURHAM DISTRICT BANKING CO. (1858), 2 De G. & J. 357; 31 L. T. O. S. 107; 4 Jur. N. S. 419; 6 W. R. 527; 44 E. R. 1028, L.JJ.

Annotations:—**Refd.** *Re* Nassau Phosphate Co. (1876), 24 W. R. 692. **Mentd.** Hill *v.* Hill (1886), 35 W. R. 137; *Re* National Debenture & Assets Corpn. (1893), 39 W. R. 707, C. A.; Young *v.* South African & Australian Exploration & Development Syndicate (1896), 44 W. R. 509.

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tors is not interfered with by Bank Act (R. S. C. c. 120), s. 79, giving noteholders a first lien on such assets, the Crown not being named in such enactment.

An insurance co., in order to deposit $50,000 with the Minister of Finance & receive a licence to do business in Canada according to Insurance Act (R. S. C. c 124), deposited the money in a bank & forwarded the deposit receipt to the Minister. The money in the bank drew interest, which, by arrangement, was received by the co. The bank having failed, the Govt. claimed payment in full of this money as money deposited by the Crown:—*Held:* it was not the money of the Crown but held by the Finance Minister in trust for the co., & it was not subject to the prerogative of payment in full in priority to other creditors.—MARITIME BANK *v.* R. (1889), 17 S. C. R. 657.—**CAN.**

s. *Statutory liability of directors — Recovery of.*]—*Held:* the liability of directors provided for by 21 Vict. c. 2, s. 24, could not be recovered from the directors by the trustees in insolvency of the bank.—COMMERCIAL BANK TRUSTEES *v.* PITTS (1896), 7 Nfld. L. R. 888.—**NFLD.**

t. *Irregularities in transfers — Holders cannot plead.*]—After a winding-up order has been made, it is too late for holders of shares, entered as such in the books of the bank, to escape liability by showing irregularities in transfers to more or less remote predecessors in title.—*Re* CENTRAL BANK OF CANADA, HOME SAVINGS & LOAN COMPANY'S CASE (1891), 18 A. R. 489.—**CAN.**

u. *Liquidators — Who may be appointed.*]—In the liquidation of a bank case the judge appointed liquidators from among the nominees of the creditors, one of them being a bank:—*Held:* there was nothing in Winding-up Act requiring both creditors & shareholders to be represented on the board of liquidators; & a bank might be appointed liquidator.—FORSYTH *v.* BANK OF NOVA SCOTIA, *Re* BANK OF LIVERPOOL (1890), 18 S. C. R. 707; Cam. Cas. 209.—**CAN.**

v. —— *Revocation of appointment—By court.*]—The ct. has power to revoke the appointment of liquidators of a bank in liquidation & to replace them, upon the intervention of interested parties, but, before granting the motion for the recall of a liquidator, it will order a meeting of the shareholders to be called & the creditors of the bank to give their opinions upon the contents of the petition. The ct. may relieve a liquidator, upon the intervention of creditors, & when it is shown that the liquidators are not in accord & that there is no harmony among them in the liquidation of the bank's affairs.—CLOYES *v.* DARLING (1884), 16 R. L. 649.—**CAN.**

w. —— *Transfer of security under Bank Act, s. 88—Liability for wages of employees.*]—Where a liquidator takes a transfer from a bank of security held by them under Bank Act, s. 88, the wages in respect to which the employees are entitled to priority are, under Winding-up Act, s. 70, such as have accrued to them during the three months next previous to the date of the winding-up order, but where the liquidator does not take over such security & the bank realise their security, they must, under Bank Act, s. 88 (7), treat the wages of the employees to the extent of three months, independent of the date when they accrued, as a prior charge to their own claim.—*Re* ALBERTA ORNAMENTAL IRON CO. & IMPERIAL BANK, [1917] 1 W. W. R. 126.—**CAN.**

x. *Officers' provident fund — Right to return of subscriptions.*]—A bank official, who has paid subscriptions to a guarantee fund on the express agreement that the fund is to be for the benefit of the officers & not of the bank, is entitled to be repaid the amount of subscriptions paid by him upon the bank going into liquidation.—*Re* COMMERCIAL BANK OF SOUTH AUSTRALIA (IN LIQUIDATION), *Ex p.* R. S. YOUNG (1886), S. A. L. R. 61.—**AUS.**

z. —— *Available to relieve double liability.*]—*Held:* the officers' pension fund of the above bank should go to the relief of the shareholders under double liability.—*Re* ONTARIO BANK (PENSION FUND) (1913), 25 O. W. R. 99; 5 O. W. N. 134; *affd.* (1914), 19 D. L. R. 512; 30 O. L. R. 350; 50 W. N. 695.—**CAN.**

a. *Enforcing double liability — Parties.*]—*Held:* the trustees of the bank of Upper Canada were necessary parties to a bill by creditors to enforce the double liability of shareholders.—BROOKE *v.* BANK OF UPPER CANADA (1870), 17 Gr. 301.—**CAN.**

b. —— *Bank organisation irregular—Effect upon position of shareholder.*]—*Re* FARMERS BANK, LINDSAY'S CASE (1916), 9 O. W. N. 408—**CAN.**

c. —— *Bank of Prince Edward Island—Effect of 35 & 36 Vict. c. 23.*]—MORRIS *v.* LIQUIDATORS BANK OF P. E. I., Cass. Dig. (2nd ed.) 68.—**CAN.**

d. —— *Stock held as collateral security.*]—A savings bank holding stock of an insolvent bank as collateral security is not liable as a stockholder for the double liability.—EXCHANGE BANK OF CANADA *v.* MONTREAL CITY & DISTRICT SAVINGS BANK (1885), 30 L. C. J. 85; 2 M. L. R. 51; *affd.* 6 M. L. R. 196.—**CAN.**

f. —— *Shares of infant—Ratification—Acquiescence.*]—*Re* SOVEREIGN BANK, CLARK'S CASE (1916), 9 O. W. N. 279, 328, 402.—**CAN.**

h. *Set-off — Debt to contributor — Double liability.*]—A contributory of an insolvent bank who is also a creditor cannot set off the debt due to him by the bank against calls made in the course of winding-up proceedings in respect of the double liability imposed by Bank Act.—MARITIME BANK *v.* TROOP (1889), 16 S. C. R. 456.—**CAN.**

j. —— —— ——.]—A contributory under Winding-up Act is entitled to set off a deposit account against a claim made against him under the double liability clause of Bank Act.—*Re* CENTRAL BANK, *Ex p.* HARRISON & STANDING (1888), 30 C. L. T. 271.—**CAN.**

k. —— *Claims of contributories.*]—Winding-up Act (45 Vict. c. 23), ss. 75, 76, in respect to claims acquired by contributories within thirty days of winding-up proceedings for use as a set-off, only apply to actions against a contributory when the debt claimed is due from the person sued in his capacity as contributory.—INGS *v.* BANK OF P. E. I. (1885), 11 S. C. R. 265.—**CAN.**

l. —— *Claims acquired before petition presented.*]—A debtor of a bank, which is being wound up under Winding-up Act (R. S. C., c. 129) is entitled to set off against a debt due by him to the bank prior to the commencement of the winding-up proceedings, a liability of the bank acquired by him before the presentation of the petition for the winding up, even though acquired by him for that purpose after the bank had suspended payment, & with a knowledge of that fact; but such right of set-off does not exist in respect to claims acquired after the presentation of the petition for the winding up.—MARITIME BANK *v.* ROBINSON (1887), 26 N. B. R. 297.—**CAN.**

m. *Authority of receivers — Enforcement of claims against shareholders.*]—The receivers & liquidators of the bank have no authority under Winding-up (Union Bank) Act, 1895, to enforce payment of claims under the Act to amend Incorporation Act, 1855, s. 5, against the shareholders as "contributories," & the ct. has no jurisdiction to settle the list.—UNION BANK OF NEWFOUNDLAND, WINDING-UP (1896), 7 Nfld. L. R. 862.—**NFLD.**

p. *Powers of curator under Winding-up Act, R. S. C., 1906—Notice of application for winding up cannot be waived.*]—*Re* FARMERS BANK (1910), 17 O. W. R. 964; 2 O. W. N. 623; 22 O. L. R. 556.—**CAN.**

q. *Executors — Contingent liability.*]—A testator died possessed of bank stock, which his exors. allowed to remain undisposed of, & received the dividends. Under the bank charter the stockholders were individually liable for the payment of the debts of the bank in proportion to the stock they held. About two years after the death of testator, the bank was wound up under 27 Vict. c. 44, & a call made on the exors. as contributories:—*Held:* they were liable in their representative capacity, & payment of legacies under the will could not be allowed against their contingent liability to calls under the charter.—MCKENZIE *v.* KING (1871), 13 N. B. R. (2 Han.) 489.—**CAN.**

r. *Scheme of arrangement — Rights of corporation & trustee depositors.*]—*Re*

Sect. 7.—Private and joint-stock and chartered banks: Sub-sect. 5. Sects. 8, 9 & 10. Sub-sect. 1.]

223. Liability to contribute—Estate of deceased member.]—A., the proprietor of shares in a joint-stock banking co., died; his extrix. produced the probate of his will, & for more than three years received the dividends which accrued on the shares, giving receipts for same as extrix. By the deed of settlement of the co. it was provided that until certain acts were done constituting the exor. of a deceased member or purchaser of deceased member's shares a partner in the co., the estate of deceased member should remain liable. On winding up the co.:—*Held:* in the absence of any proof that the extrix. had done any acts constituting her a member of the co., the estate of deceased partner was liable to contribute, & the name of the extrix. ought to be placed on the list of contributories in her representative character.—*Re* NORTH OF ENGLAND JOINT STOCK BANKING CO., *Ex p.* GOUTHWAITE (1851), 3 Mac. & G. 187; 20 L. J. Ch. 188; 16 L. T. O. S. 337; 15 Jur. 137; 42 E. R. 232.

Annotations:—**Expld.** *Re* Joint Stock Cos. Winding-up Acts 1848 & 1849, & *Re* Royal Bank of Australia, *Ex p.* Robinson's Exors. (1855), 26 L. T. O. S. 175; Baird's Case (1870), 5 Ch. App. 727, n. **Refd.** Heward *v.* Wheatley (1853), 3 De G. M. & G. 628, L.JJ.; Houldsworth *v.* Evans (1868), L. R. 3 H. L. 263, H. L.

224. —— Members paying off liabilities—Right to contribution from fully paid up shareholders.]—A bank stopping payment, some of the shareholders paid the balances belonging to customers. There being a clause in the deed of settlement that the shareholders should be interested in the profits & liable for the losses in proportion to the amount of their shares, & calls having been paid to the full amount of the shares, the master, in winding up the concern, declined to make a further call, because the full amount of the shares had been paid up. On appeal by a shareholder, who had paid off the balances to the customers:—*Held:* the master was wrong, the amount of the share being only limited to subscription & not contribution, & the master must administer the equities as if it were a suit in that ct.—*Re* MARYLEBONE JOINT STOCK BANK (1856), 25 L. J. Ch. 650; 28 L. T. O. S. 57; 4 W. R. 535.

Annotation:—**Distd.** *Re* Brampton & Longtown Ry. Co., Addison's Case (1875), L. R. 20 Eq. 620.

225. —— Purchase of new shares — Fraudulent reports of directors.]—The charter of a banking co. empowered the directors to increase the capital by the issue of new shares of £100 each, but not by less than £10,000 at a time, & it was provided that the additional capital derived from such new shares should not be published & declared as a portion of the capital of the co. till the Board of Trade was satisfied that the whole amount of the increase of capital from time to time determined on had been subscribed for the shares issued, at least £50 per share paid up, & a supplementary deed executed by the persons taking the shares. An issue of two thousand new shares was determined upon, the subscribers to be entitled to £5 per cent. interest on the sums paid by them until they had paid up £50 per share, & afterwards to participate in dividends. M. took some of them, paid up £50 per share, & executed a supplementary deed, obtained certificates of shares & received interest, but only a small part of the two thousand shares was ever subscribed for. The sums received in respect of them were entered in the reports under the head of liabilities:—*Held:* M. was a shareholder liable to be placed on the list of contributories, & not entitled to rank as a creditor for what he had paid.

The directors of a co. from time to time made to the general meetings of shareholders & printed & published false & fraudulent reports of the affairs of the co. There was nothing to show that the shareholders were aware of the falsehood of these reports. An issue of new shares being made, M. was induced by these reports to take some of them:—*Held:* notwithstanding the fraud, he was liable to be placed on the list of contributories.—*Re* ROYAL BRITISH BANK, MIXER'S CASE (1859), 4 De G. & J. 575; 28 L. J. Ch. 879; 1 L. T. 19; 7 W. R. 677; 45 E. R. 223, L.C. & L.JJ.

Annotations:—**Folld.** *Re* National Assce. & Investment Assocn. (1862), 6 L. T. 118. **N.F.** *Re* Life Assocn. of England (1865), 5 New Rep. 352. **Refd.** Western Bank of Scotland *v.* Addie, Addie *v.* Western Bank of Scotland (1867), L. R. 1 Sc. & Div. 145, H. L.

226. —— Illegal commencement of business.]—A joint-stock banking co. commenced business, contrary to 1844 Act, s. 5, before one-half of the capital was paid up. On motion by a contributory to discharge an order for a call made under an order for winding up the co.:—*Held:* notwithstanding such illegal commencement of business, the contributory was liable. — *Re* LONDON & EASTERN BANKING CORPN., *Ex p.* LONGWORTH'S EXECUTORS (1859), 29 L. J. Ch. 55; 1 L. T. 504; 6 Jur. N. S. 1, L.C. & L.JJ.

227. Secured creditors — Customers of Cheque Bank — Holders of "outstanding cheques."]—Customers of the Cheque Bank, who at the date of the winding up of the bank held cheques of the bank not filled up or signed by them:—*Held:* secured creditors of the bank as the holders of "outstanding cheques" within the trust deed of the bank.—*Re* CHEQUE BANK, LTD. (1901), 18 T. L. R. 8.

228. —— —— Balance at bank.]—Customers of the Cheque Bank, who at the time of the winding up of the bank had exhausted their supply of cheques, but had drawn them for less than the limit perforated on the cheques, thus having a balance to their credit at the bank:—*Held:* not secured creditors of the bank under the trust deed.—*Re* CHEQUE BANK, LTD. (1901), 18 T. L. R. 22.

229. Joint & several note of directors—Individual liability in winding up—Stay of action.]—Deft., a director & shareholder in a joint-stock co., together with three others, made the following promissory note: "We, the Directors of, etc., for ourselves & the other shareholders jointly & severally promise to pay to W., or bearer, on, etc., the sum of, etc., for value received on account of the co." Signed, "A.B., C.D., E.F., Directors." Deft. having been sued thereon in his individual character:—*Held:* the case did not fall within Joint Stock Cos. Winding Up Act, 1848 (c. 45), s. 73, & there was no ground for staying the action until pltf. should have proved his debt before the master appointed to wind up the affairs of the co.—PENKIVIL *v.* CONNELL (1850), 5 Exch. 381; 1 L. M. & P. 398; 19 L. J. Ex. 305; 15 L. T. O. S. 207; 155 E. R. 166.

Annotations:—**Apprvd.** Maclae *v.* Sutherland (1854), 3 E. & B. 1. **Refd.** Lindus *v.* Melrose (1858), 27 L. J. Ex. 326, Ex. Ch.

230. Liability of manager to attend & be examined — Contributory's account.] — Under Cos.

COMMERCIAL BANK OF AUSTRALIA (1893), 19 V. L. R. 333.—**AUS.**

t. *Suspension pending reconstruction—Moneys in hands of provisional liquidator—Payment into bank.*]—The N. S. W. Savings Bank, a creditor of the joint stock bank, applied to the ct., on grounds of public interest, for an order for payment into a bank of the moneys that had come to the hands of the provisional liquidator of the joint-stock bank, which bank had suspended pending reconstruction:—*Held:* such an order would be prejudicial to the public interest.—*Re* AUSTRALIAN JOINT STOCK BANK, *Ex p.* SAVINGS BANK OF NEW SOUTH WALES (1893), 14 N. S. W. Eq. 71.—**AUS.**

Act, 1862 (c. 89), s. 115, the manager of a bank, where a contributory has had an account, is liable to attend & be examined, & to produce any books & documents relative to such account.—*Re* CONTRACT CORPN., DRUITT'S CASE (1872), L. R. 14 Eq. 6.

SECT. 8.—FOREIGN AND BRITISH OVERSEAS BANKS.

See COMPANIES.

SECT. 9.—UNLAWFUL BANKS.

231. Building society—Carrying on business of banking—Winding up—Distribution of assets.]—A building society formed in 1851 under Building Societies Act, 1836 (c. 32), & empowered by its rules to borrow to an unlimited extent, started & developed a banking business. In 1911 the society was ordered to be wound up & questions of priority arose between the outside creditors, the unadvanced shareholders, & the bank customers on current & deposit account (for convenience called the depositors). The assets were insufficient for payment of all claimants in full, but were more than sufficient for payment of the outside creditors & the shareholders:—*Held:* (1) the carrying on of the banking business was *ultra vires:* (2) the depositors were not entitled to recover money paid by them on an *ultra vires* contract of loan on the footing of money had & received by the society to their use; (3) the assets remaining after payment of the outside creditors must be taken to represent in part moneys which the depositors could follow, as having been invalidly borrowed, & in part moneys which the society could follow, as having been wrongfully employed by its agents in the banking business, &, subject to any application by any individual depositor or shareholder with a view to tracing his own money into any particular asset, & to the costs of the liquidation, ought to be distributed *pari passu* between the depositors & the unadvanced shareholders according to the amounts respectively credited to them in the books of the society at the commencement of the winding up; (4) the right to follow money was not confined to cases where there was a fiduciary relationship.—SINCLAIR *v.* BROUGHAM, [1914] A. C. 398; 83 L. J. Ch. 465; 111 L. T. 1; 30 T. L. R. 315; 58 Sol. Jo. 302, H. L.; *varying* S. C. *sub nom. Re* BIRKBECK PERMANENT BENEFIT BUILDING SOCIETY, [1912] 2 Ch. 183, C. A.

Annotations:—**Consd.** Brougham *v.* Dwyer (1913), 108 L. T. 504 D. C. **Refd.** Kensington & Knightsbridge Electric Lighting Co. *v.* Notting Hill Electric Lighting Co. (1918), 87 L. J. K. B. 565. **Mentd.** Leslie *v.* Sheill, [1914] 3 K. B. 607, C. A.; Roscoe *v.* Winder, [1915] 1 Ch. 62; Hammerton *v.* Dysart, [1916] 1 A. C. 57, H. L.; John *v.* Dodwell, [1918] A. C. 563, P. C.

See, generally, BUILDING SOCIETIES.

232. Industrial society—Carrying on business of banking—Illegal loans.]—An industrial society, formed & registered under Industrial & Provident Societies Act, 1862 (c. 87), had by its rules, when founded, power to obtain loans on the security of bonds & subject to certain formalities. In 1877 the society passed a rule that money should not be received on deposit. Notwithstanding those rules the society had from time to time received loans on deposit without any bond, & had entered such loans in a book in the form of an ordinary banking book. The deposits were added to & withdrawn from at will, & carried interest. In 1887 the socety passed a rule purporting to render the loans valid, & to make them a first charge upon the assets of the society. On a petition by the liquidator of the society for directions as to the distribution of the assets:—*Held:* (1) the rule of 1887 was invalid & not binding on the society; (2) the society, by taking loans on deposit in the manner it had done, had in reality carried on the business of a banker as prohibited by s. 3 of the above Act & by Industrial & Provident Societies Act, 1876 (c. 45), s. 10 (2), (3).—*Re* BOTTOMGATE INDUSTRIAL CO-OPERATIVE SOCIETY (1891), 65 L. T. 712; 56 J. P. 216; 40 W. R. 139, D. C.

Annotation:—**Refd.** *Re* Birkbeck Permanent Benefit Bldg. Soc., [1912] 2 Ch. 183, C. A.

See. generally, INDUSTRIAL, PROVIDENT, & SIMILAR SOCIETIES.

See, also, Nos. 97, 125, 221.

SECT. 10.—OFFICIALS OF BANKS.

SUB-SECT. 1.—MANAGER.

233. Indorsing bill per procurationem for accommodation—After stoppage of bank—Notice to holder.]—B., the manager of a banking co., had a limited authority to indorse, etc., bills of exchange

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PART I. SECT. 10, SUB-SECT. 1.

u. *"Manager"—"Officer"—Act No. 557, s. 13.*]—The word "manager" in the above sect. means, with reference to a banking corpn., either the head manager at the head office wherever situate, or the manager of the branch bank at which the debt is due. An inspector in Melbourne, of a bank having its head office in New South Wales is only an "officer" within that sect., &, if he make the affidavit of renewal of a bill of sale, must depose of his own knowledge to the facts.—BANK OF NEW SOUTH WALES *v.* JONES (1878), 4 V. L. R. 253. —**AUS.**

w. *Assistant manager—"Officer"—Statute of Trusts (No. 234), s. 88.*]—D., assistant manager of a bank, was prosecuted under the above sect. for that he, being an "officer" of a body corporate, made a false entry with intent to defraud:—*Held:* (1) D. was an officer of the bank; (2) he was properly charged as an "officer" as the sect. did not only apply to "public officers," the word "public" having been inadvertently inserted in the sect.—R. *v.* DRAPER (1870), 1 V. L. R. 118.—**AUS.**

x. *Branch manager—Authority as such.*]—Where a bank places a person in the position of manager of one of its branches it must be taken, as between the bank & the public, to have clothed him with all such powers as its agent, as by the common practice of banks are bestowed upon the manager of such a branch, & which the public generally & every person dealing with the bank through such agent has a right to assume such agent possesses, in the absence of any notice or limitation of such powers; but such manager is not held by the bank as authorised to make it liable for the personal debts of its agent, or to engage its credit in furtherance of his personal business — MACKINTOSH *v.* BANK OF NEW BRUNSWICK (1913), 13 E. L. R. 249; *affd.* 15 D. L. R. 375; 42 N. B. R. 152.—**CAN.**

y. ——.]—H. assigned to defts., as security for repayment of borrowed money, a chattel mtge. Afterwards a lease of lands to H. was executed by pltfs. which contained a clause to the effect that the chattel mtge., subject to defts.' prior claim, should stand as a security for repayment of $300 lent by pltfs. to H. The lease was deposited with defts. at their branch, & J., the manager of the branch, on his attention being specially called to the clause, assured pltfs. they would be protected: —*Held:* (1) (HARVEY, C.J.) the assurance was within the scope of J.'s authority, for, although pltfs. were strangers to the bank, the transaction was one connected with & partly for the benefit of customers of the bank; (2) (STUART, J.) defts. were not liable, for the agreement made by J. was not within the scope of his authority.—AULD *v.* TRADERS BANK (1910), 16 W. L. R. 24; 3 Alta. L. R. 263—**CAN.**

z. *Acts of officers — Banking company cannot plead ignorance.*]—A banking co. are not entitled to plead ignorance of the actings of their own officers.—DRUMMOND *v.* THOMSON'S TRUSTEES (1834), 7 Wils. & S. 564, H. L.—**SCOT.**

a. ——.]—CITY & DISTRICT SAVINGS BANK *v.* JACQUES CARTIER BANK (1886), 30 L. C. J. 106.—**CAN.**

b. *Acceptance of cheque — Payable on future dates.*]—C., president & manager of the E. bank, accepted cheques of G. as good on certain future dates, & signed the acceptances "T. C., president," & these cheques G. discounted with the P. bank. After the E. bank stopped payment the P. bank presented the cheques

Sect. 10.—*Officials of banks: Sub-sect.* 1.]

for the business of the bank. The bank stopped payment, & B. afterwards indorsed a bill for the accommodation of the drawer in the same form as all bills of exchange were usually indorsed, etc., by the bank, thus, "p. p. N. & T. Joint-Stock Banking Co., B. Manager":—*Held:* the indorsement *per pro.* was notice to a party receiving the bill that B. professed to act under an authority from the bank, & a party taking the bill should ascertain that B. was acting within the terms of his authority.—ALEXANDER *v.* MACKENZIE (1848), 6 C. B. 766; 18 L. J. C. P. 94; 12 L. T. O. S. 175; 13 Jur. 346; 136 E. R. 1449.

Annotations:—**Apld.** Grant *v.* Norway (1851), 20 L. J. C. P. 93. **Expld.** *Re* Sea, Fire & Life Insce., *Ex p.* Greenwood (1854), 18 Jur. 387. **Distd. & Expld.** Richards *v.* Ruegg (1856), 27 L. T. O. S. 184. **Apprvd.** Smith *v.* M'Guire (1858), 3 H. & N. 554. **Folld.** Stagg *v.* Elliott (1862), 12 C. B. N. S. 373. **Refd.** Charles *v.* Blackwell (1877), 2 C. P. D. 151, C. A.

See, now, Bills of Exchange Act, 1882 (c. 61), s. 25, *&, generally,* BILLS OF EXCHANGE, PROMISSORY NOTES, & NEGOTIABLE INSTRUMENTS.

234. Engaging in trade—Granting himself accommodation by bank—Necessity of full disclosure.]—A manager of a bank is not entitled to grant himself the same accommodation in respect of his separate trade which he might obtain from an independent banker, & it would be necessary for him, in order to sustain any such transaction, to show that he had brought the whole circumstances most fully & fairly before the directors. It is not enough to show merely that he had not concealed anything. If he could show that he had so brought the circumstances to their knowledge, or that the directors had sanctioned the proceedings subsequently, such a proceeding might, however, be permitted to stand.—GWATKIN *v.* CAMPBELL (1854), 1 Jur. N. S. 131.

235. Fraudulent misappropriation by—Liability of bank.]—The local manager of a branch bank, while engaged at the bank, suggested to a lady, who had a deposit account, that higher interest might be obtained for her money if she purchased two houses for a sum which would pay off a mtge. held by a third person upon them, & also a lien held by the bank. She assented, & gave him her deposit note, for which he gave her a fresh deposit note for the difference between the amount of the former note & the purchase-money, & retained the residue for the purpose of making the investment. This money the local manager appropriated to his own use, & the bank refused to bear the loss:—*Held:* they were liable, the jury having found that the manager intended & induced the lady to believe that he was acting as the agent of the bank, & also

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which were duly protested:—*Held:* E. bank liable for the acceptance by their president & manager of cheques discounted by P. bank in good faith & in due course of business.—EXCHANGE BANK OF CANADA *v.* PEOPLE'S BANK, 3 M. L. R. 232; 10 L. N. 362.—**CAN.**

d. —— *To deliver to another customer on happening of event.*]—A bank manager is not acting without the scope of his authority in accepting the cheque of a customer to deliver to another customer on a particular day or on the happening of a specified event.—GRIEVE *v.* MOLSONS BANK (1885), 8 O. R. 162.—**CAN.**

f. —— *Estoppel of bank.*] — The M. Bank had by its manager accepted cheques drawn on it by the C. Bank, which had deposited them in the N. Bank, receiving consideration therefor, & the cheques on presentation were refused & protested:—*Held:* the M. Bank could not refuse its acceptance thus made, & was bound to guarantee & protect the C. Bank from all loss thereunder.—LA BANQUE NATIONALE *v.* CITY BANK & BANK OF MONTREAL (1873), 17 L. C. J. 197.—**CAN.**

g. *Appointing station manager — Ratification by bank.*]—Deft. bank were mtgees. of a station & W. was the mtgor. Default being made, G., the local manager of the bank, put W. in possession as manager. Pltf. brought an action against the bank for damage to his property caused by fires lighted by W.:—*Held:* the bank had ratified W.'s appointment as they had allowed him to draw cheques to defray station expenses & to remain in possession after action brought. *Semble:* the local manager had no power to appoint W.—MACAULEY *v.* BANK OF NEW SOUTH WALES (1893), 14 N. S. W. L. R. 269.—**AUS.**

h. *Charging commission on sale of bank's property.*]—B., the local manager of a bank, sold property of the bank to a customer, who agreed to pay B. commission on the sale:—*Held:* the agreement was illegal.—FIELD *v.* BENNETT, BENNETT *v.* FIELD (1907), S. R. Q. 187.—**AUS.**

j. *Employing architect — Branch manager.*]—The authority of a branch manager of a bank does not include the employment of an architect to make plans for a new office building.—WOODMAN *v.* HOME BANK (1916), 33 W. L. R. 917.—**CAN.**

l. *Falsifying returns — Intent — Presumption.*]—A local bank manager was prosecuted under Bank Act, s. 153, for signing a false statement in the Govt. returns:—*Held:* it must appear that accused knew that he was signing a false statement, & the signing did not afford a presumption *juris et de jure* of wilful intent or guilty knowledge.—R. *v.* BROWNE (1909), 14 Can. Crim. Cas. 247.—**CAN.**

235 i. *Fraudulent misappropriation by—Manager also executor—Liability of bank.*]—One of two exors. signed a cheque payable to bearer & a deposit slip, for the purpose of transferring money belonging to the estate, lying in a bank of which he was manager, & sent these documents to his co-exor. for his signature. On the return of the documents he misappropriated the money: — *Held:* as the fraudulent exor. must be joined as pltf., in any action against the bank, the bank was not liable at law for the amount. *Semble:* independently of the estoppel, the bank would not be liable at law for such fraudulent act of its manager.—NICHOL *v.* LONDON CHARTERED BANK OF AUSTRALIA (1878), 4 V. L. R. 324.—**AUS.**

235 ii. —— —— ——.]—Defts. employed D. as manager of a branch bank at C., where D. kept his own private account. M., a customer of the bank, devised his house to his wife, & bequeathed a policy of insurance to pltfs., & appointed D. his exor. M. died in 1886, at which date the house was subject to a mtge. for £300, & the policy of insurance was vested in defts. as security for an overdraft of M., the latter on M.'s death amounting to £161 13*s.* 10*d.* D. proved the will, & on defts. receiving the proceeds of M.'s policy of insurance, amounting to £690, that amount was placed to M.'s credit in the bank. Shortly afterwards D. drew out on his own cheque the balance remaining after payment of M.'s overdraft & lodged it to the credit of his own private account in the bank, which was then largely overdrawn, M.'s account being closed. In 1887, the sum of £300, portion of pltfs.' trust funds, was invested by D., with the consent of pltfs., on a transfer to D. of the mtge. on the house devised to M.'s widow, & the latter, who had a private current account in the bank, thereafter paid by her own cheque the yearly interest on the mtge., the cheques being handed each year by one of pltfs. to D. to add to the money in the bank; & those cheques were also in each year placed to D.'s private credit in the bank, thereby reducing his overdraft for the time being. In 1893 M.'s widow borrowed from her daughters £134, & the transaction was carried out by D. entering £134 to her credit in her bank pass-book, & by her & her son, on the requirement of D., signing two undated promissory notes in the ordinary form used by the bank, for £100 & £34 respectively, D. saying that he required that to be done "to keep the bank safe, & himself safe." In 1901 M.'s widow, who owned a deposit receipt for £300 in the bank, made a present to pltfs. of such sum, & indorsed the deposit receipt to them, & one of pltfs. brought the deposit receipt to the bank, & handed it across the counter to a junior official, D. being absent, & told him they wished it added to their other money in the bank. On the same day the deposit receipt was lodged to the credit of D.'s private account, thereby reducing a large overdraft. D. each year furnished pltfs. with an account purporting to show the balance due to pltfs., & adding interest at a fixed rate, & interest on the mtge., the last of such accounts being dated Jan. 1, 1909. D. left defts.' employment in 1909, when his own private account was largely overdrawn (the overdraft, however, being secured to the bank), & died shortly afterwards. In an action by pltfs. against deft. co. to recover the amount named in the account last furnished as due on an account stated & settled, & for money had & received for pltfs.' use:—*Held:* defts. were liable.—MALONE *v.* BELFAST BANKING CO., LTD., [1912] 2 I. R. 187, 214.—**IR.**

m. *Giving receipts for money not deposited.*]—*Held:* to give receipts in the name of the bank for moneys which they had not received was not within the scope of their manager's authority.—SASKATCHEWAN & WESTERN ELEVATOR CO. *v.* BANK OF HAMILTON (1914), 29 W. L. R. 262; 7 W. W. R. 100; 7 Sask. L. R. 134; 18 D. L. R. 411.—**CAN.**

n. *Granting power of attorney — To person not bank employee.*]—A power of attorney by a manager or cashier of a bank to a person not an employee of the bank is invalid, in the absence of anything to show the power of those officers to grant the same.—*Re* DINNING & SAMSON (1877), 4 Q. L. R. 26; 18 R. L. 656.—**CAN.**

p. *Making affidavit of bona fides — Chattel mortgage—Branch manager*].—

that as local manager he had authority from the bank to make an assignment of an equitable mtge. —THOMPSON *v.* BELL (1854), 10 Exch. 10; 23 L. J. Ex. 321; 23 L. T. O. S. 178; 2 W. R. 559; 2 C. L. R. 1212; 156 E. R. 334.

236. —— Purchase & sale of overdue bills—Rights of holders.]—P., with moneys of the O. Bank, of which he had been manager, but which, at the time of the purchase of certain bills by him, was being wound up, purchased overdue bills of exchange drawn upon & accepted by the E. Bank, which was then also in liquidation. Two days after he sold these bills to E. C. Co., then but recently incorporated, of which, by the articles of assocn., he was sole director:—*Held:* (1) P. must be taken to have acted as agent for E. C. Co., which was not affected with notice of the fraud committed by him on the O. Bank, for he could not be taken to have disclosed his own fraud; (2) as the bills were overdue when E. C. Co. took them, that co. had no better title than P. himself had, & if they had remained in his hands, the O. Bank might clearly have followed their money into them. —*Re* EUROPEAN BANK, *Ex p.* ORIENTAL COMMERCIAL BANK (1870), 5 Ch. App. 358; 39 L. J. Ch. 588; 22 L. T. 422; 18 W. R. 47, C. A.

Annotations:—**Consd.** *Re* Marseilles Extension Ry. & Land Co., *Ex p.* Credit Foncier & Mobilier of England (1871), 25 L. T. 858, C. A. **Refd.** Waldy *v.* Gray (1875), 44 L. J. Ch. 394.

237. Right to sue on bill indorsed in blank.]—The manager of an assocn. established under 7 & 8 Vict. c. 110, & also carrying on the business of a deposit & discount bank, *bonâ fide* received from a customer a bill of exchange indorsed in blank:—*Held:* it was competent to him to sue upon it in his own name only, without the indorsement of the bank, although he was a partner & shareholder in the concern, it appearing that it was a part of his duty as manager to keep possession of & to realise the securities which came to his hands in that character.—LAW *v.* PARNELL (1859), 7 C. B. N. S. 282; 29 L. J. C. P. 17; 1 L. T. 32; 6 Jur. N. S. 172; 8 W. R. 6; 141 E. R. 825.

238. Institution of prosecution—By acting manager—Liability of bank for malicious prosecution.]—The acting manager of a bank, there being also a general manager, commenced the prosecution of pltf. for stealing a bill of exchange:—*Held:* such acting manager had no authority to institute a prosecution, & the bank was not liable for his act.—BANK OF NEW SOUTH WALES *v.* OWSTON (1879), 4 App. Cas. 270; 48 L. J. P. C. 25; 40 L. T. 500; 43 J. P. 476; 14 Cox, C. C. 267, P. C.

Annotations:—**Apld.** Abrahams *v.* Deakin, [1891] 1 Q. B. 516, C. A. **Consd.** Hanson *v.* Waller, [1901] 1 K. B. 390. **Refd.** Ashton *v.* Spiers & Pond (1893), 9 T. L. R. 606, C. A.; Dyer *v.* Munday (1895), 64 L. J. Q. B. 448, C. A. **Mentd.** Edwards *v.* Mid. Ry. Co. (1881), 45 J. P. 374; Cornford *v.* Carlton Bank, [1899] 1 Q. B. 392.

See, generally, MALICIOUS PROSECUTION & PROCEDURE; MASTER & SERVANT.

239. False representation—Guarantee as to payment of cheque—Liability of bank.]—Pltf. having for some time, on a guarantee of defts., supplied D., a customer of theirs, with oats on credit, for carrying out a Govt. contract, refused to continue to do so unless he had a better guarantee. Deft.'s manager thereupon gave him a written guarantee to the effect that the customer's cheque on the bank in pltf.'s favour in payment for the oats supplied should be paid, on receipt of the Govt. money, in priority to any other payment, "except to this bank." D. was then indebted to the bank to the amount of £12,000, but this fact was not known to pltf., nor was it communicated to him by the manager. Pltf. thereupon supplied the oats to the value of £1,217; the Govt. money, amounting to £2,676, was received by D. & paid into the bank, but D.'s cheque for the price of oats drawn on the bank in favour of pltf. was dishonoured by defts., who claimed to retain the whole sum of £2,676 in payment of D.'s debt to them. Pltf. having brought an action for false representation, & for money had & received:—*Held:* (1) there was evidence to go to the jury that the manager knew & intended that the guarantee should be unavailing & fraudulently concealed from pltf. the fact which would make it so; (2) defts. would be liable for such fraud in their agent; (3) the fraud was properly charged in the declaration as the fraud of defts. *Qu.:* whether pltf. could have recovered under the count for money had & received.—BARWICK *v.* ENGLISH JOINT STOCK BANK (1867), L. R. 2 Exch. 259; 36 L. J. Ex. 147; 16 L. T. 461; 15 W. R. 877, Ex. Ch.

Annotations:—**Apld.** Swift *v.* Winterbotham (1873), L. R. 8 Q. B. 244. **Apprvd.** Swire *v.* Francis (1877), 3 App. Cas. 106, P. C. **Consd.** Weir *v.* Bell (1878), 3 Ex. D. 238, C. A.; British Mutual Banking Co. *v.* Charnwood Forest Ry. Co. (1887), 18 Q. B. D. 714, C. A.; Burdett *v.* Horne (1911), 27 T. L. R. 402. **Refd.** Bolingbroke *v.* Swindon L. B. (1874), L. R. 9 C. P. 575; Mackay *v.* Commercial Bank of New Brunswick (1874), L. R. 5 P. C. 394, P. C.; Swift *v.* Jewsbury (1874), L. R. 9 Q. B. 301, Ex. Ch.; Weir *v.* Barnett (1877), 3 Ex. D. 32; Burmah Trading Corpn. *v.* Mirza Mahomed Ally Sherazee (1878), L. R. 5 Ind. App. 130, P. C.; *Re* Collie, *Ex p.* Adamson (1878), 8 Ch. D. 807, C. A.; Chapleo *v.* Brunswick Benefit Bldg. Soc. (1880), 5 C. P. D. 331; Houldsworth *v.* City of Glasgow Bank (1880), 5 App. Cas. 317, H. L.; Taff Vale Ry. Co. *v.* Amalgamated Soc. of Railway Servants, [1901] A. C. 426, H. L.; Hamlyn *v.* Houston, [1903] 1 K. B. 81, C. A.; Giblan *v.* National Amalgamated Labourers' Union of Great Britain & Ireland, [1903] 2 K. B. 600, C. A. **Mentd.** The Thetis (1869), L. R. 2 A. & E. 365; Dixon *v.* Reuter's Telegram Co. (1877), 41 J. P. 167; Mullens *v.* Miller (1882), 31 W. R. 559; Mutual Banking Co. *v.* Charnwood Forest Ry. Co. (1887), 3 T. L. R. 498, C. A.; Thorne *v.* Heard, [1894] 1 Ch. 599, C. A.; Marsh *v.* Joseph (1896), 66 L. J. Ch. 128, C. A.; Spooner *v.* Browning, Todd, & Whish (1897), 77 L. T. 685; Ormerod *v.* Rochdale Corpn. (1898), 62 J. P. 153; Whitechurch *v.* Cavanagh, [1902] A. C. 117, H. L.; Dunlop Pneumatic Tyre Co. *v.* Maison Talbot, Shrewsbury & Talbot & Weigel, Clipper Pneumatic Tyre Co. *v.* Maison Talbot, Shrewsbury & Talbot & Weigel (1903), 52 W. R. 254; Hambro *v.* Burnand, [1903] 2 K. B. 399; Citizens' Life Assce. *v.* Brown, [1904] A. C. 423, P. C.; Ruben *v.* Great Fingall Consolidated, [1904] 1 K. B. 650; Pearson *v.* Dublin Corpn., [1907] A. C. 351, H. L.; Malcolm, Brunker *v.* Waterhouse (1908), 24 T. L. R. 854; Kettlewell *v.* Refuge Assce., [1908] 1 K. B. 545, C. A.; Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489, C. A.; Wake *v.* Dyer (1911), 75 J. P. 210; Watkins *v.* Naval Colliery Co. (1912), 107 L. T. 321, H. L.; Mair *v.* Rio Grande Rubber Estates, [1913] A. C. 853, H. L.

See, generally, AGENCY, Vol. I., pp. 587 *et seq.*; MASTER & SERVANT; MISREPRESENTATION & FRAUD.

The branch manager of an incorporated bank, to which a chattel mtge. is made for a debt due the bank at that branch, is an agent authorised to make the affidavit of *bona fides*, under 34 Vict. c. 17.—ONTARIO BANK *v.* MINER, *Temp.* Wood, 167.—**CAN.**

q. *Making fraudulent balance sheets—Inducement to depositors—Liability of officers.*]—If the directors, manager, & accountant of a bank dishonestly, *i.e.*, to obtain wrongful gain for themselves or to cause wrongful loss to others, put before the shareholders balance-sheets which they know to be materially false & misleading & likely to mislead the public as to the condition of the bank, & conceal its true condition, & thereby induce depositors to allow their money to remain in deposit in the bank, they are guilty of cheating in the aggravated form made punishable by Penal Code, s. 418, & if they acted together to put forward such a false balance sheet, they are guilty of abetment by conspiracy to cheat.—QUEEN-EMPRESS *v.* MOSS (1893), I. L. R. 16 All. 88.—**IND.**

r. *Misapplying funds—Conflict of interests.*]—A bank manager cannot lawfully lend the money of the bank to a co. in which, as a stockholder, he is largely interested, & if he have done so, is bound to refund to the bank, with interest, etc., unless there have been acquiescence on the part of the bank, nor can he become associated with a customer of the bank in an enterprise to be carried on with the bank's funds entrusted to his care.

A bank manager advancing funds to a co. in which he holds a small amount of stock is not liable to the bank for the money so lent, if all the circumstances show that his interest is so small that it may reasonably be presumed that his intention was only to promote the interests of the bank.—BANK OF UPPER CANADA *v.* BRADSHAW (1865), 16 L. C. R. 1; (1867), L. R. 1 P. C. 479; 17 L. C. R. 273, P. C.—**CAN.**

Sect. 10.—*Officials of banks: Sub-sect.* 1.]

240. —— Inducement to accept bills—Liability of bank.]—The cashier of a bank, being also their manager, holding certain bills of exchange indorsed to the bank, sent a fraudulent answer to a telegram, which induced M. to accept the bills:—*Held:* the bank had given implied authority to the cashier to answer such a telegram, &, having obtained the benefit of the bills so accepted, were liable for his false representation.—MACKAY *v.* COMMERCIAL BANK OF NEW BRUNSWICK (1874), L. R. 5 P. C. 394; 43 L. J. P. C. 31; 30 L. T. 180; 22 W. R. 473, P. C.

Annotations:—**Expld.** Bolingbroke *v.* Swindon L. B. (1874), L. R. 9 C. P. 575. **Refd.** Weir *v.* Bennett (1877), 3 Ex. D. 32; Burmah Trading Corpn. *v.* Mirza Mahomed Ally Sherazee (1878), L. R. 5 Ind. App. 130, P. C.; Chapleo *v.* Brunswick Benefit Bldg. Soc. (1880) 5 C. P. D. 331; Spooner *v.* Browning, Todd, & Whish (1897), 77 L. T. 685; Hirst *v.* West Riding Union Banking Co. (1901), 70 L. J. K. B. 828, C. A. **Mentd.** Swire *v.* Francis (1877), 3 App. Cas. 106, P. C.; Bank of New South Wales *v.* Owston (1879), 4 App. Cas. 270, P. C.; Houldsworth *v.* City of Glasgow Bank (1880), 5 App. Cas. 317, H. L.; Chapleo *v.* Brunswick Permanent Bldg. Soc. (1881), 6 Q. B. D. 696, C. A.; Ludgater *v.* Love (1881), 44 L. T. 694, C. A.; Mullens *v.* Miller (1882), 31 W. R. 559; *Re* Mutual Aid Permanent Benefit Bldg. Soc., *Ex p.* James (1883), 49 L. T. 530; British Mutual Banking Co. *v.* Charnwood Forest Ry. Co. (1887), 18 Q. B. D. 714, C. A.; Hambro *v.* Burnand, [1903] 2 K. B. 399; Citizens' Life Assce. *v.* Brown, [1904] A. C. 423, P. C.; Kettlewell *v.* Refuge Assce., [1907] 2 K. B. 242; Lloyd *v.* Grace, Smith, [1912] A. C. 716, H. L.

241. Discounting bills—Ordinary course of business of bank—No bad faith proved.]—A banking co. brought an action against their late manager & cashier to recover moneys belonging to the bank, alleged to have been improperly applied in discounting bills, etc., for his own advantage, for the benefit of parties & cos. with whom he was connected, & in which he was interested. Such transactions were all in the ordinary course of the business of the bank, & he had not exceeded the power & authority with which he was intrusted, & no case of bad faith could be proved against him:—*Held:* in the circumstances, no such action could be sustained.—BANK OF UPPER CANADA *v.* BRADSHAW (1867), L. R. 1 P. C. 479; 4 Moo. P. C. C. N. S. 406; 16 E. R. 371, P. C.

242. Statement by—To purchaser of bill—Stoppage of bank—Rights of purchaser.]—Pltfs. purchased from the N. O. Bank a bill of exchange drawn on the L. Bank. The manager of the N. O. Bank, at the time, told pltfs. that there was or would be at the maturity of the bill a balance at the L. Bank of more than sufficient to meet the bill, & that there was no doubt it would be paid. The course of dealing between the N. O. Bank & the L. Bank was that the former drew bills on the latter, & employed them also to collect the moneys receivable on bills remitted to them, the agreement being that the L. Bank was never to be under cash advances, & the funds remitted had always been sufficient to meet its acceptances. Soon after the purchase, the N. O. Bank suspended payment, & the L. Bank refused to accept the bill. The funds in the hands of the L. Bank were abundantly sufficient to meet all their acceptances for the N. O. Bank, & also to pay the bill:—*Held:* the statements of the manager were merely a correct statement of the course of business between the two banks, & did not give the purchaser of the bill any lien on the funds in the hands of the L. Bank.

If what was said by the manager had amounted to a contract to charge the funds, the clearest proof would have been necessary that he had authority to make such a contract (JAMES, L.J.).—THOMSON *v.* SIMPSON (1870), 5 Ch. App. 659; 39 L. J. Ch. 857; 18 W. R. 1090, L.C. & L.JJ.

Annotation:—**Apprvd. & Folld.** Citizens' Bank of Louisiana *v.* First National Bank of New Orleans (1873), L. R. 6 H. L. 352, H. L.

243. Obtaining advances for himself—Misstatement in accounts—Ratification by bank.]—The manager of a bank, being in the habit of obtaining advances for the bank, obtained an advance for himself on his personal credit. The bank having gone into liquidation, the accounts were debited with this advance as made to the bank, & the bank in ignorance of the facts, acquiesced in this statement of account:—*Held:* acquiescence & ratification must be founded on a full knowledge of the facts, & must be in relation to a transaction which might be valid in itself, & not illegal, & to which effect might be given as against the party by his acquiescence in & adoption of the transaction, & there was no ratification by the bank.—BANQUE JACQUES-CARTIER *v.* BANQUE D'EPARGNE DE MONTREAL (1887), 13 App. Cas. 111; 57 L. J. P. C. 42, P. C.

244. —— Manager also executor—Notice to bank.]—An exor. was also manager of a branch of a joint stock banking co., & had authority to advance money to persons at his discretion. He obtained money from the branch establishment, on cheques signed by him as exor., he not having opened an account in that character, with which he made further advances upon property on which his testator had a lien. Upon this being discovered by the directors, he assigned the security to them:—*Held:* the bank were bound by his knowledge as their manager, & were not entitled to a first charge on the property.—COLLINSON *v.* LISTER (1855), 7 De G. M. & G. 634; 25 L. J. Ch. 38; 26 L. T. O. S. 132; 2 Jur. N. S. 75; 4 W. R. 133; 44 E. R. 247, L.JJ.

Annotation:—**Mentd.** Turner *v.* L. & S. W. Ry. Co. (1874), L. R. 17 Eq. 561.

245. Guaranteeing payment of drafts — Special authorisation necessary.]—It is not within the ordinary scope of a bank manager's authority to guarantee the payment of a draft, & unless such guarantee is specially authorised, it cannot be enforced.—*Re* SOUTHPORT & WEST LANCASHIRE BANKING CO. (1885), 1 T. L. R. 204, C. A.

246. Stealing negotiable securities belonging to bank—Regaining possession from holder for value by fraud & returning to bank—Right of bank to retain.]—Defts.' manager stole certain of their negotiable securities, which came into pltfs.' possession for value. The manager afterwards obtained the same securities from pltfs. by fraud, & handed them back to defts., who did not know of the theft or fraud:—*Held:* defts. were *bonâ fide* holders for value, & entitled to retain the bonds.—LONDON & COUNTY BANKING CO. *v.* LONDON &

240 i. *Misrepresentation—Inducement to sign bills of exchange & promissory notes.*]—*Held:* the representations of the manager of pltfs.' branch bank inducing deft. to sign four bills of exchange & five promissory notes were within the scope of the authority of a manager of a bank.—BANK OF NOVA SCOTIA *v.* FISH (1894), 32 N. B. R. 434; *new trial ordered* (1895), 24 S. C. R. 709.—**CAN.**

240 ii. —— *Inducement to sign cheques—Unauthorised warranty—Rights of bank.*]—A bank manager asked applt. to lend him his name to cheques, to buy shares of the bank, promising that for any money paid by him in connection therewith, he would be reimbursed by the manager. Applt. gave his cheques, which the bank paid in due course. In an action by the bank claiming the amount so paid:—*Held:* applt. was bound to honour his cheques & had no recourse against the bank for the warranty given by the manager without their authorisation or knowledge.—PYKE *v.* SOVEREIGN BANK (1915) Q. R. 24 K. B. 198—**CAN.**

240 iii. —— *Inducement to accept drafts.*]—The local manager of a bank, having received a draft to be accepted, induced the drawer to accept, by representing that certain goods of his own were held by the bank as security for the drafts. In an action on the draft against the acceptor:—*Held:* the bank were not bound by such representation, & by taking the benefit of the acceptance they had not adopted the manager's statement in procuring it.—RICHARDS *v.* BANK OF NOVA SCOTIA (1896), 26 S. C. R. 381.—**CAN.**

RIVER PLATE BANK (1888), 21 Q. B. D. 535; 57 L. J. Q. B. 601; 61 L. T. 37; 37 W. R. 89; 4 T. L. R. 774, C. A.

Annotations:—**Refd.** Nash *v.* De Freville, [1900] 2 Q. B. 72, C. A. **Mentd.** Williams *v.* Colonial Bank, Williams *v.* London Chartered Bank of Australia (1888), 38 Ch. D. 388, C. A.; Simmons *v.* London Joint Stock Bank, Little *v.* London Joint Stock Bank, [1891] 1 Ch. 270, C. A.; Venables *v.* Baring, [1892] 3 Ch. 527; Bechuanaland Exploration Co. *v.* London Trading Bank, [1898] 2 Q. B. 658; Mallott *v.* Wilson, [1903] 2 Ch. 494.

247. Inducing customer to sign cheque by fraud—Transaction fraudulently entered in bank books as loan from bank—Right of bank to recover from customer.]—The manager of pltf.'s bank obtained the signature of deft. to a cheque, purporting to be drawn upon the bank by deft., under the pretence that it was a receipt (deft. being unable to read it), & then paid him a private debt of his own with the banker's money. The transaction was entered in the books of the bank as a loan from the bank to deft., upon his cheque:—*Held:* the banker was not entitled to maintain an action against deft. to recover back the money, the cheque having been obtained by the fraud of his agent.—FOSTER *v.* GREEN (1862), 7 H. & N. 881; 31 L. J. Ex. 158; 6 L. T. 390; 158 E. R. 726.

248. Negligence—Deed of settlement—Measure of liability.]—The declaration in an action against the manager of a banking co., after alleging the retainer & employment of deft. & the nature of his duties as manager, stated that he "did not nor would take due & proper care not to advance the money of the co. to persons of doubtful, insufficient, or bad means or credit, or on doubtful, insufficient, or bad securities, or to discount bad or forged bills & notes, & negligently & improperly advanced the money of the co. to persons of doubtful, insufficient, & bad means & credit, & on doubtful, insufficient, & bad securities, & discounted & renewed bad & forged bills & notes, & wholly neglected to take due & proper care or to use or employ due & proper skill & diligence in & about the management of the affairs of the bank & the discharge of the duties of manager as aforesaid." Plea to so much of the breach as above set out, that the deed of settlement of the co. contained a clause, which provided that "none of the directors, trustees, or other officers, should be answerable or accountable for the insufficiency or deficiency of any security or fund in or upon which the moneys of the co. might be placed out or invested, or for any loss, damage, or misfortune which might happen to the moneys, funds, effects, or property of the co., unless same should happen in consequence of the wilful neglect or default respectively of such director, trustee, or other officer of the co.," that deft. was the manager & an officer of the co. within the deed of settlement, & was employed as such upon the terms of the last-mentioned clause, & that the alleged breaches to which the plea was pleaded did not happen by reason or in consequence of the wilful neglect or default of deft. as such manager as aforesaid:—*Held:* the plea was a good answer as to so much of the breach to which it was pleaded.—WARD *v.* GREENLAND (1865), 19 C. B. N. S. 527; 144 E. R. 893.

249. Transfer of shares—Signing as "manager in trust."]—Shares were transferred to a bank, whose manager transferred them to applts. The words "manager in trust" were appended to the manager's signature:—*Held:* these words meant in trust for the bank, & not a fiduciary relation to any other person, & were not so ambiguous as to cast upon applts. the duty of making inquiry.—LONDON & CANADIAN LOAN & AGENCY CO., LTD. *v.* DUGGAN, [1893] A. C. 506; 63 L. J. P. C. 14; 9 T. L. R. 600; 1 R. 413, P. C.

250. Representations as to credit—Misrepresentation by manager—Liability of bank.]—Pltf. sued J. & G. jointly for a false representation with respect to the solvency of R. J. was sued as the public officer of a banking co. formed under Country Bankers Act, 1826 (c. 46), & G. was the manager at one of their branches. Pltf. was a customer of the S. Bank, & requested the manager of that bank to inquire for him as to R.'s credit. The manager wrote a letter addressed to the manager of defts.' banking co., requesting information whether R. was responsible to the extent of £50,000. G. replied in his own name, signing his letter as manager, & giving a favourable account of R.'s responsibility. Pltf., in consequence of this letter, supplied R. with goods, for which he never was paid, in consequence of R.'s insolvency. The statement made by G. was false to his knowledge. Defts.' banking co. had no knowledge, otherwise than through G., that such letter had been written, & gave him no express authority to write the letter;

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248 i. *Negligence — Recording lists of proprietors.*]—Where a manager of a bank delegates the duty of recording the list of proprietors of the bank to a clerk, under Bank & Bank Holidays Act, 1898, No. 9, s. 9, & the list filed is incomplete, such manager is not liable to a penalty for omitting or neglecting to cause such list to be recorded, in the absence of evidence of personal neglect or default on his part.—MILES *v.* HENDERSON (1907), 7 S. R. N. S. W. 19.—**AUS.**

t. *Petitioning in bankruptcy.*] — A bank manager, with power to institute "actions, suits, or other legal proceedings" on behalf of his bank, has power to petition in bkpcy. for it.—*Re* MACKAY, 2 J. R. N. S. 150.—**N.Z.**

u. *Promise to credit customer for private debt—Customer's cheques honoured—No credit in bank books—Right of bank to recover.*]—A bank is not bound by a promise of its manager to pay a private debt of his own to a customer, by placing the amount to the customer's credit with the bank, unless such promise be carried into effect by corresponding entries in the bank books.

A customer drew cheques upon the faith of such a promise, & the manager, without having placed any money to the customer's credit, honoured such cheques. The customer's account was thus, without his knowledge, overdrawn:—*Held:* the customer was liable to the bank for the amount of the overdraft.—BLACKWOOD *v.* ROURKE (1875), 1 V. L. R. 201.—**AUS.**

250 i. *Representations as to credit — Misrepresentation by manager—Liability of bank.*] — A bank agent informed an intending cautioner that debtor's account was overdrawn, without mentioning certain bills on which he was liable:—*Held:* there was no duty on the agent to disclose debtor's total indebtedness to the bank.—ROYAL BANK OF SCOTLAND *v.* GREENSHIELDS, [1914] S. C. 259; 51 Sc. L. R. 260.—**SCOT.**

250 ii. —— —— ——.] — Circumstances in which:—*Held:* deft. bank not liable for representations made by their agent to an intending cautioner as to the credit of his co-cautioners.—ROBINSON *v.* NATIONAL BANK OF SCOTLAND (1916), 53 Sc. L. R. 390, H. L.—**SCOT.**

250 iii. —— *Expression of opinion.*]—A bank manager untruthfully, but unknowingly, told an intending surety that K. was "all right & would be able to meet his liabilities":—*Held:* a mere expression of opinion, & surety liable.—NATIONAL BANK OF NEW ZEALAND *v.* MACINTOSH (1881), 3 N. Z. L. R. 217, C. A.—**N.Z.**

v. *Representation as to future payment — Whether personal contract.*] — Deft., the manager of a bank, represented that certain moneys would be paid by the bank on behalf of a debtor as a composition to his creditors, & gave the agent of himself & debtor authority to draw on his bank for the composition payable to the several creditors:—*Held:* deft. had not entered into any contract upon which he was individually responsible.—HENTY *v.* HOLT (1875), 3 C. A. 20.—**N.Z.**

w. —— *Whether corporate seal necessary.*]—The undertaking of a bank manager to a co. to see all calls paid is within scope of his authority, & does not require the corporate seal.—HARRISON *v.* SMITH (1869), 6 W. W & A'B. 182.—**AUS.**

x. *Selling bank shares — Agreement to reassume a specified date & price.*]—It is beyond the scope of the duties & powers of a bank manager to sell shares of his bank under a condition that the bank will reassume them within a specified date, at an agreed price, effecting, thereby, the stock transaction known as a "put."—COATES *v.* SOVEREIGN BANK (1913), 19 R. L. 371; 20 D. L. R. 142.—**CAN.**

y. *Selling land — Oral authority*] — *Qu.*, whether authority to sell lands of a bank can be conferred by parol.—DOMINION BANK *v.* KNOWLTON (1877), 25 Gr. 125.—**CAN.**

z. *Signing deed of composition.*] — A deed of composition executed by a local manager "for bank of commerce, C. N." with an ordinary seal:—*Held:* not binding on the bank not being under the corporate seal or a signature by which alone the bank had power to execute

Sect. 10.—*Officials of banks: Sub-sects.* 1 & 2.]

but the writing of such a letter was an act done within scope of the general authority conferred on G. as manager:—*Held:* (1) by Stat. Frauds Amendment Act, 1828 (c. 14), s. 6, a false representation as to the credit of another person, in order to maintain an action, must be signed by the person making it, & not by an agent, & if G. were to be considered an agent, the banking co. were not liable; (2) the signature of G. to the letter could not be considered the signature of the banking co. itself; (3) the letter was the representation of G., & not the representation of the banking co.—SWIFT *v.* JEWSBURY & GODDARD (1874), L. R. 9 Q. B. 301; 43 L. J. Q. B. 56; 30 L. T. 31; 22 W. R. 319, Ex. Ch.; *subsequent proceedings:* L. R. 9 Q. B. 560.

Annotations:—**Folld** Hosegood *v.* Bull (1876), 41 J. P. 88. **Distd.** Pearson *v.* Seligman (1883), 48 L. T. 842, C. A.; Hamlyn *v.* Houston (1902), 51 W. R. 99, C. A. **Refd.** Mackay *v.* Commercial Bank of New Brunswick (1874), 30 L. T. 180, P. C.; Hirst *v.* West Riding Union Banking Co., [1901] 2 K. B. 560, C. A.; Parsons *v.* Barclay & Goddard (1910) 103 L. T. 196, C. A.; Banbury *v.* Bank of Montreal, [1917] 1 K. B. 409, C. A. **Mentd.** Weir *v.* Barnett (1877), 3 Ex. D. 32; Cargill *v.* Bower (1878), 10 Ch. D. 502; Barnett's, Hoares *v.* South London Tram. Co. (1886), 2 T. L. R. 848; British Mutual Co. *v.* Charnwood Forest Co. (1887), 52 J. P. 150, C. A.; Bishop *v.* Balkis Consolidated Co. (1890), 2 Meg. 292, C. A.; Kettlewell *v.* Refuge Assce., [1908] 1 K. B. 545, C. A.; Banbury *v.* Bank of Montreal, [1918] A. C. 626, H. L.

251. —— —— ——.]—In an action against the G. Bank & K., the manager of one of their branches, for a false representation as to the solvency of an individual, the statement of claim alleged as follows:—that pltfs., through their bankers, S.'s Banking Co., caused the following letter to be written & sent to the G. Bank: "Private.—S. Bank, Bristol, Oct., 1875.—We shall feel obliged by your favouring us with your confidential opinion as to the general character & responsibility in the way of business of F. to the extent of £1,000 to £2,000"; that in answer to the letter the G. Bank, intending thereby to deceive pltfs. & induce them to give credit to F., caused a letter of reply to be sent to S.'s Banking Co., which was written & signed by K. upon paper belonging to the G. Bank, & supplied by them to K. for the express purpose of answering such inquiries, & was in the words following: "G. Bank, Stroud, Oct. 6, 1875.—Confidential.—For your private use & without responsibility on the part of this bank or the manager.—S.'s Banking Co., Bristol.—Gentlemen,—The person you inquire about is respectable & doing a good business, but we consider his means are not sufficient for his requirements in trade. The amount you state (£2,000) seems rather large for a single transaction.—We are, etc., K., manager"; that the words "G. Bank, Stroud, 1875.—Confidential.—For your private use & without responsibility, etc.," were printed upon the paper by the instructions of the G. Bank, before it was supplied to K.; that at the time the reply was written & sent by defts., F., to their knowledge, was insolvent, & owed more than £1,000 beyond his assets, & was largely indebted to the G. Bank, & defts. were interested in inducing corn merchants to give him credit; that, in consequence of the reply, pltfs. were induced to sell & deliver goods to the value of £818 10*s.* 6*d.* to F., on credit, in Feb. 1876, in which month he filed a petition for liquidation of his affairs, & pltfs. lost the whole of the £818 10*s.* 6*d.* so due & owing to them as aforesaid:—*Held:* defts. were not liable for the misrepresentation of K., the manager.—HOSEGOOD *v.* BULL (1876), 36 L. T. 617; 41 J. P. 88.

Annotation:—**Mentd.** Banbury *v.* Bank of Montreal, [1918] A. C. 626, H. L.

252. —— —— ——.]—The signature of a bank manager to a false representation as to the credit of another person cannot be consdered to be the signature of an incorporated banking co., so as to satisfy Stat. Frauds Amendment Act, 1828, s. 6.—HIRST *v.* WEST RIDING UNION BANKING CO., LTD., [1901] 2 K. B. 560; 70 L. J. K. B. 828; 85 L. T. 3; 49 W. R. 715; 17 T. L. R. 629; 45 Sol. Jo. 614, C. A.

Annotations:—**Refd.** Banbury *v.* Bank of Montreal, [1918] A. C. 626, H. L. **Mentd.** *Re* Royal Naval School, Seymour *v.* Royal Naval School, [1910] 1 Ch. 806.

253. —— —— ——.]—Pursuers alleged that defenders' agent, knowing that D. R. & Co., customers of defenders, were largely indebted to defenders' bank & were insolvent, conceived a fraudulent design of obtaining pursuer's acceptance in favour of D. R. & Co., in order to apply them *pro tanto* in reducing D. R. & Co.'s debt to defenders' bank, & that in pursuance of this scheme defenders' agent falsely & fraudulently made certain representations as to the credit of D. R. & Co., whereby pursuers were induced to grant acceptances to D. R. & Co., which were applied to the credit of D. R. & Co.'s banking account with defenders. D. R. & Co. were sequestrated & pursuers were compelled to pay the bills. All the representations relied on were made orally:—*Held:* there was no cause of action, having regard to Mercantile Law (Scotland) Amendment Act, 1856 (c. 60), s. 6 (substantially the same as Stat. Frauds Amendment Act, 1828, s. 6).—CLYDESDALE BANK, LTD. *v.* PATON, [1896] A. C. 381; 65 L. J. P. C. 73; 74 L. T. 738, H. L.

Annotation:—**Refd.** Banbury *v.* Bank of Montreal, [1918] A. C. 626, H. L.

254. —— **Advice as to investments—Negligence.**]—Pltf. in 1911 went to Canada on pleasure & stayed at Montreal with the general manager of defts., who gave him a letter of introduction to the branch managers asking them if he applied for assistance or advice to place themselves at his disposal. In 1912 he again visited Canada, seeking investments, & presented the letter of introduction to G., defts.' branch manager at V., upon whose oral advice he invested the sum of £25,000 upon a mtge. to secure a loan to a Canadian co., who were customers & debtors of the bank. The advice, which was honestly given, involved oral representations as to the credit of the co. The co. having failed to pay either interest or principal, pltf. brought an action against defts., claiming

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documents.—BANK OF COMMERCE *v.* JENKINS (1888), 16 O. R. 215. **CAN.**

a. *Waiving liability of maker of promissory note.*]—In the absence of evidence as to the actual authority of a bank manager, it is within the scope of his implied authority to waive, for good consideration & in the course of transacting the bank's business, the liability of the maker of a promissory note held by the bank, but beyond the scope of his authority to waive that liability without consideration & as a mere matter of favour.—COLONIAL BANK OF AUSTRALASIA *v.* ETTERSHANK (1875), 4 V. L. R. 239, P. C.—**AUS.**

b. ——.]—A manager of a local branch of a bank has authority, in the ordinary course of his business as manager, to waive verbally, for consideration, the liability of the maker of a promissory note held by such manager as security for the account of a customer at such branch of the bank.—BANK OF AUSTRALASIA *v.* COTCHETT (1878), 4 V. L. R. 226.—**AUS.**

d. *Manager of bank of British North America.*]—An action is not maintainable against the manager of the above bank under 7 Will. 4, c. 34, in his individual character, for a cause of action accrued against him only as manager.—WHITE *v.* HUNTER (1840), 1 U. C. R. 452.—**CAN.**

f. *General manager — Liable to examination for discovery.*]—In an action to recover money deposited with defts. at a branch, pltf. examined for discovery as officers the manager & ledger-keeper at the branch at the time the deposits were made. He then sought to examine the general manager:—*Held:* pltf. had the right to examine the general manager as an officer of the corpn., &, the regular means of procuring his attendance having been taken, there was no excuse for his non-attendance. — DILL *v.* DOMINION BANK (1897), 17 P. R. 488.—**CAN.**

damages for negligence & breach of duty while acting as his bankers & advisers. It was admitted that G. had no general authority to advise as to investments:—*Held:* (1) Stat. Frauds Amendment Act, 1828, s. 6, did not apply to the action; (2) (LORDS FINLAY, C. & SHAW OF DUNFERMLINE, *diss.*) there was no evidence upon which the jury could reasonably find that G. had authority to advise pltf. as to his investments, or that defts. owed any duty to pltf. to advise him carefully or at all; (3) defts. were entitled to judgment.—BANBURY *v.* BANK OF MONTREAL, [1918] A. C. 626; 87 L. J. K. B. 1158; 119 L. T. 446; 34 T. L. R. 518; 62 Sol. Jo. 665, H. L.

255. Fraudulent report of directors—Inducement to buy shares—Liability of officers.]—Where a fraudulent report of a joint-stock bank is issued, signed by the directors, & calculated to deceive the public, if one of the public, relying on such false report, buy shares & suffer loss, he can sue for the loss not only the directors who signed such report, but also the manager, secretary, or other officers who concurred in & assisted in concocting it, though the latter did not sign it, & their names or existence were not even known at the time to the party deceived. In such a case the officers of the bank are not protected from liability by reason of their being servants of the directors, for both they & the directors are servants of the shareholders, & even if they were servants, that would be no defence to such officers.—CULLEN *v.* THOMSON'S TRUSTEES (1862), 4 Macq. 424; 6 L. T. 870; 26 J. P. 611; 9 Jur. N. S. 85, H. L.

Annotations:—**Consd.** Peek *v.* Gurney (1873), L. R. 6 H. L. 377, H. L. **Mentd.** Swift *v.* Winterbotham (1873), L. R. 8 Q. B. 244; Weir *v.* Bell (1878), 3 Ex. D. 238, C. A.; Burdett *v.* Horne (1911), 27 T. L. R. 402.

256. Manager as "chief clerk"—Signing & issuing notes—Bank Notes Act, 1828 (c. 23), s. 7.]—Prisoner was convicted of perjury for making a false return relating to the issue of unstamped notes under the above Act. It was objected that he was not an "accountant," cashier, or chief clerk, within the above sect.:—*Held:* a manager of a joint-stock banking co. who had clerks under his control & who, though neither accountant nor cashier, gave orders to the cashiers & directed the issue of notes & signed them, was a clerk, & if at the head of his department, was a "chief clerk" within the sect.—R. *v.* GREENLAND (1867), L. R. 1 C. C. R. 65; 36 L. J. M. C. 37; 15 L. T. 589; 31 J. P. 243; 15 W. R. 460; 10 Cox, C. C. 377, C. C. R.

SUB-SECT. 2.—CASHIER.

257. Embezzlement by—Cheque obtained on false credit—Rights of bank.]—The cashier of pltfs., bankers, entered in one of the ledgers to the credit of deft., a customer of the bank, the sum of £200 which was a false credit. He then told deft. that he had paid £200 in the house in deft.'s name, showing him the bank books, & induced him to draw upon the house for £200 which he embezzled:—*Semble:* that an action for money had & received could not be supported against deft.—BIRCH, CHAMBERS & CO. *v.* VALE (1812), Russ. & Ry. 223, n.

258. Discounting bills—Ordinary course of business of bank—No bad faith proved.]—BANK OF UPPER CANADA *v.* BRADSHAW, No. 241, *ante.*

259. Scope of authority—Payment on genuine orders.]—The cashier of a bank has authority, arising from the nature of his employment, to pay the money of the bank to persons presenting genuine orders, & to judge of their genuineness.—R. *v.* PRINCE (1868), L. R. 1 C. C. R. 150; 38 L. J. M. C. 8; 19 L. T. 364; 33 J. P. 21; 17 W. R. 179; 11 Cox, C. C. 193, C. C. R.

Annotations:—**Mentd.** R. *v.* Cooke (1871), 40 L. J. M. C. 68, C. C. R.; R. *v.* Middleton (1873), L. R. 2 C. C. R. 38

260. Fraudulent misappropriation by—Purchase of shares—Right of bank to shares.]—Bkpt., who was the cashier in a bank, misappropriated moneys entrusted to him by his employers for banking purposes, & purchased therewith certain shares. Bkpt. absconded, & an application by the bank for an order that it was entitled to the shares purchased with the stolen money was refused by the county ct. judge:—*Held:* the order of the county ct. judge must be reversed, & the trustee in bkpcy. must deliver up the shares to the bank.—*Re* HULTON, *Ex p.* MANCHESTER & COUNTY BANK, LTD. (1891), 8 Morr. 69; 39 W. R. 303, D. C.

PART I. SECT. 10, SUB-SECT. 2.

g. *Acting in individual capacity.*]—Money deposited with the cashier of a bank, acting individually & not in the affairs of the bank, does not constitute the bank the attorney of the parties to whom the money is due.—LYNCH *v.* MCLENNAN & BANK OF UPPER CANADA (1858), 3 L. C. J. 84; 9 L. C. R. 257.—**CAN.**

h. ——.]—When the cashier of a bank has entered into transactions, even in his own name, which are within the ordinary scope of the duties of such cashier, the bank is bound by such transactions.—CITY & DISTRICT SAVINGS BANK *v.* JACQUES-CARTIER BANK (1886), 30 L. C. J. 106.—**CAN.**

k. *Misrepresentation by — Inducement to accept bills.*]—L. drew bills of exchange on pltf. which he accepted for the accommodation of defts., who agreed to guarantee the payment of them at maturity: the bills would fall due on Sept. 2, 1868. On Aug. 11, L. drew other bills on pltf., also for defts.' accommodation. Pltf., not having received funds from defts. to take up the bills falling due on Sept. 2, telegraphed to L. that unless those funds were sent he would not accept the bills drawn on Aug. 11. L. had become insolvent, & left the country. L.'s trustees took the telegram to the bank cashier, who knew that L. had absconded, & an answer was sent to pltf. by cable, in the name of L., stating that funds had been sent by the last mail, which was the fact. In consequence of this answer pltf. accepted the bills drawn on Aug. 11, & was obliged to pay them. The telegram was in the handwriting of one of L.'s trustees but was sent to the telegraph office by the cashier of the bank, & the cost of transmitting it charged to L. in the bank books. In an action against the bank for falsely representing by the telegram that L. was in St. John, whereby pltf. was induced to accept the bills:—*Held:* answering the telegram addressed to L. was not within the scope of the cashier's duties, & it should have been left to the jury to find whether the answer was sent by the authority of the directors.—MCKAY *v.* COMMERCIAL BANK (1872), 14 N. B. R. (Pug.) 1.—**CAN.**

m. *Payment to—Payment to bank.*]—In an action by the cashier of a bank in his own name on a bill indorsed to the bank:—*Held:* as the facts proved showed payment to pltf. it was a fair inference that this was payment to the bank.—SEELEY *v.* COX (1896), 28 N. S. R. 210; *affd.* in S. C., Cont. Dig. 199.—**CAN.**

n. *Power of attorney by — To person not bank employee—Invalid.*]—*Re* DINNING & SAMPSON (1877), 4 Q. L. R. 26; 18 R. L. 606.—**CAN.**

p. *Purchase of bank shares at request of—Cheque of customer honoured—No receipt of money on cheque—Recovery by bank.*]—Deft., at the request of the cashier, & for the benefit of the bank, bid in certain shares of the bank stock, which were advertised for sale. Deft. had no funds in the bank, but the cashier told him he could draw a cheque for the amount of the purchase-money, which he did, & the amount was paid by the cashier to the seller of the shares, which were then transferred to deft. The purchase of its shares by the bank was contrary to the charter. Deft. offered to transfer the shares to the bank, but they refused to accept them, & repudiated the whole transaction:—*Held:* the bank could not recover the amount of the cheque.—COMMERCIAL BANK *v.* STEVENSON (1872), N. B. Dig. 81.—**CAN.**

259 i. *Scope of employment—Misappropriation of funds—Liability of cashier's sureties.*]—The sureties of an absconding bank cashier are not relieved from liability, by showing that the bank employed their principal in transacting what was not properly banking business, in the course of which he appropriated the bank funds to his own use, the claim against the sureties being for the moneys so appropriated by the principal, & not for losses occasioned by such illegal transactions.—SPRINGER *v.* EXCHANGE BANK OF CANADA, BARNES *v.* EXCHANGE BANK OF CANADA (1887), 14 S. C. R. 716.—**CAN.**

Sect. 10.—*Officials of banks : Sub-sects.* 3 & 4. *Part II. Sect.* 1 : *Sub-sect.* 1.]

SUB-SECT. 3.—CLERK.

261. Scope of employment—Loss of money—Liability of clerk's sureties.]—C. entered into the service of bankers as their clerk at B., & gave a bond with sureties for the faithful discharge of his duties, & they covenanted thereby to make good all losses which might accrue to the bankers through the negligence, etc., of C. D., a customer of the bank, lived twelve miles from B., & requested the bankers to send over a person to receive his rents on a certain day. C. was sent over, received the cash from D., & lost it on his way home. In an action of covenant against the sureties for the amount of the money lost by C., the jury found that it was not the custom for bankers at B. to send over & receive money from their customers in the country :—*Held :* (1) the money was received by C. in the course of his employment as bankers' clerk ; (2) the receipt of the money by C. was a receipt by the bankers, & they were entitled to recover.—MELVILLE *v.* DOIDGE (1848), 6 C. B. 450 ; 18 L. J. C. P. 7 ; 12 L. T. O. S. 127 ; 12 Jur. 923 ; 136 E. R. 1324.

See, further, GUARANTEE.

262. Retirement or dismissal—Right to pension—Rules of bank.]—When a clerk breaks an unwritten but well recognised rule of his employer, & receives in consequence a letter requiring him to resign, that notice, although polite instead of peremptory language was used, is a dismissal.

Pltf. having received such a notice :—*Held :* he was not entitled to a retiring allowance, one of the conditions on which such an allowance was granted being that appct. "retired with the consent of the directors."—STEPHENSON *v.* LONDON JOINT STOCK BANK, LTD. (1903), 52 W. R. 183 ; 20 T. L. R. 8 ; 47 Sol. Jo. 876, C. A.

SUB-SECT. 4.—AUDITOR.

263. Whether "officer" of company—Duties—Misfeasance.]—An auditor of a banking co., appointed in accordance with Cos. Act, 1879 (c. 76), is an officer of the co. within Cos. (Winding-up) Act, 1890 (c. 63), s. 10.

The duty of an auditor is confined to ascertaining & certifying to the shareholders the true financial position of the co. at the time of the audit, but in discharging that duty it is not sufficient to ascertain that the balance-sheet corresponds with the books ; he must take reasonable care to ascertain that the books themselves show the true position of the co.

An auditor of a banking co. regulated by Cos. Act, 1879, certified that the balance-sheet was a correct summary of the accounts of the co. as recorded in the books, & added that the value of the assets was dependent on realisation. The principal asset consisted of loans to customers, which were put down in the books at far too high a figure, no allowance being made for bad or doubtful debts. The auditor made a private report to the directors, calling their attention to the unsatisfactory nature of the securities held for most of these loans :—*Held :* the certificate did not comply with 1879 Act, & the auditor was guilty of a misfeasance under Cos. (Winding-up) Act, 1890, s. 10, in withholding from the shareholders the information to which he called the attention of the directors, & he & the directors were jointly & severally liable for the amount of a dividend paid out of the capital of the co. in pursuance of a resolution of the shareholders, founded on the recommendation of the directors & upon the balance-sheet certified by the auditor.—*Re* LONDON & GENERAL BANK, [1895] 2 Ch. 166, 673 ; 64 L. J. Ch. 866 ; 72 L. T. 610 ; 73 L. T. 304 ; 43 W. R. 481 ; 44 W. R. 80 ; 11 T. L. R. 374, 573 ; 39 Sol. Jo. 450, 706 ; 2 Mans. 282, 555 ; 12 R. 263, 502, C. A.

Annotations :—**Consd.** *Re* Kingston Cotton Mill Co., [1896] 2 Ch. 279, C. A. ; *Re* Western Counties Steam Bakeries & Milling Co., [1897] 1 Ch. 617, C. A. **Refd.** R. *v.* Roberts, [1908] 1 K. B. 407, C. A. ; *Re* Republic of Bolivia Exploration Syndicate, [1914] 1 Ch. 139. **Mentd.** *Re* National Bank of Wales, [1899] 2 Ch. 629, C. A.

See, generally, COMPANIES.

PART I. SECT. 10, SUB-SECT. 3.

q. *Clerk—Filling up blank drafts for unauthorised purposes.*]—If a clerk in a bank, having or honestly believing that he has an implied or express authority to fill up blank drafts signed by the cashier or assistant-cashier of the bank, fills up such blanks for other purposes than those for which he knew them to have been signed, with intent to defraud, he thereby commits forgery.—*Ex p.* HOKE (1886), 14 R. L. 705.—**CAN.**

r. —— *Misappropriating accepted cheque—Liability of bank.*]—The bank clerk, who receives an accepted cheque with directions to pay certain drafts, &, instead of carrying the cheque to the credit of the depositor, pays himself a part of the proceeds of the cheque, renders the bank liable to an accounting for the money so received. The burden of proof is upon deft. to explain what was done with the money.—SERCHUCK *v.* BANQUE NATIONALE (1915), 21 R. L. 396.—**CAN.**

t. *Teller of bank Authority to receive deposits—Subject to special conditions.*]—Though a teller of a bank may not in fact have authority to receive deposits, except on the ordinary terms, yet if he receive a deposit, subject to special conditions as to its appropriation which ought to be communicated by him to the manager, & the deposit is retained by the bank, the bank will be bound by such condition.—CHAMBERLAIN *v.* ENGLISH, SCOTTISH & AUSTRALIAN CHARTERED BANK (1878), 4 V. L. R. 45.—**AUS.**

u. —— *Fidelity guarantee—Misapplication of funds—Scope of employment.*]—In an action on a deed, whereby deft. guarantees that A. shall, during his service as clerk or in any other capacity whatsoever, be faithful in his conduct, render proper accounts, pay money, etc., a plea that before the breach of duty alleged A. was, without deft.'s consent, changed from the situation of clerk to that of teller whereby his responsibility was entirely changed & increased, is bad.—ROYAL CANADIAN BANK *v.* YATES (1869), 19 C. P. 439.—**CAN.**

v. —— —— *Mode of checking cash—Evidence.*]—Pltfs. granted a bond for the intromissions of a teller in a bank. Previous thereto, a "proposal for guarantee" had been submitted by the teller to pltfs., containing answers to queries. One of the queries, to the effect "How often the employer would balance appct.'s accounts, & what are the checks used to secure accuracy of accounts," was answered. "His cash is checked weekly by a brother teller, & by the cashier separately, & monthly by the directors." This answer was signed by the bank & by the teller. The teller failed to account for his intromissions :—*Held :* (1) the jury had been rightly directed that the question whether there was an undertaking on the part of the bank depended on the point whether the matter represented was material to the interests of the party putting the question, & if the jury thought the representation material, then, taking the "proposal" as questions put to employers before pltf. entered into their obligation, it was an undertaking given to them on which they might rely ; (2) evidence on the part of defenders as to the usual mode of checking in other banks was inadmissible, merely to show that what they had done was fairly within ordinary practice. — BRITISH GUARANTEE ASSOCN. *v.* WESTERN BANK OF SCOTLAND (1853), 25 Sc. Jur. 502.—**SCOT.**

w. —— *Right to sue for shortage.*]—Pltf. was teller of a bank, at which a note of deft. became due. Deft. paid in to pltf. a sum afterwards discovered to be £25 short, & pltf. was compelled to make it good to the bank :—*Held :* he could recover it from deft. as money paid to his use.—RIVERS *v.* ROE (1854), 4 C. P. 21.—**CAN.**

x. *Holding shares in trust for bank—Indemnity—Winding up of bank—Right of proof.*]—B., a clerk in the M. bank, held a number of shares in various cos. in trust for the bank, the bank having for certain reasons transferred such shares into his name. The bank gave B. an indemnity against all liability in respect of such shares. B. was made insolvent in respect of shares so held by him in one of these cos., & all the cos. put in proofs in respect of uncalled capital against his estate. The various cos. had all gone into liquidation, & all the unpaid capital therein had been called up. The M. bank also went into liquidation, some of these cos. being still indebted to it :—*Held :* the trustees of B.'s estate were entitled to prove in the liquidation proceedings of the M. bank in respect of the whole amount of calls in respect of those shares for which B. was liable.—*Re* THE MERCANTILE BANK OF AUSTRALIA, LTD. (IN LIQUIDATION), *Ex p.* BULLOCK (1895), 21 V. L. R. 476.—**AUS.**

Part II.—Business of Banking.

SECT. 1.—GENERAL RIGHTS AND OBLIGATIONS.

SUB-SECT. 1.—NATURE AND CONDITIONS OF BANKING.

264. Banking business part of law merchant — Judicial notice.]—The nature of the business of bankers is part of the law merchant, & is to be judicially noticed by the ct.—BANK OF AUSTRALASIA *v.* BREILLAT (1847), 6 Moo. P. C. C. 152 ; 13 E. R. 642, P. C.

Annotations :—**Mentd.** Bute *v.* Mason (1849), 7 Moo. P. C. C. 1, P. C. ; Maclae *v.* Sutherland (1854), 3 E. & B. 1 ; Lindus *v.* Melrose (1858), 3 H. & N. 177, Ex. Ch.

265. Banking customs — Establishment.] — Bankers have no right to establish a customary law among themselves at the expense of other men (FOSTER, J.) — HANKEY *v.* TROTMAN (1746), 1 Wm. Bl. 1 ; 96 E. R. 1.

Annotations :—**Consd.** Medcalf *v.* Hall (1782), 3 Doug. K. B. 113. **Mentd.** Robson *v.* Bennett (1810), 2 Taunt. 388.

266. Carrying on business—Receipt of deposits—Cessation.]—As soon as a banker ceases to receive deposits, the trade of banking ceases.—GRIFFITHS *v.* JAY (1835) 4 L. J. Ch. 69.

267. —— Loss—Fraud.]—The trade of a banker in an especial manner demands the strictest fair dealing, as it is one of confidence ; & where a banker had carried on his business for eighteen years at an unvarying loss, & with a knowledge of it, & continued to receive deposits to the last day before becoming bkpt. :—*Held :* the Bkpcy. Ct. would visit such conduct with the severest punishment, & refuse his certificate.—*Re* JOHNSON (1848), 10 L. T. O. S. 378.

268. —— Representation as to solvency.]—The position of a banker differs from that of an ordinary trader. The ordinary trader by the mere fact that his premises are open & that his business is being carried on does not represent that he is solvent. In the case of a banker, the mere fact of his keeping his doors open for business & carrying on business may afford some evidence from which a jury may find that he impliedly represents he is solvent.—R. *v.* PARKER & BULTEEL (1916), 80 J. P. 271 ; 25 Cox, C. C. 145.

269. Wrongful use of bank name.]—A declaration stated that pltf. had established a bank in London called "The Bank of London," & was the first person who had established a bank by or under that name, & had established the bank at great expense, & caused the name to be published & affixed on the offices of the bank, so that same might be seen & known by the public, & had caused prospectuses of the bank to be printed & circulated with the name & title of "The Bank of London" thereon, & the bank was then commonly known by the name of, & was the only bank named or styled, "The Bank of London," whereby pltf. had acquired & was acquiring great gains & profits. It then proceeded to allege that defts., intending to injure pltf. in his bank & the business of his bank, afterwards, & while his bank was the only bank named or styled "The Bank of London," wrongfully & fraudulently established a certain other bank in London under the name, style, & title of "The Bank of London," in imitation of, & as representing, the Bank of London of pltf., & wrongfully & fraudulently transacted business at the bank so established by defts. under such name, & under the false colour & pretence that

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PART II. SECT. 1, SUB-SECT. 1.

a. *Essential characteristics.*]—The essential characteristics of the business of banking are the collection of money by receiving deposits upon loan, repayable when & as expressly or impliedly agreed upon, & the utilisation of the money so collected by lending it again in such sums as are required.—STATE SAVINGS BANK OF VICTORIA COMRS. *v.* PERMEWAN WRIGHT & CO., LTD. (1915), V. L. R. 81 ; 19 C. L. R. 457.—**AUS.**

b. ——.]—A. carried on business as a banker, or money-lender in three towns. The premises, where the business was carried on, consisted of two rooms in a house in each of the towns, one of which was occupied by A., & the other by his clerk. He attended one day in each week in each place. The course of business was as follows : Money was lent on promissory notes, payable in twelve weeks, with interest at the rate of ½*d.* in the pound per week. Advances were also made on mtges. The firm had been in the habit of receiving large sums of money on deposit, for which it gave promissory notes, payable three months after date. It afterwards substituted deposit receipts similar in form to those issued by banks, & the amount of money received on these was very large. The firm also lent small sums, up to £5, without taking any security, & cashed "crop notes" & small American drafts. The books kept were of the most primitive sort, & not such as were usually kept by bankers. A. did not issue notes, cheques, pass-books, letters of credit, or bills on foreign or British banks, & there were not any current accounts kept with the firm. The establishment was commonly known as A.'s bank, & the officials of the Bank of Ireland had also called the firm bankers : —*Held :* A. was a banker within 33 Geo. 2, c. 14.—*Re* SHIELDS' ESTATE, BANK OF IRELAND (GOVERNOR & CO.), PETITIONERS, [1901] 1 I. R. 172 ; 35 I. L. T. 3, C. A.—**IR.**

c. *Accepting bills — Corporate seal not necessary.*]—An incorporated banking co. can accept bills as incident to their business, & such acceptance need not be under their corporate seal.—BERTON *v.* CENTRAL BANK (1883), 5 All. 493.—**CAN.**

d. *Central bank—Obligations imposed by charter.*]—After part performance of a contract, from which the declaration required by 4 Will. 4, c. 44, s. 20, has been omitted, & receiving property under it, the bank cannot set up such omission in answer to a suit for specific performance of such contract. *Qu. :* whether such omission would render the contract void.—PICKARD *v.* CENTRAL BANK (1863), 5 All. 472.—**CAN.**

e. —— ——.]—The above sect. is directory only, & its non-observance does not render the instruments referred to in the sect. void.—BERTON *v.* CENTRAL BANK (1883), 5 All. 493.—**CAN.**

f. *Land bank — Being both vendor & purchaser—Duty of bank.*]—A land bank, whose business was the buying & selling of land, having a property under offer to them for £14,000, found a syndicate of five persons, of whom H. was one, ready to take over the property from the bank for £20,000. The bank purchased the property, but, on offering it to the syndicate, one of the original five was no longer ready to purchase, & the bank put forward C. to take the place of the fifth member of the syndicate, & the sale was then completed. H. entered into the arrangement, relying on his own judgment as to the value of the property, & he knew that C. was the nominee of the bank :—*Held :* although the bank was both vendor & purchaser it was not the promoter of the syndicate so as to owe any duty to H. to disclose to him the price originally given for the property, nor did the relationship existing between the bank & H. prevent the bank from making a profit at the expense of H., as he knew that the bank was vendor as well as purchaser, & that it was the business of the bank to make a profit out of land sales.—REAL ESTATE BANK, LTD. *v.* HUNTER (1897), 18 N. S. W. L. R. 219.—**AUS.**

g. *Marriage settlement by banker.*]—A settlement made by a banker on his son's marriage, & purporting to provide for the issue of the marriage, is within 33 Geo. 2, c. 14, s. 3, & the limitations in favour of such unborn children are void.—SPEARING *v.* DELACOUR (1838), 1 Dr. & Wal. 591.—**IR.**

h. *Purchase of goods at execution — To acquire outstanding charge.*]—*Held :* under 19 & 20 Vict. c. 127, s. 21, the bank had a right to purchase goods at a sheriff's sale other than on an execution at their own suit, if in that way they wished to acquire an outstanding claim or charge on the property of a debtor of the bank.—KINGSMILL *v.* BANK OF UPPER CANADA (1863), 13 C. P. 600.—**CAN.**

k. *Receipt of money in trust to purchase shares—Receipt outside bank.*]—Under Bank Act (R. S. C. c. 29), s. 76 (1), a bank may lawfully receive money deposited with it in trust, for the purchase of stock to be transferred by it to the depositor, & such a deposit may be lawfully made in the hands of the manager outside the bank premises, at the office of the depositor, to whom the bank, on taking possession of the money, becomes liable for it.—HOOPER *v.* EASTERN TOWNSHIPS BANK (1908), Q. R. 35 ; S. C. 221.—**CAN.**

l. *Trust company—Whether bank.*]—REVELSTOKE SAWMILL CO. *v.* FAWCETT (1915), 8 W. W. R. 477.—**CAN.**

Sect. 1.—General rights and obligations: Sub-sects. 1 & 2.]

same was the bank established by pltf., & that thereby pltf. had been prevented from carrying on his business at the bank so established by him so fully & extensively as he would otherwise have done, & had been deprived of profits, & that by means of the premises divers persons were induced to believe & did believe that the bank so established by defts. was the bank called "The Bank of London" established by pltf.:—*Held:* the declaration disclosed no cause of action, it not being averred that pltf. had ever carried on the business of a banker.

Semble: such action would lie against a trading corpn. (WILLES, J.).—LAWSON *v.* BANK OF LONDON (1856), 18 C. B. 84; 25 L. J. C. P. 188; 27 L. T. O. S. 134; 2 Jur. N. S. 716; 4 W. R. 481; 139 E. R. 1296.

Annotations:—**Consd.** McAndrew *v.* Bassett (1864), 4 New Rep. 12; Raggett *v.* Findlater (1873), L. R. 17 Eq. 29. **Refd.** Maxwell *v.* Hogg, Hogg *v.* Maxwell (1867), 2 Ch. App. 307, L.JJ. **Mentd.** Licensed Victuallers' Newspaper Co. *v.* Birmingham (1888), 36 W. R. 433, C. A.

270. Notice left after business hours—When operative.]—A notice left at a bank after business hours only operates as notice to the bank from the time when in ordinary course of business it is opened & read.—CALISHER *v.* FORBES (1871), 7 Ch. App. 109; 41 L. J. Ch. 56; 25 L. T. 772; 20 W. R. 160, L.JJ.

Annotations:—**Mentd.** *Re* Dallas, [1904] 2 Ch. 385, C. A.; *Re* Weniger's Policy, [1910] 2 Ch. 291.

271. Exchange contract—Condition precedent—Repudiation.]—Bankers contracted with A. to pay in exchange for silver sterling money or its equivalent at certain prices, but at the same time stipulated that the goods in payment for which the silver would be received should be financed through them:—*Held:* (1) financing the goods was a condition precedent to the contract; (2) both parties were reciprocally bound to settle reasonable terms of financing, & as the bankers repudiated the obligation, A. was entitled to judgment on the contract.—BANK OF CHINA, JAPAN & THE STRAITS, LTD. *v.* AMERICAN TRADING CO., [1894] A. C. 266; 63 L. J. P. C. 92; 70 L. T. 849; 6 R. 494, P. C.

SUB-SECT. 2.—THE RELATION OF BANKER AND CUSTOMER.

272. Relation of debtor & creditor.]—The relation between a banker & customer, who pays money into the bank, is the ordinary relation of debtor & creditor, with a superadded obligation arising out of the custom of bankers to honour the customer's drafts; & that relation is not altered by an agreement by the banker to allow the interest on the balances in the bank.

The relation of banker & customer does not partake of a fiduciary character, nor bear analogy to the relation between principal & factor or agent, who is *quasi*-trustee for the principal in respect of the particular matter for which he is appointed factor or agent.—FOLEY *v.* HILL (1848), 2 H. L. Cas. 28; 9 E. R. 1002, H. L.

Annotations:—**Consd.** *Re* Gibson & Sturt, *Re* St. Alban's Bank (1850), 15 L. T. O. S. 95. **Distd.** Pennell *v.* Duffell (1853), 4 De G. M. & G. 372, L.JJ. **Consd.** A.-G. *v.* Edmunds (1868), L. R. 6 Eq. 381; South Australian Insce. *v.* Randell (1869), L. R. 3 P. C. 101, P. C.; Burdick *v.* Garrick (1870), 5 Ch. App. 233, L.C. & L.J. **Distd.** Atkinson *v.* Bradford Third Equitable Benefit Bldg. Soc. (1890), 25 Q. B. D. 377, C. A. **Refd.** Teed *v.* Beere (1859), 33 L. T. O. S. 26; Moxon *v.* Bright (1869), 4 Ch. App. 292, L.C.; Blyth *v.* Whiffin (1872), 27 L. T. 330; Summers *v.* City Bank (1874), L. R. 9 C. P. 580; Banner *v.* Berridge (1881), 18 Ch. D. 254; Greenwell *v.* National Provincial Bank (1883), Cab. & El. 56; Marten *v.* Rocke, Eyton (1885), 53 L. T. 946; *Re* Tidd, Tidd *v.* Overall (1893), 62 L. J. Ch. 915; Royal Bank of Scotland *v.* Tottenham, [1894] 2 Q. B. 715, C. A.; *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135. **Mentd.** Blower *v.* Blower (1858), 5 Jur. N. S. 33; Jackson *v.* Ogg (1859), John. 397; Smith *v.* Leveaux (1863), 2 De G. J. & Sm. 1; Hill *v.* South Staffordshire Ry. Co. (1865), 11 Jur. N. S. 192; St. Aubyns *v.* Smart (1867), L. R. 5 Eq. 183; Seagram *v.* Tuck (1881),

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m. *What is trading—Acquisition of controlling interest in trading company.*]—Bank Act prohibits a bank from creating an alias to carry on business with the bank's money & account to the bank for the profits thereof, but it does not prohibit the acquisition by a bank of the controlling interest in a trading co. & the *de facto* direction of the affairs thereof by the bank.—NORTHERN CROWN BANK *v.* GREAT WEST LUMBER CO. (1914), 28 W. L. R. 708; 6 W. W. R. 528; 17 D. L. R. 593.—**CAN.**

n. —— *Buying & selling goods—Action for breach of warranty.*]—Bank Act, 34 Vict. c. 5, prohibits banks from buying & selling goods or merchandise, & an action will not lie against an incorporated bank for breach of warranty on the sale of a machine.—RADFORD *v.* MERCHANTS BANK (1883), 3 O. R. 529.—**CAN.**

o. —— *Holding shares in mercantile house.*]—Bill by a banker for an account of shares held in trust for him in a mercantile establishment dismissed, the trust being in contravention of 29 Geo. 2, c. 16, which prohibited bankers from being traders.—OTTLEY *v.* BROWNE (1810) 1 Ball & B. 360.—**IR.**

p. —— *Purchase of mining shares.*]—E. deposited with the V. Bank scrip for shares in the mining co. as security for moneys then due by him to the bank. Subsequently S. instituted proceedings before a warden for the forfeiture of the co.'s claim, but the warden dismissed the case. Pending an appeal S. agreed to withdraw his proceedings in consideration of the bank giving an undertaking to meet the liabilities on E.'s shares so long as they held them as security, & E.'s trustees by arrangement with the bank sold E.'s shares which were purchased for the bank in the name of nominees:—*Held:* the purchase of the shares by the bank in the circumstances was not violation of its Act of incorporation as investing its funds in a trading or mercantile speculation not within the ordinary & legitimate purposes & operations of banking establishments.—HARRISON *v.* SMITH (1869), 6 W. W. & A'B. 182.—**AUS.**

q. —— *Purchase of pig-iron.*]—A decree was pronounced against a banking co. for the price of pig-iron bought by its directors. A partner presented an application to interdict the directors from paying the decree out of the co. funds, on the ground that such transaction was a violation of the articles of copartnery, which limited the business of the co. to banking. Interdict refused.—GRAHAM *v.* NORTH BRITISH BANK (1849), 21 Sc. Jur. 458.—**SCOT.**

r. —— *Taking assignment of customer's business for debt.*]—Bank Act does not prevent a bank from agreeing to take, in payment of a debt from a customer, an assignment of a lease of the latter's business premises, & to carry on the business for a time, with a view to disposing of it as a going concern at the earliest possible moment.—ONTARIO BANK *v.* MCALLISTER (1910), 43 S. C. R. 358.—**CAN.**

s. —— ——.]—Defts., a firm carrying on a milling business, being heavily indebted to a bank, effected a settlement by which, upon payment of $10,000 & a transfer of all their assets, the partners were to be discharged from all liability, & an agreement was entered into whereby the firm agreed to surrender to the bank all the assets, & assign the lease of the milling property. At the same time another agreement was executed, by which one of the partners was to act as manager & continue the business in the firm's name, the bank indemnifying the partnership against all liability incurred while doing so:—*Held:* the carrying on of the business for the purpose of & to the extent provided for by the agreement, was not *ultra vires* of the bank under Bank Act, R. S. C., 1906 (c. 29), s. 76.—PETERBOROUGH HYDRAULIC POWER CO. *v.* MCALLISTER (1908), 12 O. W. R. 364; 17 O. L. R. 145.—**CAN.**

t. *Guarantee of account—In which bank not interested.*]—*Held:* the guarantee by a bank of an account, in which they had no interest, was *ultra vires* their powers under Bank Act, R. S. C., 1906 (c. 29).—MCINTOSH *v.* BANK OF NEW BRUNSWICK (1914), 14 E. L. R. 420.—**CAN.**

u. *Action by chartered bank—Proof of charter.*]—In an action as indorsees of a promissory note by a bank, whose charter has been continued by Banking Act (34 Vict. c. 5), it is not necessary to produce the charter of the bank to show their right to sue.—BANQUE NATIONALE *v.* BECKETT (1885), 25 N. B. R. 145.—**CAN.**

PART. II. SECT. 1, SUB-SECT. 2.

a. *When it arises.*]—A yearly sum of money was regularly remitted from England to the O. bank to be paid to R. by monthly instalments. R. obtained an advance from A. & gave cheques to A. drawn upon the forms used by the customers of the bank, amounting to the advances by A. & each cheque being for the amount of

44 L. T. 800; *Re* Palmer, *Ex p.* Richdale (1882), 19 Ch. D. 409, C. A.; How *v.* Winterton, [1896] 2 Ch. 626, C. A.; Kerrison *v.* Glyn, Mills, Currie (1911), 81 L. J. K. B. 465, H. L.

273. *S. P. Re* GIBSON & STURT, *Re* ST. ALBAN'S BANK (1850), 15 L. T. O. S. 95.

274. ——.]—The ordinary relation between a banker & his customers is merely that of debtor & creditor, & not of trustee & *cestui que trust.*—*Re* AGRA & MASTERMAN'S BANK, *Ex p.* WARING (1866), 36 L. J. Ch. 151.

275. —— **Deposits by customer—Bank bound to pay on demand.**]—The operation of banking is this. We speak of deposits by customers, & of their keeping money at a banker's; but both in fact & in contemplation of law they give their money or securities for money to the banker, who becomes their debtor & is bound to repay it on demand. So the operation of a cash credit is the reverse of the former; the customer becomes debtor to the bank by so much as the bank advances on his drafts, & the surety becomes bound to pay that debt if the customer fails (LORD BROUGHAM).—SWAN *v.* BANK OF SCOTLAND (1835), 1 Deac. 746; 10 Bli. N. S. 627; 2 Mont. & A. 656; 6 E. R. 231, H. L.

Annotation:—**Refd.** *Re* Gibson & Sturt, *Re* St. Alban's Bank (1850), 15 L. T. O. S. 95.

276. —— —— ——.]—Money deposited with a banker by his customer in the ordinary way is money lent to the banker, with a superadded obligation that it is to be paid when called for by cheque; & if it remain in the banker's hands for six years without any payment by him of the principal or allowance of interest, Stat. Limitations is a bar to its recovery.—POTT *v.* CLEGG (1847), 16 M. & W. 321; 16 L. J. Ex. 210; 8 L. T. O. S. 493; 11 Jur. 289; 153 E. R. 1212.

Annotations:—**Distd.** Atkinson *v.* Bradford Third Equitable Benefit Bldg. Soc. (1890), 25 Q. B. D. 377, C. A. **Refd.** Cooke *v.* Seeley (1848), 17 L. J. Ex. 286; *Re* Gibson & Sturt, *Re* St. Alban's Bank (1850), 15 L. T. O. S. 95; Tassell *v.* Cooper (1850), 9 C. B. 509; Farley *v.* Turner (1857), 5 W. R. 666; Seymour *v.* Brecon Corpn. Treasurer (1860), 29 L. J. Ex. 243; Garnett *v.* M'Kewan (1872), L. R. 8 Exch. 10; Goodwin *v.* Robarts (1875), 44 L. J. Ex. 157, Ex. Ch.; Arnold *v.* Cheque Bank (1876), 1 C. P. D. 578; *Re* Tidd, Tidd *v.* Overell, [1893] 3 Ch. 154. **Mentd.** *Re* Clendenning (1859), 33 L. T. O. S. 291; R. *v.* Hassall (1861), 9 W. R. 708, C. C. R.

277. —— —— **Agreement to pay customer elsewhere—Consideration.**]—A declaration in *assumpsit* stated that defts. were bankers, & that pltf., being about to proceed to N., paid into their banking-house in L. a sum of money, that they might cause the same sum to be paid to him at N., at a certain time then agreed upon between them, & defts. received the sum of money for that purpose, & thereupon, in consideration of the premises, promised to cause the sum of money to be paid to him at N. at the time agreed upon:—*Held:* the declaration imported an absolute undertaking to pay the money at N., & there was a sufficient consideration for the promise, & the declaration was good.—SHILLIBEER *v.* GLYN (1836), 2 M. & W. 143; 2 Gale, 212; 6 L. J. Ex. 21; 150 E. R. 704.

Annotation:—**Mentd.** Balfe *v.* West (1853), 13 C. B. 466.

278. Deposits by deceased partner—Proceeds of sale of partnership property—Rights of surviving partners.]—Money deposited with bankers is, in law, a loan by the customer to the bankers. Where A., in his own name, deposits with his banker, C., the proceeds of a sale of the partnership effects of A. & B., A. & B. cannot join in an action against C. for the amount, unless it be shown that the deposit was made by A. as agent for the firm, & C. cannot be sued by B. as surviving part-owner.—SIMS *v.* BOND (1833), 5 B. & Ad. 389; 2 Nev. & M. K. B. 608; 110 E. R. 834.

Annotations:—**Expld.** Walshe *v.* Howlett & Provan (1853), 1 C. L. R. 823. **Refd.** Parker *v.* Marchant (1843), 1 Ph. 356; Foley *v.* Hill (1844), 1 Ph. 399; Cooke *v.* Seeley (1848), 2 Exch. 746; *Re* Derbyshire's Estate, Webb *v.* Derbyshire (1905), 94 L. T. 138; Société Coloniale Anversoise *v.* London & Brazilian Bank, [1911] 2 K. B. 1024. **Mentd.** Cobb *v.* Becke (1845), 4 L. T. O. S. 394; Brunton *v.* Thompson (1846), 7 L. T. O. S. 430; Humble *v.* Hunter (1848), 17 L. J. Q. B. 350; Coulthurst *v.* Sweet (1866), L. R. 1 C. P. 649; New Zealand & Australian

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one instalment. These the bank agreed to pay provided R. drew no other cheques for those sums. The cheques given to A. were duly paid. Subsequently there being an accumulation to R.'s credit, R. drew a cheque for a sum less than the sum of the monthly instalments which had accumulated in the bank, the cheque not being a multiple of the monthly sum:—*Held:* the relation of banker & customer was not made out between the parties, & an action for dishonouring the cheque failed.—ROBINSON *v.* ORIENTAL BANK (1872), 3 V. L. R. 177.—**AUS.**

b. ——.]—A special arrangement was made between pltf. & the banker of his creditor that a sum should be sent to such banker who should pay out of it a debt due to the creditor & retain the residue for pltf.:—*Held:* the relation of banker & customer was not thereby established & pltf. was not entitled to have his cheques on such residue honoured.—STEWART *v.* BANK OF AUSTRALASIA (1883), 9 V. L. R. 240.—**AUS.**

c. *How terminated — Bankruptcy of customer.*]—The relation of banker & customer is terminated by the assignment by the latter of his estate to trustees for the benefit of his creditors, or by his insolvency; & where such termination took place during the currency of a promissory note, silent as to interest:—*Held:* from the date of its maturity simple interest only was chargeable, & not interest according to the previous dealings of the parties as banker & customer.—WHITE *v.* LONDON CHARTERED BANK OF AUSTRALIA (1877), 3 V. L. R. 33, 168.—**AUS.**

d. —— *Death of customer.*]—D. & Co., stockbrokers, had dealings with M. & Co., bankers, on the terms, that any commission business which D. & Co. transacted for M. & Co. should be placed to the account of an old debt, & that M. & Co., as bankers of D. & Co., should make them advances. One of the firm of D. & Co. having died:—*Held:* at D.'s death, the account ceased to be a banking account, & the balance due was merely a simple contract debt, & did not bear interest.—GRAVES *v.* DAVIES (1866), 17 I. Ch. R. 227.—**IR.**

275 i. *Relation of debtor & creditor — Deposits by customer.*]—The ordinary relation between a banker & customer in respect of moneys paid by the latter to the former is that of debtor & creditor, & no fiduciary relation will be created in the absence of directions by the customer which convert the banker into a trustee in respect of the sums so paid. A trust will exist when the banker is to collect & remit, but not where he is to use & repay. Where a customer remits money to a banker, with directions to receive such money in fixed deposit for a certain period together with another sum to be remitted, the banker does not, when the latter amount is not paid, hold the former sum in trust by virtue of such direction, although he cannot claim to hold it as a fixed deposit payable only after the limited period.—MADRAS OFFICIAL ASSIGNEE *v.* SMITH (1908), I. L. R. 32 Mad. 68.—**IND.**

275 ii. —— —— *Bank bound to repay on demand.*]—Money held by a banker after his customer had demanded repayment is not held by him in a fiduciary capacity. A creditor cannot transform his debtor into a trustee by merely demanding repayment of the debt.—MADRAS OFFICIAL ASSIGNEE *v.* KRISHNA BHATTA (1910), I. L. R. 34 Mad. 128.—**IND.**

275 iii. —— —— *Money held in suspense account.*]—Money was held by bankers in suspense account:—*Held:* the money was not held in a fiduciary capacity & the relationship of banker & customer existed between the parties.—MADRAS OFFICIAL ASSIGNEE *v.* MILAPPARANGAVUR SARVAJANA SAHAYA NIDHI (1910), I. L. R. 34 Mad. 125.—**IND.**

275 iv. —— —— ——.]—A. paid money into a bank with instructions to pay over same to B., who had no account with the bank. The bank wrote to B. stating that they had received the money & held same in suspense account pending instructions from B.:—*Held:* the bank held the amount as agents of A., for remittance to B., & not as bankers either of A. or B.—MADRAS OFFICIAL ASSIGNEE *v.* RAJAM AYYAR (1913), I. L. R. 36 Mad. 499.—**IND.**

275 v. —— —— *Direction to apply in particular manner.*]—A customer instructed his banker to purchase a Govt. promissory note with money standing to his credit with the banker:—*Held:* a mere direction by a customer to a banker to apply money at credit of the former's account in a particular way did not alter the relationship between banker & customer (MILLER, J.).—MADRAS OFFICIAL ASSIGNEE *v.* LUPPRIAN (1910), I. L. R. 34 Mad. 121.—**IND.**

275 vi. —— —— *Employed by bank under agreement on customer's behalf.*]—A. deposited money with B., a banker, & drew against them, but not to the full extent, & the residue was employed on A.'s account by B. according to an agreement between them:—*Held:* besides the ordinary relation of banker & customer, there subsisted also between them that of principal & agent.—NASIR BIN ABDUL HABIB FAZAL *v.* DAYABHAI ITCHACHAND (1872), 10 Bom. 300.—**IND.**

Sect. 1.—General rights and obligations: Sub-sect. 2.]

Land Co. *v.* Ruston (1880), 5 Q. B. D. 470; Cooke *v.* Eshelby (1887), 12 App. Cas. 271, H. L.

279. Deposit by foreign sovereign—Bank restrained from parting with funds—Indemnity.]—The existence of a contingent right in a foreign sovereign to a fund in a bank will not prevent the ct. from exercising jurisdiction to restrain the bank from parting with the fund until the determination of the question between the British subject & the foreign sovereign as to the right to the fund.

Certain securities were deposited by pltfs. in a bank in the name of the ambassador of a foreign State, in order to secure the performance of a contract between pltfs. & the foreign govt. The ambassador threatened to withdraw the deposit on the ground of an alleged breach of contract by pltfs., which they denied:—*Held:* an *interim* injunction might be granted against the bank to restrain them from parting with the fund, &, under the order, the bank would be protected against any proceedings by the ambassador.—GLADSTONE *v.* MUSURUS BEY (1862), 1 Hem. & M. 495; 1 New Rep. 178; 32 L. J. Ch. 155; 9 Jur. N. S. 71; 11 W. R. 180; 71 E. R. 216.

Annotations:—**Consd.** Smith *v.* Weguelin (1869), L. R. 8 Eq. 198; Lauviene *v.* Morgan (1872), 7 Ch. App. 554, n. **Distd.** Twycross *v.* Dreyfus (1877), 5 Ch. D. 605, C. A. **Refd.** The Charkieh (1873), L. R. 4 A. & E. 59. **Mentd.** The Parlement Belge (1880), 5 P. D. 197, C. A.; Musurus Bey *v.* Gadban (1894), 71 L. T. 51, C. A.

See, generally, CONSTITUTIONAL LAW; INJUNCTION.

280. Acceptance of bill by customer—Agreement with bank & holder as to payment—Alteration of agreement.]—It cannot be doubted that if a man held a bill of exchange of which another was the acceptor, & both were to go together to a banker who had money of the acceptor's deposited with him, & it were agreed amongst them that the banker should hold that money until the bill of exchange should be satisfied, &, if not satisfied, that he should pay the bill out of that money, that would constitute a good consideration, & it could not be altered afterwards except by the consent of all parties (LORD ABINGER, C.B.).—WALKER *v.* ROSTRON (1842), 9 M. & W. 411; 11 L. J. Ex. 173; 152 E. R. 174.

Annotations:—**Apld. & Distd.** Gates *v.* Hoppe (1850), 9 C. B. 541. **Apld.** Griffin *v.* Weatherby (1868), L. R. 3 Q. B. 753. **Refd.** Parsons *v.* Middleton (1847), 6 Hare, 261; Liversidge *v.* Broadbent (1859), 4 H. & N. 603; Noble *v.* National Discount Co. (1860), 5 H. & N. 225. **Mentd.** Greenaway *v.* Atkinson (1881), 29 W. R. 560, C. A.

281. —— Obligation to pay.]—*Semble:* the relation of banker & customer does not of itself, & apart from other circumstances, impose upon a banker the duty of paying his customer's acceptances.—BANK OF ENGLAND *v.* VAGLIANO BROTHERS, [1891] A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 7 T. L. R. 333, H. L.; *revsg.* S. C. *sub nom.* VAGLIANO BROTHERS *v.* BANK OF ENGLAND (1889), 23 Q. B. D. 243, C. A.

Annotations:—**Mentd.** Robinson *v.* Canadian Pacific Ry. Co., [1892] A. C. 481, P. C.; *Re* English Bank of the River Plate, *Ex p.* Bank of Brazil, [1893] 2 Ch. 438; *Re* Budgett, Cooper *v.* Adams, [1894] 2 Ch. 557; Scholfield *v.* Londesborough, [1896] A. C. 514, H. L.; Clutton *v.* Attenborough, [1897] A. C. 90, H. L.; River Thames Conservators *v.* Smeed, Dean, [1897] 2 Q. B. 334, C. A; Preist *v.* Last (1903), 89 L. T. 33; Vinden *v.* Hughes, [1905] 1 K. B. 795; Lewes Sanitary Steam Laundry Co. *v.* Barclay (1906), 22 T. L. R. 737; Macbeth *v.* North & South Wales Bank, [1906] 2 K. B. 718; North & South Wales Bank *v.* Macbeth, North & South Wales Bank *v.* Irvine, [1908] A. C. 137, H. L.; Macbeth *v.* North & South Wales Bank, [1908] 1 K. B. 13, C. A.; Holland *v.* Manchester & Liverpool District Banking Co. (1909), 14 Com. Cas. 241; Kepitigalla Rubber Estates *v.* National Bank of India, [1909] 2 K. B. 1010; Hall *v.* Hayman, [1912] 2 K. B. 5; Wimble *v.* Rosenberg, [1913] 3 K. B. 743, C. A.; MacLaren *v.* A.-G. for the Province of Quebec, [1914] A. C. 258, P. C.; Sanday *v.* British & Foreign Marine Insce., [1915] 2 K. B. 781, C. A.; MacConnell *v.* Prill, [1916] 2 Ch. 57; R. *v.* Kennaway (1916), 86 L. J. K. B. 300, C. A.; MacMillan *v.* London Joint Stock Bank, [1917] 2 K B. 439, C. A.; London Joint Stock Bank *v.* MacMillan & Arthur, [1918] A. C. 777, H. L.

282. Receipt of money on behalf of another bank—Stoppage of other bank—Right of person paying money to return.]—When a banker receives money, either from his customer or from a third person on account of his customer, he becomes his customer's debtor for the amount so received. But this does not entitle the banker to retain money which in common honesty ought not to be kept. If, indeed, the banker has paid over the money to his customer or has altered his position in relation to his customer to his detriment on the faith of the payment, the banker may refuse to pay the amount & may leave the person who has paid him to enforce his remedy against the customer.

By a standing arrangement between pltf., who resided in England, & K. & Co., a firm of bankers in New York, the latter agreed to honour the drafts of a Mexican co., in which pltf. was interested, up to £500, & pltf. agreed to recoup K. & Co. by paying into their account with defts. the sum of £500 on being advised that the credit of £500 given by K. & Co. to the Mexican co. was nearly exhausted. On Oct. 21, 1907, K. & Co. advised pltf. that they had credited the Mexican co. with £500, & requested him to pay that amount to their credit with defts. K. & Co. made an entry in their books crediting the Mexican co. with £500, & they advised that co. thereof. The Mexican co. drew cheques upon K. & Co., but the cheques were not presented. Pltf. received K. & Co.'s letter on Oct. 30, & thereupon instructed his bankers to pay £500 to defts. to be placed to K. & Co.'s credit, & this was done on Oct. 31. On Oct. 30 K. & Co. had stopped payment, but this fact was not known in England till after the £500 had been paid to defts. by pltf. Immediately on becoming aware of the stoppage of payment by K. & Co., pltf. applied to defts. for repayment of the £500. K. & Co. were largely indebted to defts., & the latter, who had done no more than make an entry in their books of the receipt of the £500, claimed to retain that sum in reduction of K. & Co.'s indebtedness:—*Held:* as pltf. had paid the £500 under a mistake as to the true state of arrears, he was entitled to recover it from defts.—KERRISON *v.* GLYN, MILLS, CURRIE & Co. (1911), 81 L. J. K. B. 465; 105 L. T. 721; 28 T. L. R. 106; 56 Sol. Jo. 139; 17 Com. Cas. 41, H. L.

283. Fraud—Account—Equitable jurisdiction.]—A bill for an account will lie against a banker by his customer.

A bill was brought against a banker by his customer for an account, & for an injunction to restrain an action on a foreign judgment obtained by the banker from the customer in respect of their mutual dealings. It appeared by specific allegations in the bill that, notwithstanding the judgment, the balance of accounts was in favour of the customer:—*Held:* the case made by the bill was *primâ facie* a case of fraud in the banker, which he was bound to answer.—BOWLES *v.* ORR (1835), 1 Y. & C. Ex. 464; 160 E. R. 189.

Annotations:—**Mentd.** Padwick *v.* Hurst (1854), 18 Beav. 575; Aberystwith & Welsh Coast Ry. Co. *v.* Piercy (1864), 2 Hem. & M. 713; Abouloff *v.* Oppenheimer (1882), 30 W. R. 429, D. C.

284. Mode of keeping accounts — Agreement — Acquiescence—Right to dispute items.]—When the

284 i. *Mode of keeping accounts—Debiting debt due to bank.*]—A banker is not to debit his customer's account with a debt due to him from his customer, in the absence of any authority from the customer to that effect, & the following question, "What is the custom of bankers as to charging their customers' accounts with costs paid their solrs.

accounts between banker & customer have been carried on for a series of years on a particular principle, the ct. will assume there is an agreement to that effect, but acquiescence in it does not amount to a settlement of account. The customer will be at liberty to dispute & contest the items, though not the principle upon which the bank account is kept. —MOSSE *v.* SALT (1863), 32 Beav. 269 ; 32 L. J. Ch. 756 ; 55 E. R. 106.

Annotations :—**Mentd.** Spencer *v.* Wakefield (1887), 4 T. L. R. 194 ; Goslings & Sharpe *v.* Blake (1888), 22 Q. B. D. 153 ; *Re* Cooper, [1911] 2 K. B. 550, C. A.

285. Property in paid cheques.]—A cheque is the property of the drawer when paid (WILDE, C.J.).

A banker has only a special property in it, & a right to keep it *pro tempore ;* he holds it only as agent for the customer (ALDERSON, B.).—R. *v.* WATTS (1850), as reported in 2 Den. 14 ; 4 New Sess. Cas. 381, C. C. R.

Annotations :—**Mentd.** R. *v.* Powell (1852), 16 J. P. 104, C. C. R. ; R. *v.* Smith (1855), 19 J. P. 774, C. C. R. ; R. *v.* Morrison (1859), Bell, C. C. 158 ; R. *v.* Lowrie (1867), 36 L. J. M. C. 24, C. C. R. ; R. *v.* Cooke (1871), L. R. 1 C. C. R. 295.

Payment of cheques, *see* Sect. 8, *post.*

286. Change in banking partnership—Securities deposited for current balance with old firm—Account carried on by new firm—Appropriation of payments.]—Securities to a banking firm for a current balance cease on the change of the firm by the admission of a new partner, & if the account be carried on by the new firm, subsequent payments by debtor will be applied in the first instance exclusively in satisfaction of the balance due at the date of the admission of the new partner.—EYTON *v.* KNIGHT (1838), 2 Jur. 8.

287. —— Unauthorised payment by bank—Liability of new partners.]—Where a banking firm makes payments professedly on behalf of a customer (who has a banking account with the firm), but without his authority, & the sum so paid is entered to his debit in the books of the firm, & the firm afterwards admits new partners, the new firm is not liable to the customer for such payments, unless there be an agreement between the two firms & the customer that the new firm shall take upon themselves the actual liabilities of the old firm.—CRAUFURD *v.* COCKS (1851), 6 Exch. 287 ; 2 L. M. & P. 192 ; 155 E. R. 551 ; *sub nom.* CRAWFURD *v.* COCKS, 20 L. J. Ex. 169.

288. —— Money drawn out after change — Liability of new partner.]—In the case of bankers, where there has been a change in the firm, & money has been drawn out & paid in since the change, the money drawn out is to be taken as part of the balance due at the time of the change, & the knowledge by the customer of the new partner has never been made an ingredient in the consideration of his liability.—SCOTT *v.* BEALE & BISHOP (1859), 34 L. T. O. S. 67 ; 6 Jur. N. S. 559.

289. Several accounts of same customer—Debt due to bank on one account—Right of customer to set-off.]—The P. corpn. (who besides their municipal character filled those of managers of the public baths & washhouses under Baths & Washhouses Act, 1846 (c. 74), & of the local board of health under Public Health Act, 1848 (c. 63)) kept three separate accounts at their bank, viz. (1) "The P. Corpn. Account," (2) "The Corpn. Baths & Washhouses Revenue Account," (3) "The P. Local Board of Health Account." Upon the first account they were indebted to the bank, & upon the other two the bank was indebted to them in an equal amount. In an action brought by the bank to recover the balance due to it on account No. 1 :—*Held :* the corpn. were entitled to set off the debts due to them on the other two accounts.—PEDDER *v.* PRESTON CORPN. (1862), 12 C. B. N. S. 535 ; 31 L. J. C. P. 291 ; 6 L. T. 540 ; 9 Jur. N. S. 496 ; 10 W. R. 773 ; 142 E. R. 1251.

Annotation :—**Mentd.** Anthony *v.* Brecon Markets Co. (1872), 26 L. T. 979, Ex. Ch.

290. —— Deposit of securities for overdraft — Bank's right to retain on general account.]—A customer had three accounts with his bankers, called the loan account, the discount account, & the general account. In the loan account were entered advances made to the customer, to secure which bills were deposited by the customer. The customer, in May, 1866, wrote to the bankers, advising them that some foreign correspondents of his had drawn upon the bankers to the amount of £10,500, adding "since by this time our credit with you will no longer afford a margin to that extent, I hasten to hand to you, to hold by way of collateral security, the following bills," which were specified. It appeared by the books of the bankers that it was their custom to carry the bills deposited wth them by the customer to the credit of the loan account generally : —*Held :* there was nothing to exclude the right of the bankers to hold the bills referred to in the above letter as security for the balance due to them upon their general account with the customer.—*Re* EUROPEAN BANK, AGRA BANK CLAIM (1872), 8 Ch. App. 41 ; 27 L. T. 732 ; 21 W. R. 45, L.JJ.

291. Accounts of company & promoter—Fictitious entries—Claim by company.]—Pltfs., a telegraph co., invited applications for shares, received some in the ordinary way & allotted some, on which deposits were paid. The number allotted was, however, insufficient to procure a settling day on the Stock Exchange, & some of the directors of the co., S., the promoter, & C., defts.' manager, agreed, in order that defts. might certify to the committee of the Stock Exchange, the requisite amount of shares to have been subscribed, that an account should be opened in S.'s name with defts., & another account in pltfs.' name, that pltfs. should guarantee to defts. the repayment of any money drawn by S., & charge with such repayment any balance in their favour, that defts. should have a bonus of £600, & C. of £1,000, that S. should get persons to apply for shares, which should be duly allotted, & should draw on his account for, & pay into pltfs.' account the requisite deposits, taking blank transfers from the pretended allottees. This plan was carried out. Accounts were opened, that in pltfs.' name with £1,500 really paid in, that in S.'s name with a loan of £1,500 from defts. Sham appcts. were obtained by S., & shares allotted to them, & S. thereupon drew on his account, & with the proceeds paid the requisite deposits into pltfs.' account. The pretended allottees, immediately after the shares were allotted, handed blank transfers to S. Finally pltfs.' account with defts. stood with a credit of £24,505 18*s.* 6*d.*, made up of the £1,500 really paid in & the pretended deposits. S.'s account stood with a debit of £24,506 8*s.* 4*d.*, made up of the sums he had drawn & the £1,500 loan. No settling day was ever granted, & the co. afterwards went into liquidation under a winding-up order. In an action by pltfs. to recover the whole amount to their credit, defts. paid their bonus of £600 into ct., & denied liability as to the residue :—*Held ;* pltfs. were entitled to the £1,500 actually paid by them to defts., but to no more, & judgment must be

for preparing securities given by the customer to cover liabilities to the bank ?" is inadmissible.—WHYTE *v.* BANK OF NEW SOUTH WALES (1862), 2 N. S. W. S. C. R. 17.—**AUS.**

289 i. *Several accounts of same customer —Power of bank to combine.*]—The relation of banker & customer is that of debtor & creditor, & a banker has power to combine two private accounts & to consider the balance as the amount due to the customer.—DANIELS *v.* IMPERIAL BANK (1914), 30 W. L. R. 133 ; 7 W. W. R. 666 ; 19 D. L. R. 166 ; 8 Alta. L. R. 26.—**CAN.**

Sect. 1.—General rights and obligations: Sub-sects. 2 & 3, A.]

given for them for £900.—BRITISH & AMERICAN TELEGRAPH CO. *v.* ALBION BANK (1872), L. R. 7 Exch. 119; 41 L. J. Ex. 67; 26 L. T. 257; 20 W. R. 413.

Annotations:—**Apld.** Gray *v.* Lewis, Parker *v.* Lewis (1873), 8 Ch. App. 1035, L.JJ. **Mentd.** R. *v.* Aspinall (1876), 1 Q. B. D. 730.

292. "Customer"—Person having current or deposit account—Bills of Exchange Act, 1882 (c. 61), s. 82.]—To make a person a "customer" of a bank within the above sect. there must be some sort of account, either a current or a deposit account, or some similar relation.—GREAT WESTERN RY. CO. *v.* LONDON & COUNTY BANKING CO., LTD., [1901] A. C. 414; 70 L. J. K. B. 915; 85 L. T. 152; 50 W. R. 50; 17 T. L. R. 700; 45 Sol. Jo. 690; 6 Com. Cas. 275, H. L.

Annotations:—**Consd.** Gordon *v.* London City & Midland Bank, Gordon *v.* Capital & Counties Bank, [1902] 1 K. B. 242, C. A. **Mentd.** Capital & Counties Bank *v.* Gordon, London City & Midland Bank *v.* Gordon, [1903] A. C. 240, H. L.; Crumplin *v.* London Joint Stock Bank (1913), 109 L. T. 856; Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

See, further, Sect. 12, sub-sect. 3, *post.*

293. Drawing cheque—Customer's duty to bank.]—A customer of a bank owes a duty to the bank in drawing a cheque to take reasonable & ordinary precautions against forgery, & if, as the natural & direct result of the neglect of those precautions, the amount of the cheque is increased by forgery, the customer must bear the loss as between himself & the banker.—LONDON JOINT STOCK BANK *v.* MACMILLAN & ARTHUR, [1918] A. C. 777; 119 L. T. 387; 34 T. L. R. 509; 62 Sol. Jo. 650, H. L.

Liability in respect of forged & altered cheques, *see, further*, Sect. 10, *post.*

294. Knowledge of customer's signature—Duty of bank.]—*Semble:* it is the duty of a banker to know his customer's signature.—SMITH *v.* MERCER (1815), 1 Marsh. 453; 6 Taunt. 76; 128 E. R. 961.

Annotations:—**Consd.** Wilkinson *v.* Johnson (1824), 3 B. & C. 428; London & River Plate Bank *v.* Bank of Liverpool, [1896] 1 Q. B. 7. **Mentd.** East India Co. *v.* Tritton (1824), 5 Dow. & Ry. K. B. 214; Young *v.* Grote (1827), 4 Bing. 253; Davies *v.* Watson (1833), 2 Nev. & M. K. B. 709; Leeds & County Bank *v.* Walker (1883), 11 Q. B. D. 84.

295. Treasurer of guardians—Also bank manager—Loss from bank paying forged orders—Liability of bank.]—Pltfs., guardians of the poor, appointed deft., the manager of a bank, to be their treasurer. He received no remuneration from them nor profit from the sums deposited in his hands, those sums being dealt with by the bank as other funds deposited by customers. B., the clerk to the guardians allowed L., a clerk in his employ, to draw up orders on the treasurer for payment of money. These orders were paid across the bank counter, as cheques usually were. L. drew up orders in such a manner as to enable himself to increase the amount after they had been duly signed by the guardians & countersigned by deft., & he did increase them accordingly by various sums, in most instances by £10, the syllable "teen" being added after the written word four, six, seven, or nine, & a 1 being inserted before the figure 4, 6, 7, or 9, in spaces left by L. for the purpose. The orders thus fraudulently increased were presented at the bank & paid in the ordinary way, & the payment of the excess was due solely to the fact that deft.'s clerks were misled by want of proper caution on the part of the guardians & their clerk in signing the orders. In some cases L. forged the indorsement of payees; in others he both increased the amounts & forged the indorsements. The guardians sued their clerk for negligence in his duty, but settled the action on his consenting to a judge's order to stay proceedings on payment of a certain sum. They then brought a similar action against deft.:—*Held:* (1) the clerk & the treasurer were not joint tortfeasors so as to make the compromise of the action against the one a bar to the action against the other; (2) pltfs. were disentitled, by the negligence of themselves & their clerk, to recover against deft.; (3) although the treasurer was not within the protection afforded to a "banker" by 16 & 17 Vict. c. 59, s. 19, yet the account of the guardians must be deemed to have been kept with the bank itself, & the Act operated to discharge the bank, & deft., its servant, from liability in respect of the payment of the orders of which the indorsements were forged.—HALIFAX UNION *v.* WHEELWRIGHT (1875), L. R. 10 Exch. 183; 44 L. J. Ex. 121; 32 L. T. 802; 39 J. P. 823; 23 W. R. 704.

Annotations.—**Distd.** Cosford Union Grdns. *v.* Grimwade (1892), 8 T. L. R. 775. **Apld.** Colchester Union Grdns. *v.* Moy (1893), 68 L. T. 564. **Refd.** Scholfield *v.* Londesborough, [1896] A. C. 514, H. L.; Kepitigalla Rubber Estates *v.* National Bank of India, [1909] 2 K. B. 1010; MacMillan *v.* London Joint Stock Bank [1917] 2 K. B. 439, C. A.; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L. **Mentd.** Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482, C. A.

296. Liability of bank for acts of partner—Loss to customer from fraud of partner—Transaction not in scope of banking business.]—Pltf., a customer of a banking firm, was advised by W., one of the partners in the bank, to dispose of certain Dutch bonds, & to place the money upon better security. He then proposed that it should be lent to his own son. This proposal was acquiesced in by pltf. in consequence of her having great confidence in the firm. The money was paid out by a cheque upon the bank to a third person named, or bearer, & pltf. received a promissory note for repayment, with a guarantee from W. W. absconded, & the security proved to be worthless. Upon bill filed against the other members of the firm:—*Held:* they were not liable for the loss, as the transaction was not within scope of a banker's business, & was not recommended or sanctioned by the other partners.—BISHOP *v.* JERSEY (COUNTESS) (1854), 2 Drew. 143; 2 Eq. Rep. 545; 23 L. J. Ch. 483; 22 L. T. O. S. 326; 18 Jur. 765; 2 W. R. 247; 61 E. R. 673.

Annotations:—**Consd.** Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489, C. A. **Mentd.** St. Aubyn *v.* Smart (1868), 3 Ch. App. 646, L.JJ; Biggs *v.* Bree (1881), 51 L J. Ch. 64.

297. Advising customer as to investments—Whether part of banking business.]—While it is not part of the ordinary business of a bank to give advice to customers as to investments generally, yet there may be occasions when advice may be given by a banker as such & in the course of his business (LORD FINLAY, C.).—BANBURY *v.* BANK OF MONTREAL, [1918] A. C. 626; 87 L. J. K. B. 1158; 119 L. T. 446; 34 T. L. R. 518; 62 Sol. Jo. 665, H. L.

298. British customer of foreign bank—Remittances sent on request—Obligation of bank—Impossibility of performance.]—Pltfs., a British firm in London, had an account with defts., a bank in Berlin. From time to time, at pltfs.' request, the bank were accustomed to make remittances by

f. *Bill of lading indorsed to customer—Notice of goods' arrival not necessary.*]—A bank is not obliged by law to give notice of the arrival of the goods to the customer to whom it has indorsed & delivered the bill of lading, even if the bank itself received notice of the arrival.—MASSON *v.* MERCHANTS' BANK OF CANADA (1898), Q. R. 14 S. C. 293.—**CAN.**

g. *Mutual dealings.*]—33 Geo. 2, c. 14, s. 4, is not applicable to cases of mutual dealings between a banker & his customer, these being of the nature of transactions between debtor & creditor.—CLANCARTY (LORD) *v.* LA TOUCHE (1810), 1 Ball & B. 429.—**IR.**

cheque in sterling on their branch in London, & for the purpose of such remittances they purchased drafts or bills on London. In July, 1914, when war with Germany was pending, pltfs. requested defts. to remit to them a part of their balance, & in reply were informed that no exchange on London could be procured in Berlin, & that the remittance could not be made :—*Held :* the implied obligation of defts. to pltfs. was to use reasonable care to purchase & forward remittances at pltfs.' risk & expense, & it was not an absolute undertaking to remit when requested whether there was exchange or whether drafts on England could be purchased or not.—LEETE (JOSEPH) & SONS *v.* DIRECTION DER DISCONTO GESELLSCHAFT (1915), 85 L. J. K. B. 281 ; 114 L. T. 332 ; 32 T. L. R. 158.

SUB-SECT. 3.—BRANCH BANKS AND BANKING AGENTS.

A. Branch Banks.

299. Changing Bank post bill for bankrupt — Notice of bankruptcy to head office—Notice to branch.]—N. committed an act of bkpcy. on Mar. 12, & on the same day absconded with two £500 Bank post bills drawn in London, payable to himself, which he afterwards indorsed in blank. Application was made by solrs. on the 16th to the Bank of England to stop the bills, describing them, & stating that N. had absconded with them. On Apr. 8 the same solrs. again applied at the Bank to the same effect, & it was then stated that a *fiat* of bkpcy. against N. was expected by every post. At Gloucester, where a branch bank of the Bank of England was established under Country Bankers Act, 1826 (c. 46), s. 15, N. delivered the bills to S., saying he wanted gold for them. S., who was known at the branch, delivered them to the agent there on Apr. 12, & received £1,000 in gold, first indorsing them, at the agent's desire, to the Governor & Co. of the Bank of England. S. paid over the whole £1,000 to N., having no interest in the bills, & having acted merely as his friend & agent. The commission had not then issued. Neither S. nor the bank agent knew of the act of bkpcy. The bills were sent to the Bank of England from the branch, uncancelled. The practice at the branch banks, when bills were changed there, was to take an indorsement & send them up uncancelled :—*Held :* (1) the delivery of the £1,000 to S. for the bills was a transaction between the Bank of England & N., bkpt., by their respective agents ; (2) there was sufficient notice to the Bank to take away the protection of 6 Geo. 4, c. 16, s. 82, & such notice to the Bank operated as notice to the branch bank, a reasonable time having elapsed for transmitting it before the bills were received there from S.—WILLIS *v.* BANK OF ENGLAND (1835), 4 Ad. & El. 21 ; 1 Har. & W. 620 ; 5 Nev. & M. K. B. 478 ; 5 L. J. K. B. 73 ; 111 E. R. 694.

Annotations :—**Distd.** Wright *v.* Fearnley (1838), 5 Bing. N. C. 89 ; Powles *v.* Page (1846), 3 C. B. 16. **Mentd.** Cornfoot *v.* Fowke (1839), 9 L. J. Ex. 297.

300. Different branches—Separate indorsements of bills of exchange to—Independent indorsees.]—A bill of exchange was indorsed to a branch of a bank at Portmadoc, who sent it to the Pwllheli branch of the same bank, who indorsed it to the head establishment in London :—*Held :* each of the branch banks was to be considered as an independent indorsee, & each entitled to the usual notice of dishonour.—CLODE *v.* BAYLEY (1843), 12 M. & W. 51 ; 13 L. J. Ex. 17 ; 2 L. T. O. S. 123 ; 7 Jur. 1092 ; 152 E. R. 1107.

Annotations :—**Consd.** Woodland *v.* Fear (1857), 7 E. & B. 519 ; Fielding *v.* Corry, [1898] 1 Q. B. 268, C. A. **Refd.** Prince *v.* Oriental Bank Corpn. (1878), 3 App. Cas. 325, P. C. ; R. *v.* Lovitt, [1912] A. C. 212, P. C. **Mentd.** Prideaux *v.* Criddle (1869), 10 B. & S. 515.

301. —— Separate agencies of one principal—Not separate banks.]—Branch banks must be considered only as agents of the principal bank, not as separate & distinct banks.

Applts. were payees of a promissory note payable at a branch bank of resps. When the note became due the manager of the branch bank cancelled it as paid, & remitted to the principal bank a draft for the amount in favour of applts.' bankers. The note was not in fact paid, but was dishonoured, & the next day the manager of the branch bank wrote to the manager of the principal bank, requesting him to cancel the draft, & returning the dishonoured note, indorsed "cancelled in error." No intimation was given to applts. or their bankers that the note had been paid :—*Held :* the branch banks must be treated as separate agencies of one principal, the resp. corpn., & applts. could not maintain an action for money received to their use.—PRINCE *v.* ORIENTAL BANK CORPN. (1878), 3 App. Cas. 325 ; 47 L. J. P. C. 42 ; 38 L. T. 41 ; 26 W. R. 543, P. C.

Annotations :—**Distd** Bank of Africa *v.* Colonial Government (1888), 13 App. Cas. 215, P. C. **Refd.** Fielding *v.* Corry, [1898] 1 Q. B. 268, C. A. ; R. *v.* Lovitt, [1912] A. C. 212, P. C. **Mentd.** Sinclair *v.* Brougham, [1914] A. C. 398. H. L.

302. Account at branch in one country—Payment demanded at branch in another country — Obligation to pay.]—There is no obligation on a bank to pay in one country a debt due to a customer on current account in another country.

Pltfs. had an account at the Berlin branch of deft. bank, which had its head office in Germany & a branch in London. They wrote to the London branch demanding payment of the balance due on the account at the Berlin branch, & upon refusal to pay sued the bank without having made any request to the bank in Berlin to pay or to remit the balance to London :—*Held :* pltfs. were not entitled to demand payment from the London branch; & there had not been any breach by the bank of any obligations to pltfs.—CLARE & CO. *v.* DRESDNER BANK, [1915] 2 K. B. 576 ; 84 L. J. K. B. 1443 ; 113 L. T. 93 ; 31 T. L. R. 278 ; 21 Com. Cas. 62.

Annotation :—**Refd.** Leete *v.* Direction der Disconto Gesellschaft (1915), 85 L. J. K. B. 281.

303. Notice of stoppage to one branch—Cheque cashed at another branch—Right of bank to sue drawer.]—Where the drawer of a cheque stops payment by a notice given only to the bank branch on which it is drawn, & the payee afterwards indorses the cheque to another branch of the same bank &

PART II. SECT. 1, SUB-SECT. 3.—A.

300 i. *Different branches—Separate indorsements to—Independent indorsers.*] — Different branches of the same bank may be indorsers from one to the other, & in case of dishonour notice need not be given direct to the head office, but each branch in succession is entitled to notice.—R. *v.* LOVITT, [1912] A. C. 212, P. C.—**CAN.**

301 i. —— *Not separate banks.*]—A bank & its branches are but one concern. —BAIN *v.* TORRANCE (1884), 1 Man. L. R. 32.—**CAN.**

302 i. *Account at one branch—Cheque presented at different branch.*]—A cheque presented at a different branch of a bank than the one where the customer keeps his account need not be cashed as the obligation of a bank to pay cheques rests primarily on the branch at which the customer keeps his account.—R. *v.* LOVITT, [1912] A. C. 212, P. C.—**CAN.**

h. *Branch office in Ontario — Head office in another Province—Residence "within Ontario."*]—Canadian banking corpns. authorised by Parliament to do business in Ontario, although having their head offices in another Province, are to be deemed resident "within Ontario" within r. 935, & moneys deposited with them at branches within Ontario may be attached in their hands as debts due to the depositors.—WENTWORTH COUNTY *v.* SMITH (1893), 15 P. R. 372.—**CAN.**

Sect. 1.—*General rights and obligations: Sub-sect.* 3, *A. & B.; sub-sect.* 4.]

the manager of that other branch advances money on the cheque in good faith & without notice that the cheque has been stopped, the bank is entitled to recover against the drawer in an action on the cheque.—LONDON, PROVINCIAL & SOUTH-WESTERN BANK, LTD. *v.* BUSZARD (1918), 35 T. L. R. 142.

See, further, Nos. 493, 494, 500, 548, 574, 618, 669, 670, *post*.

B. Banking Agents.

304. Agent to country bank—Drawing bill in own name on account of bank—Dishonour of bill—Liability of agent.]—An agent to a country bank, to whom pltf. sent a sum of money, in order to procure a bill upon London, drew in his own name for the amount upon a banking firm in London, the persons constituting that firm & the country bank being the same:—*Held:* the agent was liable as drawer, although pltf. knew that he was agent, & supposed that the bill was drawn by him as such, & on account of the country bank, to which the agent paid over the money.—LEADBITTER *v.* FARROW (1816), 5 M. & S. 345; 105 E. R. 1077.

Annotations:—**Mentd.** Castrique *v.* Buttigieg (1855), 10 Moo. P. C. C. 94, P. C.; Lindus *v.* Melrose (1858), 3 H. & N. 177, Ex. Ch.; Deslandes *v.* Gregory (1860), 2 E. & E. 602; Courtauld *v.* Saunders (1867), 16 L. T. 562; Alexander *v.* Sizer (1869), L. R. 4 Exch. 102.

305. London banker & correspondent abroad—Dishonour of bills of correspondent—Notice of dishonour.]—A banker in London corresponding with a banker abroad has the same right, with respect to English bills of his correspondent becoming due while in his hands, as an English banker has with respect to his customer in England; & if such a bill be dishonoured, he may send it, when returned, to his correspondent abroad; but *semble:* if the foreign correspondent be afterwards in London in possession of the bill, he ought not to send it again to the London banker, but should himself give notice of dishonour to the party who indorsed it to him.—DALY *v.* SLATTER (1830), 4 C. & P. 200.

306. Agents for collection—Payment of bill—Neglect to credit principal—Liability for loss occasioned by sub-agents.]—M. employed R. & Co., bankers in Edinburgh, to obtain for him payment of a bill drawn on a person resident in Calcutta. R. & Co. accepted the employment & wrote promising to credit him with the money when received. R. & Co. transmitted the bill in the usual course of business to C. & Co., of London, & by them it was forwarded to India, where it was duly paid. R. & Co. wrote to M. announcing the fact of its payment, but never actually credited him in their books with the amount. The house in India failed:—*Held:* (1) R. & Co. were the agents of M. to obtain payment of the bill; (2) payment having been actually made, they became *ipso facto* liable to him for the amount received, & he could not be called on to suffer any loss occasioned by the conduct of their sub-agents, as between whom & himself no privity existed.—MACKERSY *v.* RAMSAYS BONARS & CO. (1843), 9 Cl. & Fin. 818; 8 E. R. 628, H. L.

Annotations:—**Consd.** Prince *v.* Oriental Bank Corpn. (1878), 3 App. Cas. 325, P. C. **Refd.** Beatie *v.* Carmichael (1857), 29 L. T. O. S. 228. **Mentd.** Meyerstein *v.* Eastern Agency Co. (1885), 1 T. L. R. 595; West Ham Grdns. *v.* St. Matthew Bethnal Green, [1896] A. C. 477, H. L.

307. Mortgaging bonds for bank — Sale by mortgagees—Balance of proceeds kept by agent—Liability of agent.]—Deft., who was a customer of & had an account with a bank, was also employed by the bank to raise money on certain Spanish bonds, which he accordingly did. The money being afterwards recalled by the mtgees., & not paid, the

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PART II. SECT. 1, SUB-SECT. 3.—B.

k. *When relation of agency arises.*]—Three banks, creditors of B. Brothers, who required extension of time, agreed together to grant it & make further advances to them, declaring it a matter of common cause:—*Held:* the stipulation in the agreement that A., to whom the funds for renewal were handed, should supervise the affairs of B. Brothers during the period covered by the agreement did not constitute him the agent of the banks.—UNION BANK *v.* QUEBEC BANK (1887), 14 Q. L. R. 69. —**CAN.**

See, generally, AGENCY, Vol. I., pp. 267—271.

l. *Change in mode of remuneration—Discharge of surety.*]—It is no defence to an action against a surety, on a bond for the due performance of his duty by A., employed as a bank's agent at a commission or percentage on business done, that, after deft. entered into the bond, the bank, without deft.'s knowledge or consent, changed the mode of remuneration to a fixed salary.—BANK OF TORONTO *v.* WILMOT (1859), 19 U. C. R. 73.—**CAN.**

n. *Change in nature of employment—Discharge of surety.*]—A surety by bond, for the due performance of the office of a bank agent, is not responsible for losses occurring after the nature of the agency has been changed & the agent appointed a cashier.—BANK OF UPPER CANADA *v.* COVERT (1837), 5 O. S. 541.—**CAN.**

See, generally, GUARANTEE.

o. *Municipal treasurer—Also bank agent.*]—S., treasurer of the county of Middlesex, & agent of the G. Bank, opened an account with the bank without the knowledge of the council, & having misapplied the moneys of the council, overdrew that account to pay debts due by the county, which he ought to have paid out of the moneys received by him as treasurer. S. having absconded, the bank sued the council for the amount thus overdrawn, as money paid to their use:—*Held:* no portion of it could be recovered.—GORE BANK *v.* COUNTY OF MIDDLESEX (1859), 16 U. C. R. 595.—**CAN.**

p. —— ——.]—A treasurer of a municipality should not be permitted to act also as agent of a bank.—INGERSOLL TOWN *v.* CHADWICK (1860), 19 U. C. R. 278.—**CAN.**

q. *Member of firm—Also bank agent—Discounting for own accommodation.*]—K., agent of a bank & also a member of a business firm, procured accommodation drafts from a customer of the bank which he discounted as such agent &, without indorsing them, used the proceeds, in violation of his instructions, in the business of his firm. The firm having become insolvent, the question arose whether those drafts constituted a debt due from the estate to the bank, or whether the bank could repudiate the act of its agent & claim the whole amount from the solvent acceptors:—*Held:* the drafts were debts due & owing from the insolvents to the bank, & the agent being bound to account to the bank for the funds placed at his disposal he became a debtor to the bank, on his authority being revoked, for the amount of those drafts as money for which he had failed to account.—MERCHANTS' BANK OF HALIFAX *v.* WHIDDEN (1891), 19 S. C. R. 53.—**CAN.**

r. *Cashing cheque unaccepted by principal bank.*]—A bank acting as agent for another bank is not authorised, in the absence of express agreement, to cash a cheque drawn upon the principal bank, but unaccepted by it.

No compensation arises between the principal bank & its agent, entitling the latter to set off moneys paid under an unaccepted cheque upon the principal bank against moneys held by the agent & due to the principal bank.—MARITIME BANK *v.* UNION BANK OF CANADA (1888), M. L. R. 4 S. C. 244.—**CAN.**

s. *Giving guarantee not under seal—Repudiation by bank.*]—D. purchased lumber, held as security by a bank for a loan to R., on condition it was culled & any deficiency paid for. The bank's local agent, with the approval of their head manager, without having it culled gave a guarantee in writing, but not under seal, on behalf of the bank that the lumber should be culled prior to shipment:—*Held:* no seal required, & if the bank wished to repudiate it they should repay the money paid by D. for the lumber.—DOBELL *v.* ONTARIO BANK (1884), 9 A. R. 484.—**CAN.**

t. *Granting power of attorney to third party to receive money.*]—The local agents of the bank cannot grant powers of attorney to third parties to receive money ordered to be paid to the bank by a decree of the ct.—BANK OF BRITISH NORTH AMERICA *v.* RATTENBURY (1859), 1 Ch. Ch. 65.—**CAN.**

u. *Indorsement on power of attorney for transfer of stock—Not representation binding on bank.*]—The owner of bank stock being about to assign the same, procured from one of the agents of the bank a memorandum on the back of a power of attorney for the transfer of the stock in the words: "No liability at G. office":—*Held:* not such a representation, made to the intending transferee, as bound the bank.—COOK *v.* ROYAL CANADIAN BANK (1873), 20 Gr. 1.—**CAN.**

w. *Losing cheque—Liability of bank.*]—Pltf.'s agent paid money into the agency of the G. Bank at S., partly in cash & partly by cheque on the C. Bank at T., to be placed to pltf.'s credit with the G. Bank at H. The agent at S. took upon the whole sum the usual commission of a quarter of one per cent. for transmission, but the cheque was lost

bonds were sold, & deft. received the balance, & retained it, without the knowledge of the bank. On a bill filed on behalf of the bank for payment of this balance, & also for a general account :—*Held :* although deft., by his answer, said the result of the general account when taken would be in his favour, yet he was not entitled to withhold payment of the balance received by him in respect of the bonds until the general account should be taken, & a decree for payment of that balance & interest must be made, & also the decree for taking the general account.

A banking co., who were mtgees. of certain Spanish bonds, employed deft. to raise money upon them by deposit in his own name. The party with whom deft. deposited them called on deft. for repayment, &, on default, sold the bonds, with the concurrence of deft., without the knowledge of the co., & paid the balance of the proceeds to deft. The co. were afterwards compelled by their mtgor. to replace the bonds or their value :—*Held :* deft. was answerable to the co. for the market price of the bonds at the time of the actual sale, & he was not answerable for the value of the bonds at any other time.—GORDON *v.* PYM (1843), 3 Hare, 223 ; 67 E. R. 364.

308. Misappropriation by agent with limited authority—Extent of authority—Liability of bank.]—In an action by resp. to recover from the applt. bank moneys paid to their compradore or Chinese agent at their Hong Kong branch, for the purpose of a telegraphic transfer to resp.'s nominee at Shanghai it appeared that the compradore, to the knowledge of resp., had no authority without the express approval of the bank manager to receive the money or to fix the rate of exchange or other terms on which the transfer was to be effected :—*Held :* the bank were not liable for the compradore's misappropriation of the moneys.—RUSSO-CHINESE BANK *v.* LI YAU SAM, [1910] A. C. 174 ; 79 L. J. P. C. 60 ; 101 L. T. 689 ; 26 T. L. R. 203, P. C.

Annotations :—**Mentd.** Lloyd *v.* Grace, Smith, [1911] 2 K. B. 489, C. A. ; Willis, Faber *v.* Joyce (1911), 27 T. L. R. 388.

Rights arising on failure of bank.] — *See* Nos. 948-952, *post.*

SUB-SECT. 4.—ASSIGNMENT AND ATTACHMENT OF MONEY, ETC., HELD BY BANK.

309. Cheque as assignment—Balance at bank.]—A cheque does not operate as an equitable assignment by the drawer of part of his balance at his banker's. —HOPKINSON *v.* FORSTER (1874), L. R. 19 Eq. 74 ; 23 W. R. 301.

Annotations :—**Apld.** Schroeder *v.* Central Bank of London (1876), 34 L. T. 735. **Refd.** *Re* Beaumont, Beaumont *v.* Ewbank, [1902] 1 Ch. 889.

310. —— Debt or chose in action—Judicature Act, 1873 (c. 66), s. 25 (6).]—A cheque is a mere order to pay & is not an assignment of anything. It cannot be an absolute assignment of a debt or legal chose in action within the above sub-sect.—SCHROEDER *v.* CENTRAL BANK OF LONDON, LTD. (1876), 34 L. T. 735 ; 24 W. R. 710 ; 2 Char. Pr. Cas. 77.

Annotation :—**Mentd.** Read *v.* Brown (1888), 22 Q. B. D. 128, C. A.

See, now, Bills of Exchange Act, 1882 (c. 61), s. 53 (1).

311. Direction to bank to pay debt—No communication to assignee—Statements by bank.]—By an order in a suit, A. was ordered to pay a sum to B. After A. had appealed, B.'s bankers induced B. to enforce the order & pay the amount to his account, the bankers undertaking to repay it if, on the appeal, B. should be ordered to repay it. The order was reversed, & B. directed his bankers to pay the amount to A., but the direction was not communicated to A. The bankers had also said they were quite ready to pay the money to A., & B. had said, "there it is for you," viz., at the bankers'. B.

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in being sent from H. to T., & was never paid by the C. Bank, or credited to pltf. : —*Held :* pltf. could not sue the G. Bank for the amount of the cheque as money had & received.—TODD *v.* GORE BANK (1844), 1 U. C. R. 40.—**CAN.**

a. *Agent making overdrafts on own account—Knowledge of bank.*] — Cautioners for a bank agent were liable for all overdrafts on cash credits sanctioned by the agent. The agent, with the knowledge of the bank, made overdrafts on his own account :—*Held :* such overdrafts were really advances by the bank to its agent, & not by the agent on behalf of the bank to a customer, & cautioners not liable.—NORTH OF SCOTLAND BANKING CO. *v.* FLEMING (1882), 10 R. (Ct. of Sess.) 217.—**SCOT.**

b. *Misrepresentation inducing payment of bill—Evidence of similar misrepresentations inadmissible.*]—In an action against a bank to recover money, which the pursuer averred he had been induced to pay on a bill in the erroneous belief that it was still outstanding, induced thereto by the acts or omissions of the defenders or their bank agent, pursuer averred that the bank agent had been guilty of similar misrepresentations to customers in other cases, one of which he specified in detail :—*Held :* the averments as to similar misrepresentations were irrevelant, & proof thereof refused. —INGLIS *v.* NATIONAL BANK OF SCOTLAND, LTD., [1909] S. C. 1038.—**SCOT.**

c. *Money deposited with branch agent—Private agreement as to rate of interest—Liability of bank to repay.*]—A. deposited two sums with a country branch of an Edinburgh bank through their accredited agent, receiving regular official receipts of the same date as the deposits. The agent granted to A. two letters marked "private," agreeing to make up the interest on the sums deposited to more than the ordinary bank interest. Of the two sums the first was entered in the bank books, the second was not entered. The agent having absconded :—*Held :* the bank were liable in payment of the second sum as well as of the first, with interest at the ordinary rate, both being bank transactions.—CRAW *v.* COMMERCIAL BANK (1840), 3 Dunl. (Ct. of Sess.) 193. —**SCOT.**

d. *Preparing will & benefiting thereunder—Fiduciary relationship.*]—A country bank agent, not a law agent, prepared & saw executed the will of a testator. He was himself the residuary legatee :—*Held :* (1) the rule that a person in a fiduciary relation could not obtain a gift did not apply, as this was the case of a legacy & not a gift ; (2) there was no rigid rule of law against the agent, but merely a presumption of fact, & though the *onus* of supporting the will was on him, yet if he gave a clear & consistent account of his conduct which satisfied the judge of his perfect honesty, & if his own evidence, being credible in itself, was supported by the other evidence in the case, & if he was able to displace any inference of fact which might be *primâ facie* unfavourable, there was no ground for holding that he must be found to have failed in discharging the *onus. Qu. :* whether the bank agent's position fell to be treated as the same as that of a law agent.—LOWS *v.* GUTHRIE (LOW'S TRUSTEES) (1907), 44 Sc. L. R. 925.—**SCOT.**

e. *Promissory notes signed in usual course of business—Conditional delivery —Notice to agent notice to bank.*]—In an action brought by pltf. bank against M., as indorser of a promissory note made by S., & as joint & several maker with S., of two other promissory notes, the defence was that the notes were signed by M., & delivered to pltfs.' agent under a special agreement, of which pltfs. had notice, that they were not to be used until they had been indorsed or signed by certain other parties as co-sureties : —*Held :* the signature of M. was obtained in the course of the business of the agency, & within the scope of the agent's authority, & his knowledge of the condition, upon which the signatures were obtained, was the knowledge of the bank.—COMMERCIAL BANK OF WINDSOR *v.* SMITH (1901), 34 N. S. R. 426.—**CAN.**

PART II. SECT. 1, SUB-SECT. 4.

f. *Cheque sent through post — When property passes.*]—A cheque was sent by post to bankers in a letter, which was received by the bankers in the afternoon, but the amount was not credited in the bank books till next morning :—*Held :* the property passed as soon as the cheque reached the bankers in the afternoon.—HALWELL *v.* WILMOT TOWNSHIP (1897), 24 A. R. 628.—**CAN.**

g. *Assignment of fixed deposit.*] — It is competent to a person, who has money with a banking co. on fixed deposit, with the assent of such co., if not without it, to assign to any person whom he pleases, either absolutely or by way of a charge, the debt due or about to become due to him from the banking co.—GUR PRASAD *v.* GORAKHPUR BANK, LTD (1914), I. L. R. 36 All. 507.—**IND.**

Sect. 1.—*General rights and obligations: Sub-sect.* 4.]

became bkpt. :—*Held:* neither the agreement, nor the order, nor the statements so made, gave to A. any claim upon the fund in the hands of the bankers.—MORRELL *v.* WOOTTEN (1852), 16 Beav. 197; 51 E. R. 753.

Annotation:—**Distd.** Greenway *v.* Atkinson (1881), 29 W. R. 560, C. A.

312. Voluntary assignment by deed of moneys at bank—Notice after death of assignor—Judicature Act, 1873, s. 25 (6).]—R., who kept an ordinary banking account at defts.' bank, by deed in 1881 assigned to pltf. "all moneys then or thereafter to be standing to his credit in the books of or at defts.' bank" upon certain trusts. The assignment was a voluntary one. No notice of it was given to defts. till after R.'s death, when a much larger sum was standing to his credit at defts.' bank than at the date of the assignment:—*Held:* (1) though the assignment was a voluntary one, it was not competent to defts., who were mere strangers, to raise this objection; (2) this was an assignment of a debt or legal *chose* in action within the above sub-sect.; (3) the notice was good; (4) pltf. was entitled to the moneys standing to the credit of R. at defts.' bank at the date of R.'s death.—WALKER *v.* BRADFORD OLD BANK, LTD. (1884), 12 Q. B. D. 511; 53 L. J. Q. B. 280; 32 W. R. 644.

Annotations:—**Apld.** Mercantile Bank of London *v.* Evans (1898), 79 L. T. 496. **Mentd.** Skipper & Tucker *v.* Holloway & Howard, [1910] 2 K. B. 630.

313. Transfer of shares on conditions—Conditions not performed—Transferor's right to return.]—Pltf., a British subject, instructed his London bankers to transfer certain shares to defts. "to the order of" a German bank, which had arranged to transfer them to New York. The shares were accordingly handed over to defts. "to the order of" the German bank, but the latter failed to give directions for their transfer to New York & when war broke out between England & Germany the shares were still in defts.' hands. Pltf. claimed them back from defts. & brought an action for their delivery to him. The German bank had no lien upon the shares:—*Held:* as pltf. had a right, as against the German bank, to the delivery of the shares, defts. were bound to hand them over to pltf.—WETHERMAN *v.* LONDON & LIVERPOOL BANK OF COMMERCE, LTD. (1914), 31 T. L. R. 20.

314. Moneys of married woman deposited at bank—Rights of husband against trustees—Costs.]—A married woman, living apart from her husband in adultery, acquired moneys, which she deposited with bankers. She then married again, her first husband being still alive, & on such marriage settled the money so deposited for the benefit of herself & second husband & two illegitimate children. Shortly afterwards she was convicted of murder, & executed. Previous to her trial, she & her trustees applied to the bankers for the fund, in order to employ it in her defence, which the trustees conducted in an extravagant manner, but the bankers refused to pay it over. After her execution, the trustees & the first husband severally brought actions against the bankers to recover the money, which were stayed under an interpleader rule, & an issue was directed to try the question between the first husband & the trustees under which a verdict was found for the first husband:—*Held:* (1) he was entitled to the money; (2) on showing cause against a rule for paying over the money to pltf., the bankers should be allowed their costs out of the fund, which were to be retained by them on paying it over to pltf.; (3) the trustees, not having acted *bonâ fide*, should repay the costs of the bankers to pltf., & also pay all the costs incurred by him in the course of the proceedings. *Semble:* if the trustees had acted *bonâ fide*, they would not have been charged with such cost.—AGAR *v.* BLETHYN (1835), 2 Cr. M. & R. 699; Tyr. & Gr. 160; 5 L. J. Ex. 36; 150 E. R. 296.

Annotation:—**Mentd.** Shingler *v.* Holt (1861), 7 H. & N. 65.

315. Administration of estate—Moneys in hands of bank—Claim of judgment creditors.]—Administration of an estate, where a creditor had obtained judgment upon a plea of *plene administravit* by two of the exors., & a confession of assets to a certain amount by another exor.—such assets consisting of money in the hands of bankers not yet reached by the execution—which the two exors. prevented from being paid upon the cheque of the third exor. to the judgment creditor, & which was afterwards paid into ct.

With regard to the claim of the judgment creditor to the sum in the banker's hands, money in the hands of a banker is not in the nature of a chattel deposited with a third party, but is merely a simple contract debt (WIGRAM, V.-C.).—GAUNT *v.* TAYLOR (1843), 2 Hare, 413; 67 E. R. 170.

Annotations:—**Mentd.** Staniar *v.* Evans, Evans *v.* Staniar (1886), 34 Ch. D. 470; *Re* Griffith, Jones *v.* Owen, [1904] 1 Ch. 807.

316. Attachment of debt—Moneys in hands of bank.]—*Qu.:* whether money in the hands of the judgment debtor's bankers, merely as such, is liable to attachment.—SEYMOUR *v.* BRECON CORPN. & TREASURER (GARNISHEE) (1860), 29 L. J. Ex. 243.

317. Garnishee order—Attachment of all moneys in hands of bank — Funds in excess of judgment debt—Right to dishonour cheques of debtor.]—A garnishee order *nisi* which attached all debts owing or accruing due from the garnishee to the judgment debtor was served on the garnishee, who had in his hands as banker on current & deposit accounts moneys belonging to the judgment debtor exceeding the amount of the judgment debt. The judgment debtor having brought an action against the garnishee for refusing to honour cheques which the judgment debtor drew on the balance over & above the amount of the debt:—*Held:* (1) an order made

317 i. *Garnishee order—Judgment obtained by fraud—Liability of bank to repay.*]—A bank paid money of a depositor into ct. on a garnishee order absolute obtained by an alleged judgment creditor of the depositor. The judgment had in fact been obtained by fraud, the depositor having died a month before the proceedings commenced, but there was no suggestion that the bank had not acted *bonâ fide*:—*Held:* the bank had not been negligent & as the money had been paid under compulsion of law, pltf.'s claim, as administratrix of the depositor, to the money failed.—LAU KAN SHI *v.* BANK OF CANTON, LTD. (1916), 11 Hong Kong L. R. 79.—**HONG KONG.**

317 ii. —— *Money conveyed from place to place by draft.*]—Where money is simply conveyed by a bank by means of draft from one part of the country to another, that is not money in the hands of the bank, which is liable to attachment by garnishment.—LYNCH *v.* MCLENNAN & BANK OF UPPER CANADA (1858), 3 L. C. J. 84; 9 L. C. R. 257.—**CAN.**

317 iii. —— *Money in trust account.*]—Deft. at one time carried on business in partnership, against which pltfs. recovered judgment. Deft. was also a county ct. clerk, & acted as agent for four cos. In connection with these employments he opened an account in a bank which was styled, "F. A. trust," in which were deposited trust moneys. Pltfs. obtained an order garnishing the amount at the credit of the account, & applied to have the money paid over to them. Deft. had drawn out from the account moneys for his own purposes, or moneys to repay other trust moneys received by him before the opening of the account, which he had used:—*Held:* (1) the improper withdrawal from & use by a trustee of moneys from a trust account would never deprive other trust moneys lying at the credit of the account of their trust character; (2) unless the money was money with which debtor could deal as his own, it could not be garnished.

Where the account is a mixed one, the *onus* is on the party seeking to attach it, to show that the money is debtor's with which he can deal &, in the absence of proof that the account or so much of it is his, the money will be treated as all trust money.—STOBART *v.* AXFORD (1893), 9 Man. L. R. 18.—**CAN.**

317 iv. —— *Payment under order obtained subsequently by another creditor—*

in such terms attached the whole of the moneys; (2) the garnishee was right in dishonouring the cheques, & no action lay. *Semble:* the operation of such an order may be restricted by the ct. or a judge to such an amount of the debts owing by the garnishee as will satisfy the judgment debt.—ROGERS *v.* WHITELEY, [1892] A. C. 118; 61 L. J. Q. B. 512; 66 L. T. 303; 8 T. L. R. 418, H. L.

Annotations:—**Refd.** Galbraith *v.* Grimshaw & Baxter, [1910] 1 K. B. 339, C. A. **Mentd.** Yates *v.* Terry, [1901] 1 K. B. 102; *Re* Greenwood, Sutcliffe *v.* Gledhill, [1901] 1 Ch. 887; Edmunds *v.* Edmunds, [1904] P. 362; Geisse *v.* Taylor, [1905] 2 K. B. 658.

318. —— Moneys standing at Companies Liquidation Account at Bank of England.]—Money standing at the Cos. Liquidation Account at the Bank of England is not attachable under the garnishee procedure at the suit of a judgment creditor of a person entitled, as a shareholder in a co. that has been wound up, to money at that account representing surplus assets of the co. There is no relation of debtor & creditor in respect of such money between any person & the judgment debtor.—SPENCE *v.* COLEMAN, [1901] 2 K. B. 199; 70 L. J. K. B. 632; 84 L. T. 703; 49 W. R. 516; 17 T. L. R. 469; 45 Sol. Jo. 483, C. A.

319. —— Proceeds of cheque obtained by false pretences—Rights of drawer against execution creditor.]—K. obtained a cheque for £70 from pltf. by false pretences. The proceeds of the cheque were represented by a balance at a bank standing to the credit of K. A judgment creditor obtained a garnishee order attaching this balance. Pltf. disaffirmed the transaction & claimed to follow the proceeds of the cheque & to be entitled to such proceeds in priority to the execution creditor:—*Held:* pltf. could avoid the transaction & follow the proceeds of the cheque & as between pltf. & the execution creditor the former had the better title.—LEVENE *v.* MATON (1907), 51 Sol. Jo. 532.

320. —— Retired pay collected on Army pay warrants—Liability to attachment—Army Act, 1881 (c. 58), s. 141.]—Deft., a retired officer of the Army, was entitled to retired pay in respect of past services. The retired pay was payable quarterly, & on each occasion a form of pay warrant had to be filled in & signed by deft., which contained a declaration that he was entitled to retired pay at a certain rate for the last quarter, followed by the words "Received of H.M. Paymaster-General this day of , 190 , the sum of pounds, being the amount of retired pay due for the period stated in the above declaration." At the end of the form were the words "This receipt must be presented for payment by a London banker, but may be negotiated in the country or abroad, & is to be left by the banker at the Paymaster-General's office one day for examination." Deft. opened an account at a bank for the sole purpose of collecting his retired pay, no other moneys being paid into this account, & he drew against this account by cheques in the ordinary way. On Jan. 1, 1909, a sum of £6 13*s.* 8*d.* was standing to his credit at the bank, this sum being the balance of the retired pay previously received by him from the Paymaster-General, & on that day a pay warrant on the form given above, duly filled in & signed, for the sum of £17 12*s.* 6*d.*, being the amount of his retired pay due to him on that day for the preceding quarter, was handed by him to the bank for collection, & the bank at once credited his account with the amount. On the same day, after the amount had been so credited, a garnishee order *nisi* was served on the bank, at the instance of a judgment creditor of deft., attaching all debts owing or accruing due from the bank to deft. to answer the judgment debt. The pay warrant was paid by the Paymaster-General on Jan. 7. Deft. contended that both the above sums were protected from execution by the above sect.:—*Held:* (1) the £6 13*s.* 8*d.* had lost its character of retired pay as it had been received from the Paymaster-General at the time when the garnishee order was served, & was liable to attachment; (2) the £17 12*s.* 6*d.* was not liable to attachment, notwithstanding that the amount had been placed by the bank to deft.'s credit, as it retained its character of retired pay until it had been paid by the Paymaster-General.

It is impossible to contend that the bank could have sued the Crown or the Paymaster-General upon this document (DARLING, J.).—JONES & CO. *v.* COVENTRY, [1909] 2 K. B. 1029; 79 L. J. K. B. 41; 101 L. T. 281; 25 T. L. R. 736; 53 Sol. Jo. 734, D. C.

321. —— Incorrect designation of judgment debtor & account—Duty of bank to retain money—Onus of proof.]—Unless a garnishee order *nisi* correctly designates the judgment debtor & the account which he has with a bank, the bank on which the order is served need not retain the money of the customer which the order purports to attach, since the *onus* of ascertaining whether the order in truth & in fact applies to a particular customer's account does not rest with the bank.—KOCH *v.* MINERAL ORE SYNDICATE (LONDON & SOUTH WESTERN BANK, LTD., GARNISHEES) (1910), 54 Sol. Jo. 600, C. A.

Liability of bank to first creditor.]—A. obtained on July 8 a conditional order from the Ct. of Q.B. to attach dividends "accruing" on a sum of stock in the Bank of Ireland. B. subsequently obtained a conditional order from the Ct. of Common Pleas to attach same fund. A.'s order was made absolute on Nov. 10, & B.'s order subsequently, on Nov. 12. The bank paid over the dividends under the absolute order obtained by B.:—*Held:* the bank was liable to pay over again to A. the dividends which had accrued due on the stock since the date of the service of his conditional order.—SALAMAN *v.* DONOVAN (1860), 2 L. T. 92; 10 I. C. L. R. app. xiii.; 5 Ir. Jur. N. S. 90.—**IR.**

317 v. —— *Money on deposit receipt.*]—An order was made attaching money lodged in bank on deposit receipt.—BARRETT *v.* M'CARTHY (1829), 13 I. L. T. Jo. 375.—**IR.**

317 vi. —— ——.]—Money due on a bank deposit receipt, payable in future, is attachable under a garnishee order, & on the *ex p.* application of pltf., who has obtained judgment against deft., the ct. will make a conditional order to attach, but not to pay.—REIDY *v.* CASEY (1882), 16 I. L. T. 93.—**IR.**

317 vii. —— —— *Bank in liquidation.*]—Money due on a deposit receipt by a bank, which is being wound up under liquidators, is attachable under a garnishee order against the liquidators, although the amount payable depends on that of the future dividends that may be declared on the realisation of the assets.—SMITH *v.* SEXTON (1886), 20 I. L. T. 75.—**IR.**

317 viii. —— *Money of two persons on deposit receipt—Attachment by creditor of one.*]—The earnings of a vessel owned in equal shares by two brothers, A. & B., were lodged in bank on deposit receipt, "to be drawn by either or the survivor." Arrestment having been used by a creditor of A., the bank refused to pay to B., though holding the receipt:—*Held:* the sum in the deposit receipt must be divided equally between the trustee & B., reserving all questions of accounting. *Qu.:* whether the sum in the deposit receipt could be effectually attached by arrestment used at the instance of A.'s creditor.—BANK OF SCOTLAND *v.* ROBERTSON (1870), 42 Sc. Jur. 180; 8 Macph. (Ct. of Sess.) 391.—**SCOT.**

317 ix. —— —— —— *Payment by bank to other.*]—Arrestments upon the dependence of an action against A. were used in the hands of the local agent of a bank upon a sum of money due by the bank to A. This sum was lying upon a deposit receipt, which was in these terms:—"Received from A. & B., payable to either or survivor." The arrestor obtained decree in the original action, but during its dependence the bank paid the sum in question to B. on presentation of the deposit receipt indorsed by B. In an action against the bank for breach of arrestment pursuer averred that payment had been made with knowledge & in bad faith:—*Held:* the bank was not bound to pay to B., & the above averments were relevant.—ALLAN'S EXECUTOR *v.* UNION BANK OF SCOTLAND, LTD., [1909] S. C. 206; 46 Sc. L. R. 124; 165 L. T. 553.—**SCOT.**

317 x. —— *Money in savings bank.*]—Money lodged in a savings bank not charged under 3 & 4 Vict. c. 105, s. 23.—MACALISTER *v.* MURRAY (1842), 5 I. L. R. 92.—**IR.**

Sect. 1.—*General rights and obligations: Sub-sects.* 4, 5, 6 & 7. *Sect.* 2: *Sub-sect.* 1.]

322. Restraining bank from parting with money—Claim by next of kin.]—Pltf. claimed as next of kin of her mother a sum of 295,000 francs held by deft.'s bank, deft. having married pltf.'s mother. The ct. having granted an injunction to restrain deft. parting with the fund, deft. moved to discharge it. The ct. discharged the order, but restrained the bank from parting with securities representing about half pltf.'s claim.—DE LACY *v.* LIZARDI (1912), *Times*, Oct. 19.

SUB-SECT. 5.—BANKER'S RECEIPTS.

Deposit account receipts, *see* Sect. 3, sub-sect. 2, *post.*

323. Given by agent—Whether binding on bank.]—An agent for the Bank of Scotland, also carrying on the business of a banker on his private account, received money, for which he gave a receipt, which did not purport on the face of it to be given for the Governor & Company of the Bank of Scotland. The agent became insolvent. The holder of the security supposed that he was dealing with the Bank of Scotland:—*Held:* the instrument did not bind the Bank of Scotland.—BANK OF SCOTLAND *v.* WATSON (1813), 1 Dow, 40; 3 E. R. 615, H. L.

Annotations:—**Consd.** Trueman *v.* Loder (1840), 3 Per. & Dav. 267. **Refd.** Yorkshire Banking Co. *v.* Beatson & Mycock, Leeds & County Banking Co. *v.* Beatson & Mycock (1880), 5 C. P. D. 109, C. A. **Mentd.** Furze *v.* Sharwood (1841), 2 Q. B. 388.

324. Necessity of stamp—Payment in by allottee of shares.]—When money is paid into a banker's by an allottee of shares, the usual banker's receipt does not require a receipt stamp.—CLARKE *v.* CHAPLIN (1847), 1 Exch. 26; 5 Ry. & Can. Cas. 294; 16 L. J. Ex. 246; 9 L. T. O. S. 512; 154 E. R. 11; *subsequent proceedings* (1848), 11 L. T. O. S. 6, *sub nom.* CHAPLIN *v.* CLARKE (1849), 4 Exch. 403, Ex. Ch.

325. —— ——.]—In an action by an allottee of shares in a projected joint-stock co. to recover back the deposit pltf. gave in evidence the banker's receipt stamped with an agreement stamp:—*Held:* the banker's receipt so stamped was admissible in evidence.—CHAPLIN *v.* CLARKE (1849), 4 Exch. 403; 6 Ry. & Can. Cas. 193; 13 L. T. O. S. 286; 154 E. R. 1269, Ex. Ch.

Annotations:—**Apld.** Ward *v.* Londesborough (1852), 12 C. B. 252. **Apprvd.** Mowatt *v.* Londesborough (1854), 3 E. & B. 307. **Refd.** Moore *v.* Garwood (1849), 4 Exch. 681, Ex. Ch. **Mentd.** Carlill *v.* Carbolic Smoke Ball Co., [1892] 2 Q. B. 484.

326. Negotiability—Bonds deposited for registration.]—A banker's receipt for bonds deposited for registration is not, either in law or by the custom of the Stock Exchange, a negotiable instrument passing the property in the bonds by delivery.—BEAUCLERK *v.* GREAVES (1886), 2 T. L. R. 837.

SUB-SECT. 6.—SALE AND PURCHASE OF SECURITIES FOR CUSTOMER.

327. Power of attorney—Fraudulent sale by bank—Liability of estates of deceased partner.]—Trustees intended to give to bankers a power of attorney to receive the dividends of stock, a trust fund, but a power to sell the stock, as well as to receive the dividends, was actually executed by the trustees. The stock having been fraudulently sold out by the bankers, two of whom had since died:—*Held:* the estates of both were liable to make good the defalcation with costs.—SADLER *v.* LEE (1843), 6 Beav. 324; 12 L. J. Ch. 407; 1 L. T. O. S. 142; 7 Jur. 476; 49 E. R. 850.

Annotations:—**Apprvd.** Blair *v.* Bromley (1847), 2 Ph. 354, L.C.; St. Aubyns *v.* Smart (1867), L. R. 5 Eq. 183; Moore *v.* Knight, [1891] 1 Ch. 547. **Refd.** Davenport *v.* Stafford (1851), 14 Beav. 319; Bishop *v.* Jersey (1854), 2 Drew. 143.

328. —— **Sale by London agent of country bank for customer—Payment of proceeds to country bank—Usual course of business.**]—Evidence of the course of business & custom of London bankers is admissible to explain the authority meant to be given to a London banker by a power of attorney to sell stock sent through a country banker.

Pltf. executed a power of attorney authorising M. & Co., bankers, to sell consols. The power was transmitted to M. & Co. through A. & W., of Shrewsbury, pltf.'s bankers, of whom M. & Co. were the London agents. They sold the stock & placed the proceeds to the credit of A. & W., to whom they had subsequently paid & from whom they had received large sums in the course of business. A. & W. failed, & pltf. brought an action to recover the proceeds of the stock from M. & Co. Deft. tendered evidence to show that according to the course of business of London bankers the proceeds were properly paid to the country bank:—*Held:* the evidence was admissible.—ADAMS *v.* PETERS (1849), 2 Car. & Kir. 723.

329. Sale of trust property under forged power of attorney—By partner also co-trustee—Proceeds credited to bank—Rights of trustees.]—F. being one of three co-trustees, proprietors of stock, & also one of several co-partners in the banking house of M. & Co., forged the names of his co-trustees to a power of attorney purporting to authorise his co-partners jointly & severally to sell stock. The stock was sold & the proceeds of sale were paid to an account of M. & Co. at the city bankers of M. & Co., & F., without the knowledge & in fraud of his partners, drew more than the

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322 i. *Restraining bank from parting with money—Funds embezzled—Payment out of part for defence.*]—A person having been accused of embezzling money from his employer, & having certain sums of money lodged to his own credit in bank, an injunction was granted upon petition, restraining the officers of the bank from paying out the money to the accused, the petition alleging that it was the money of the employer. Upon motion, an order was made directing payment of £30 out of those sums to the attorney of the accused for the purpose of defraying the expense of the defence of the accused upon the criminal charge, the attorney undertaking to account for same, if called by the ct. to do so.—ALLEN *v.* M'KENNA (1856), 27 L. T. O. S. 46.—**IR.**

PART II. SECT. 1, SUB-SECT. 5.

k. "*Accountable receipt*"—*Fraudulent alteration.*]—An acknowledgment by a bank of moneys received to be accounted for by the party receiving it is an "accountable receipt" within R. S. C., c. 165, s. 29, & the fraudulent alteration of same is forgery.—*Ex p.* DEBAUM (1888), 32 L. C. J. 281; 16 R. L. 612.—**CAN.**

l. *Receipt given to wrong person—Rights of owner.*]—If A.'s money, whether by mistake or fraud, is entered to the credit of, & a receipt given for it to, B. by a banker, A.'s right to it is not thereby devested, nor can the banker be compelled to pay the money to a person whose title originated in the mistake or fraud.—COCHRANE *v.* O'BRIEN (1844), 6 I. Eq. R. 317.—**IR.**

PART II. SECT. 1, SUB-SECT. 6.

m. *Money received for investment—Duty to keep separate.*]—A customer by letter instructed bankers, who received money for investment, charging a commission, to invest R. 40,000 in municipal debentures. They only purchased R. 18,000 worth of such debentures, because, if they had bought all, they would have had to pay more than the market price:—*Held:* the money was in their hands as bankers & not as agents, & they were not bound to keep the R. 40,000 separate from their own funds, nor even after the letter to set it apart for investment.—*Re* COWIE'S PETITION (1880), I. L. R. 6 Calc. 70; 7 C. L. R. 19.—**IND.**

amount of the sums so paid in. The moneys were never appropriated by M. & Co. to any particular account.

Neither F.'s co-trustees, nor his co-partners, were privy to the fraud, but two of the partners signed transfers. F. was executed for another forgery. The surviving trustees having sued the surviving partners for the money:—*Held:* the money constituted a debt due from the bankers to the trustees.—STONE *v.* MARSH (1827), 6 B. & C. 551; 9 Dow. & Ry. K. B. 643; 5 L. J. O. S. K. B. 201; 108 E. R. 554.

Annotations:—**Distd.** Bishop *v.* Jersey (1854), 22 L. T. O. S. 326. **Refd.** Dudley & West Bromwich Banking Co. *v.* Spittle (1860), 8 W. R. 351; Chowne *v* Baylis (1862), 31 Beav. 351; The Amerika (1916), 13 Asp. M. L. C. 558, H. L. **Mentd.** *Re* Jones, *Ex p.* Jones (1833), 3 Deac. & Ch. 525; Marsh *v.* Keating (1833), 2 Cl. & Fin. 250, H. L.; White *v.* Spettigue (1845), 13 M. & W. 603; Wickham *v.* Gatrill (1854), 2 Sm. & G. 353; Lee *v.* Bayes (1856), 18 C. B. 599; *Re* Redpath, *Ex p.* G. N. Ry. Co. (1857), 30 L. T. O. S. 211; The Princess Royal (1870), L. R. 3 A. & E. 41; *Re* Shepherd, *Ex p.* Ball (1879), 48 L. J. Bcy. 57, C. A.; Midland Insce. *v.* Smith (1881), 6 Q. B. D. 561.

SUB-SECT. 7.—MONEY PAID TO BANK BY MISTAKE.

330. Mistake of fact—Payment to wrong bank—Liability to refund.]—K. & Co. sent £5,300 to S. & Co. to meet bills which were drawn by K. & Co. upon, & accepted by, S. & Co., payable at the Bank of England, on Oct. 5, & which K. & Co. had got discounted. On the 2nd S. & Co. found that they must become insolvent, & placed £5,300 in the N. Bank in the names of two partners of S. & Co. On the 3rd S. discovered that out of K. & Co.'s £5,300 only £3,300 had been paid into the Bank of England, the remaining £2,000 having been by a clerk's mistake paid into S. & Co.'s general account at the L. Bank, which refused to let S. draw out the £2,000, claiming a lien on it. The same evening S. & Co. stopped payment. K. & Co. took up the bills, obtained £3,300 of the £5,300 deposited in the N. Bank, & agreed to let the £2,000 be put into the hands of an accountant until the right to it should be decided. Subsequently S. & Co. filed a liquidation petition, having up to that time committed no act of bkpcy.:—*Held:* the £2,000 must be paid to K. & Co. on the ground that, S. & Co. having never intended to misappropriate it, no relation of debtor & creditor with respect to it arose between S. & Co. & K. & Co., & S. & Co. could have properly employed the £2,000 to meet the bills.—*Re* SMITH, FLEMING & Co., *Ex p.* KELLY & Co. (1879), 11 Ch. D. 306; 48 L. J. Bcy. 65; 27 W. R. 830, C. A.

Annotation:—**Consd.** *Re* Blackpool Motor Car Co., Hamilton *v.* Blackpool Motor Car Co., [1901] 1 Ch. 77.

331. —— —— ——.]—Pltf. bank being under instructions from R. to remit his moneys to a bank at Halifax, through the mistake of their agents paid them to a New York bank for transmission to defts. Defts. on being advised thereof debited the New York bank, & credited R. in account with the amount thereof, & being afterwards advised of the mistake claimed to retain & use the moneys in reduction of R.'s account with them:—*Held:* on being advised of the mistake defts. were bound to repair it, & pltf. bank had a sufficient interest in the moneys to recover them as moneys received to their use.—COLONIAL BANK *v.* EXCHANGE BANK OF YARMOUTH, NOVA SCOTIA (1885), 11 App. Cas. 84; 55 L. J. P. C. 14; 54 L. T. 256; 34 W. R. 417, P. C.

332. —— —— ——.]—Defts., foreign bankers, were in the habit of making advances to K., who then purchased goods which defts. held as security, & when K. found a purchaser he assigned the right to receive the purchase-money to defts., who accordingly released the goods. K. also carried on the same system with B. & Co. Pltfs. bought from K. two parcels, the one released by defts. & the other by B. & Co. K. instructed pltfs. to pay defts. & B. & Co. respectively for the goods so purchased. By mistake pltfs. paid both sums to defts., who credited K.'s account, notifying K. of their having done so. Defts., acting *bonâ fide*, continued to make advances to K., who knew of the mistake, but did not disclose it, & afterwards became bkpt. Pltfs. sought to recover from defts. the sum which should have been paid to B. & Co. as money paid under mistake of fact:—*Held:* defts. were liable to refund the money which had been paid to them under a mistake of fact, even though they had paid it away to a third party in ignorance of the mistake.—CONTINENTAL CAOUTCHOUC & GUTTA PERCHA CO. *v.* KLEINWORT, SONS & CO. (1904), 90 L. T. 474; 52 W. R. 489; 20 T. L. R. 403; 48 Sol. Jo. 383; 9 Com. Cas. 240, C. A.

Annotation:—**Folld.** Kerrison *v.* Glyn, Mills, Currie (1909), 101 L. T. 675.

333. —— —— ——.]—Applts., bankers, were in the habit of making advances to K. on the security of goods. Sometimes they released goods in order that they might be sold; sometimes they advanced money to buy goods on the terms that when sold the proceeds should be remitted direct by the purchasers to applts. Resps. used to buy goods from K., & in Sept. he directed them to send all remittances direct to applts. K. at the same time was borrowing on similar terms from other bankers, B. & Co. In Jan. K. delivered goods to resps. & directed them to pay the price to B. & Co., who had an equitable mtge. on the goods. Resps. agreed to do so, but by an oversight remitted the money to applts. The payment was made & received in good faith, applts. believing it represented a sum due to them from K. After discovery of the mistake resps. were held liable to pay the amount to B. & Co., & then sued applts. for the amount as being money paid under a mistake of fact:—*Held:* resps. were entitled to recover, as the position of applts. had not been altered to their disadvantage.—KLEINWORT, SONS & CO. *v.* DUNLOP RUBBER CO. (1907), 97 L. T. 263; 23 T. L. R. 696; 51 Sol. Jo. 672, H. L.

Annotations:—**Distd.** Kerrison *v.* Glyn, Mills, Currie (1910), 15 Com. Cas. 1, 241, C. A. **Refd.** Baylis *v.* London, [1913] 1 Ch. 127, C. A.

SECT. 2.—RECEIPT OF MONEY ON CURRENT ACCOUNT.

SUB-SECT. 1.—IN GENERAL.

334. Appropriation of payments—Earlier drawings attributed to earlier payments in.]—On a current account the earlier drawings are attributed to the earlier payments in.

Neither banker nor customer even thinks of saying, This draft is to be placed to the account of the

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PART II. SECT. 2, SUB-SECT. 1.

334 i. *Appropriation of payments.*]—Except with regard to a banking account, the law does not interfere with a creditor's appropriation of payments, unless in case where third parties or their rights are affected by the transactions between debtor & creditor.—PALMER *v.* SUTHERLAND (1869), 2 Q. S. C. R. 44.—**AUS.**

334 ii. ——.]—In an account current where there is no appropriation of payments to the discharge of any particular debts, the law makes an appropriation according to the order of the debit items in the account.—CUTHILL *v.* STRACHAN (1894), 21 R. (Ct. of Sess.) 549.—**SCOT.**

334 iii. —— *New account—Balance due on old account.*]—When a new account has been opened, receipts credited to the

Sect. 2.—Receipt of money on current account: Subsects. 1 & 2, A.]

£500 paid in on Monday & this other to the account of the £500 paid in on Tuesday. There is a fund of £1,000 to draw on, & that is enough. In such case there is no room for any other appropriation than that which arises from the order in which the receipts & payments take place & are carried into account (GRANT, M.R.).—DEVAYNES *v.* NOBLE, CLAYTON'S CASE (1816), 1 Mer. 572; 35 E. R. 781.

Annotations:—**Follds.** Bodenham *v.* Purches (1818), 2 B. & Ald. 39. **Apld.** Brooke *v.* Enderby (1820), 2 Brod. & Bing. 70. **Distd.** Simson *v.* Ingham (1823), 2 B. & C. 65. **Consd.** *Re* Tills, *Ex p.* Alexanders (1824), 2 L. J. O. S. Ch. 159; Williams *v.* Rawlinson (1825), 3 Bing. 71. **Apld.** Pemberton *v.* Oakes (1827), 4 Russ. 154, L.C. **Distd.** Stoveld *v.* Eade (1827), 4 Bing. 154. **Folld.** Field *v.* Carr (1828), 5 Bing. 13. **Apld.** Solarte *v.* Maes Hilbers (1832), 1 L. J. K. B. 196; Smith *v.* Wigley & Tunnicliffe (1833), 3 Moo. & S. 174. **Consd.** Wilson *v.* Hirst (1833), 4 B. & Ad. 760. **Distd.** Chitty *v.* Naish (1834), 2 Dowl. 511. **Consd.** Nottidge *v.* Pritchard (1834), 8 Bli. N. S. 493, H. L. **Folld.** Toulmin *v.* Copland (1834), 2 Cl. & Fin. 681, H. L. **Distd.** Whittington *v.* Jennings (1834), 6 Sim. 493. **Consd.** Walker *v.* Hardman (1837), 11 Bli. N. S. 229, H. L. **Apld.** Copland *v.* Toulmin (1840), 7 Cl. & Fin. 350, H. L. **Consd.** Bower *v.* Marris (1841), Cr. & Ph. 351, L. C.; Henniker *v.* Wigg (1843), Dav. & Mer. 160. **Distd.** *Re* Wright, *Ex p.* Eyre (1843), 1 Ph. 227, L.C. **Apld.** Pennell *v.* Deffell (1853), 4 De G. M. & G. 372, L.JJ. **Consd.** Nash *v.* Hodgson (1855), 6 De G. M. & G. 474, L.JJ. **Distd.** Wickham *v.* Wickham (1855), 2 K. & J. 478. **Consd.** Bell *v.* Buckley (1856), 11 Exch. 631. **Apld.** Cavendish *v.* Greaves (1857), 24 Beav. 163. **Apprvd.** *Re* Medewes' Trust (1859), 26 Beav. 588. **Distd.** Hipkins *v.* Amery (1860), 2 Giff. 292. **Folld.** Merriman *v.* Ward (1860), 1 John. & H. 371; Siebel *v.* Springfield (1863), 3 New Rep. 36. **Distd.** Denison *v.* Avison (1865), 12 L. T. 340. **Apld.** Laing *v.* Campbell (1865), 36 Beav. 3. **Folld.** Brown *v.* Adams (1869), 21 L. T. 71, C. A. **Apld.** *Re* Hammond, *Ex p.* Brook (1869), 20 L. T. 547; *Re* Boys, Eedes *v.* Boys, *Ex p.* Hop Planters Co. (1870), L. R. 10 Eq. 467. **Distd.** Thompson *v.* Hudson (1871), 6 Ch. App. 320, L.JJ. **Apld.** *Re* Devonport & South Devon Steam Flour Mill Co., Bateman's Case (1873), 42 L. J. Ch. 577. **Distd.** City Discount Co. *v.* McLean (1874), L. R. 9 C. P. 692. **Apld.** Hooper *v.* Keay (1875), 1 Q. B. D. 178. **Distd.** Lacey *v.* Hill, Leney *v.* Hill (1876), 4 Ch. D. 537. **Apld.** *Re* Hamilton, *Ex p.* Smith (1877), 25 W. R. 760; Kinnaird *v.* Webster (1878), 10 Ch. D. 139. **Distd.** Browning *v.* Baldwin (1879), 40 L. T. 248. **Consd.** *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A. **Apld.** London & County Banking Co. *v.* Ratcliffe (1881), 6 App. Cas. 722, H. L. **Expld.** Blackburn Bldg. Soc. *v.* Cunliffe Brooks (1882), 22 Ch. D. 61, C. A. **Distd.** *Re* Sherry, London & County Banking Co. *v.* Terry (1884), 25 Ch. D. 692, C. A. **Consd.** Parr *v.* Bradbury (1885), 1 T. L. R. 285; *Re* Companies Acts, *Ex p.* Watson (1888), 21 Q. B. D. 301. **Apld.** Dreyfus *v.* Peruvian Guano Co. (1889), 61 L. T. 180. **Distd.** Hancock *v.* Smith (1889), 41 Ch. D. 456, C. A. **Apld.** Perkinson *v.* Wakefield (1889), 5 T. L. R. 562. **Distd.** *Re* Wood, Anderson *v.* London City Mission, [1894] 2 Ch. 577. **Consd.** *Re* London & General Bank, [1895] 2 Ch. 673, C. A. **Apld.** *Re* Stenning, Wood *v.* Stenning (1895), 73 L. T. 207. **Distd & Expld.** The Mecca, [1897] A. C. 286, H. L. **Distd.** Mutton *v.* Peat, [1899] 2 Ch. 556. **Apld.** Bank of New South Wales *v.* Goulburn Valley Butter Co. Proprietary, [1902] A. C. 543, P. C.; Egg *v.* Craig (1903), 89 L. T. 41. **Consd.** *Re* Oatway, Hertslet *v.* Oatway, [1903] 2 Ch. 356; Smith *v.* Betty, [1903] 2 K. B. 317, C. A.; Seymour *v.* Pickett, [1905] 1 K. B. 715, C. A.; Bannatyne *v.* MacIver, [1906] 1 K. B. 103, C. A.; *Re* Bourne, Bourne *v.* Bourne, [1906] 1 Ch. 113; Davis *v.* Petrie, [1906] 2 K. B. 786, C. A.; Deeley *v.* Lloyds Bank, [1910] 1 Ch. 648, C. A. **Distd.** Galula *v.* Pintus (1911), 16 Com. Cas. 185. **Consd.** *Re* O'Shea, *Ex p.* Lancaster, [1911] 2 K. B. 981, C. A. **Refd.** Smith *v.* Ure (1833), 2 Knapp, 188, P. C.; Mills *v.* Fowkes (1839), 5 Bing. N. C. 455; Smith *v.* Nicolls (1839), 8 L. J. C. P. 92; Jones *v.* Broadhurst (1850), 9 C. B. 173; Scott *v.* Beale & Bishop (1859), 6 Jur. N. S. 559; Fenton *v.* Blackwood (1874), L. R. 5 P. C. 167, P. C.; *Re* Pollard, *Ex p.* Dickin (1878), 8 Ch. D. 377, C. A.; *Re* Taurine Co., Anning & Cobb's Claim (1878), 38 L. T. 53; *Re* Miller, *Ex p.* Official Receiver, [1893] 1 Q. B. 327, C. A.; *Re* Hallett, *Ex p.* Blane, [1894] 2 Q. B. 237, C. A.; *Re* Head, Head *v.* Head (1894), 63 L. J. Ch. 549, C. A.; Ascherson *v.* Tredegar Dry Dock & Wharf Co., [1909] 2 Ch. 401. **Mentd.** *Re* Biddulph, *Ex p.* Eyre (1842), 3 Mont. D. & De G. 12, L.C.

335. —— —— Bond given as continuing security—Discharge.]—In an ordinary banking account the first item of the debit side is discharged by the first item on the credit side.

One of defts., upon opening an account with pltfs., bankers, borrowed of them £1,000, for which he, together with the other defts., became bound to pltfs., with a condition for repayment with interest by a certain day, & continued afterwards to pay in & draw out money upon the usual footing of a banker's account. The first sum entered to his debit on the account was partly made up of the £1,000, to secure which the bond had been given:—*Held*: the bond was not satisfied by sums subsequently paid in exceeding in amount the £1,000, as the bond was intended to secure pltfs. against such advances as they should from time to time make to deft.—HENNIKER *v.* WIGG (1843), 4 Q. B. 792; 1 Dav. & Mer. 160; 1 L. T. O. S. 229; 7 Jur. 1058; 114 E. R. 1095.

Annotations:—**Distd.** *Re* Boys, Eedes *v.* Boys, *Ex p.* Hop Planters Co. (1870), L. R. 10 Eq. 467. **Apld.** City Discount Co. *v.* McLean (1874), L. R. 9 C. P. 692. **Consd.** *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A.; Deeley *v.* Lloyds Bank, [1912] A. C. 756, H. L. **Refd.** Merriman *v.* Ward (1860), 1 John & H. 371; Mosse *v.* Salt (1863), 32 Beav. 269; *Re* Hamilton, *Ex p.* Smith (1877), 25 W. R. 760; Cory *v.* Owners of Turkish Steamship Mecca, The Mecca, [1897] A. C. 286, H. L.

See, generally, GUARANTEE.

336. —— —— Debt due from company—Liability of shareholders.]—The principle of appropriation of payments laid down in *Clayton's Case*, No. 334, *ante*, applies to dealings between a co. & its bankers, so that a former shareholder, who has transferred his shares, is exonerated from contributing to the co.'s debt to its bankers if before the winding up sufficient money had been paid to the bank to cancel what was due to the bank when such shareholder ceased to be a member.—*Re* DEVONPORT & SOUTH DEVON STEAM FLOUR MILL CO., BATEMAN'S CASE (1873), 42 L. J. Ch. 577.

337. —— Advances by bank partly illegal.]—There was a running cash & bill account between

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new account are conclusively appropriated to that account, & cannot be treated as received in liquidation of a balance due on an old account, the operation of the rule in *Clayton's Case*, No. 334, *supra*, being excluded.—HORTON *v.* BANK OF NEW ZEALAND (1889), 7 N. Z. L. R. 582.—**N.Z.**

334 iv. —— *Deposit for special purpose—Misapplication by manager—Liability of bank.*]—ONTARIO BANK *v.* STEWART (1881), Cass. Dig., 2nd ed., 571.—**CAN.**

n. *Account over-credited—Right of bank to repayment.*]—Pltfs., under instructions from one of their branches, telephoned to one of their sub-agencies to credit deft. with $2,000. The sub-agency, by some misunderstanding, credited him with $3,000, which he drew out. The $2,000 had been paid into the branch bank by way of an advance on the shipping bills of cattle bought from deft. for about $2,800, but of this pltfs. had no notice. Deft. refused to repay the difference between the $2,000 & the price of the cattle, on the ground that in faith of the payment to him he had allowed them to be shipped abroad, which by his agreement for sale was not to be done till payment of the price in full:—*Held*: deft. was bound to repay the excess over the $2,000.—BANK OF TORONTO *v.* HAMILTON (1896), 28 O. R. 51.—**CAN.**

o. *Credits exceeding interest charged—Imputation of payments on interest.*]—Where the credits for each year, in an account current, are in excess of the amount of interest charged for the year, it cannot be pretended that compound interest has been charged, as payments made by a debtor on account are imputed first on the interest.—DUDLEY *v.* DARLING (1886), M. L. R. 2 Q. B. 458; 10 L. N. 110.—**CAN.**

p. *Joint account—Right of surviving joint owner.*]—It is immaterial as to the source of money before it was deposited with a bank in a joint account, & after it is so deposited, it is not subject to being disposed of by the will of either party, & the surviving joint owner is entitled to the whole unaffected by any testamentary disposition, which deceased joint owner may have made.—WEESE *v.* WEESE (1916), 27 O. W. R. 123.—**CAN.**

q. *Guardian transmitting trust moneys—Payment by mistake into private account—Right of bank to recover from guardian.*]—A., guardian of children, transmitted money to B., a banker, to be deposited in their name. B., instead of doing so, placed the money to the credit of A.'s private account. Thereafter the children obliged B. to pay those sums to them:—*Held*: B. entitled to recover the amount from A.'s representatives.—M'KENZIE *v.* M'LEOD (1821), 1 S. 193.—**S. AF.**

bkpt. & a banking co., who were under considerable advances to him, but part of these advances arose out of illegal transactions. Bkpt. from time to time deposited bills & made payments without any specific appropriation or any settled account between him & the bankers :—*Held :* the payments must be appropriated in reduction of the earlier items of the account, & of the legal & not the illegal part of the demand.—*Re* HOBSON, *Ex p.* RANDLESON (1833), 2 Deac. & Ch. 534, Ct. of R.

338. —— Unappropriated payments—Discharge of disputed sum—Statute of Limitations.]—In an action for the balance of a banking account, the question between the parties was whether a disputed sum, above six years old, had been paid by pltfs. with deft.'s authority or not :—*Held :* the jury having found that the payment was authorised by deft., pltfs. were entitled to apply subsequent unappropriated payments of deft. in discharge of the sum in question, so as to prevent the operation of Stat. Limitations.—WILLIAMS *v.* GRIFFITH (1839), 5 M. & W. 300 ; 151 E. R. 127.

See, generally, CONTRACT.

339. Several accounts—Inquiries as to what account dealt with.]—The general rule is that in a naked case of banker & customer bankers need not inquire upon what account moneys are paid in or drawn out, & such cheques as the customer may think fit to draw on the bank the bankers are bound to honour.—BODENHAM *v.* HOSKINS (1852), 21 L. J. Ch. 864 ; 19 L. T. O. S. 294 ; 16 Jur. 721 ; *affd.* 2 De G. M. & G. 903, L.JJ.

Annotations :—**Consd.** *Re* Gross, *Ex p.* Adair (1871), 24 L. T. 198 ; Martin *v.* Rocke, Eyton (1885), 34 W. R. 253. **Refd.** Pearson *v.* Scott (1878), 9 Ch. D. 198. **Mentd.** *Re* Gross, *Ex p.* Kingston (1870), 6 Ch. App. 635, n. ; Bailey *v.* Johnson (1871), L. R. 6 Exch. 279 ; MacBryde *v.* Eykyn (1871), 24 L. T. 461 ; Wilson *v.* Bury (1880), 5 Q. B. D. 518, C. A. ; Greenwell *v.* National Provincial Bank (1883), Cab. & El. 56 ; Coleman *v.* Bucks & Oxon Union Bank, [1897] 2 Ch. 243 ; Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A.

340. Sale of goods wrongfully obtained—Bill given against proceeds—Right to follow.]—H., having stolen a steamer, proceeded with it to Santos & shipped a cargo of coffee consigned to purchasers at Genoa. H. took the vessel to the Cape of Good Hope, where he sold the cargo for over £10,000. He paid £8,000 into the Cape Town branch of deft. bank & took bills of exchange for that amount drawn on the London branch, payable at 90 days' sight to the order of H. £4,000 worth of these bills, having been seized by the sheriff in Australia, were in the possession of pltfs. A bill for £500 had been negotiated, & the whereabouts of the remaining bills was not known. Pltfs. were persons interested in the cargo which had been fraudulently disposed of :—*Held :* pltfs. were entitled to follow the proceeds of sale & to payment of £4,000 on the bills held by them, the further consideration of the case being adjourned to enable pltfs. to obtain possession of the outstanding bills.—COMITÉ DES ASSUREURS MARITIMES *v.* STANDARD BANK OF SOUTH AFRICA (1883), Cab. & El. 87.

341. Fraud on Government—Money payable to Government.]—A person, who had been convicted & punished for fraud on the Govt., had paid into the bank certain money, the proceeds of such fraud :—*Held :* such money was payable to the Govt., & the depositor's claim to the money must be rejected.—HEALEY *v.* BANK OF NEW SOUTH WALES (1900), Nov. 28, unreported, P. C.

342. Closing of account—Property mortgaged to secure advances—Appointment of receiver.]—In 1899 a customer of a bank mtged. certain lands to the bank to secure the balance for the time being owing on foot of overdrafts, bills of exchange, promissory notes, credits, advances, interest, commission, discount, & premiums on policies of insurance. The security was to bear interest computed from day to day at the current bank rate up to 6 per cent. The deed contained a proviso that no greater principal sum than £5,700 should be recoverable on the security. In keeping the mtgor.'s current account, which was continued from the date of the mtge. until after action brought & was approved each half-year by the mtgor., the interest was charged from day to day with half-yearly rests, so that the interest was capitalised every half-year. In 1903 the mtgor. owed to the bank on his current account & on promissory notes a sum in excess of £5,700, &, on his failure to reduce his overdraft, the bank refused to honour his cheques, except certain cheques drawn by him for the preservation of the subject-matter of the security, & for this purpose the bank also made certain payments, which they debited to the overdrawn account. In Dec., 1904, the bank appointed a receiver of the mtged. premises under Conveyancing & Law of Property Act, 1881 (c. 41). The bank paid to the credit of the mtgor.'s current account all sums received by them from the receiver out of rents & profits & also the proceeds of sale of part of the mtge. security sold by them in exercise of their powers under the mtge., with the result that in this way more than £5,000 was appropriated to the payment of principal. In an action to enforce their security the bank claimed that an account should be taken as between mtgor. & mtgee., & that the current account should be treated as closed as from the date of the appointment of the receiver :—*Held :* (1) the current account was not closed by the appointment of the receiver, but continued as an operative account to which the provisions of the mtge. deed applied ; (2) the bank had no lien for salvage in respect of the moneys paid to preserve the subject-matter of the security, inasmuch as those payments were not made by the bank, but by the mtgor. out of moneys advanced to him by the bank ; (3) with regard to the surplus on the receiver's account, the application of the moneys in reduction of the interest in the manner prescribed by Conveyancing & Law of Property Act, 1881, was capable of alteration by the consent of the parties interested, & such consent ought to be inferred from the facts, & it was not competent to the bank to object to the appropriation of these moneys to the payment of principal as illegal.—YOURELL *v.* HIBERNIAN BANK, LTD., [1918] A. C. 372 ; 87 L. J. P. C. 1 ; 117 L. T. 729, H. L.

SUB-SECT. 2.—TRUST ACCOUNTS AND EXECUTORS' ACCOUNTS.

A. Trust Accounts.

343. Liability of bank—Trust money credited to private account—Right to set off—Evidence of notice.]—A promissory note, payable four years after

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PART II. SECT. 2, SUB-SECT. 2.—A.

343 i. *Liability of bank—Trust moneys credited to private account.*]—At a sale of real estate, it was agreed that the purchasers' acceptances should be placed in the hands of pltf., solr. to the vendors, to be deposited by him with defts. in a trust account, which was opened immediately after the sale by pltf., & certain bills of exchange deposited by pltf. for collection. Among the bills of exchange was one for £443 4*s.*, drawn by the vendors & accepted by the purchaser as follows : "S. & G., trust account, per R.," & indorsed "Pay defts. or order, S. & G. for trust account per R." This bill never came into the possession of pltf. but was lodged by the vendors with defts., discounted, & the proceeds placed to their credit. Defts. having refused to acknowledge pltf.'s right to the bill or the proceeds :—*Held :* defts. were bound to have placed the proceeds of the bill to pltf.'s account, & not to that of S. & G.—REID *v.* BANK OF NEW ZEALAND, 3 J. R. N. S. 40.—**N.Z.**

343 ii. —— *Co-trustee also manager of branch where trust account kept—Breach of trust.*]—A local bank manager, who was one of two trustees, kept

Sect. 2.—Receipt of money on current account: Subsect. 2, A.]

date, was made the subject of a marriage settlement. About the time the note became due it was arranged to change the trustees of the settlement. In payment of the note a bill at seven days was drawn by a country bank on a bank in town in favour of the outgoing trustees, & it was sent to one of them to indorse, who, having indorsed it, sent it for the same purpose to D., the other trustee, a solr., who had been instructed to invest the proceeds of it, when paid, in stock in the names of the new trustees. D. delivered the bill to the registered officer of a bank with which he had dealings, desiring him "to take charge of it," & saying that he "should want to purchase some stock." The officer noticing that the bill was payable seven days after sight, D. desired him to place it to his private account. The bill was paid & D.'s private account credited. The same day D. drew for the amount to invest in the trusts of the settlement, but the bank refused to part with it unless D. made good certain liabilities in respect of bills discounted for him, not due at the time the bill in question was delivered, but some of which had then been dishonoured. In a suit by the trustees & *cestuis que trust* of the settlement against D. & the officer of the bank to recover the trust fund, D. by his answer stated that he told the officer that the bill was in payment of trust money, but the officer denied that he heard anything about a trust, or had received special directions, & alleged he had only been told to take charge of the bill, & D. said he should want some stock:—*Held:* (1) the bank were not liable to make good the trust fund; (2) D.'s answer was not evidence against the bank.—HAWKS *v.* HOWARD (1847), 10 L. T. O. S. 2.

344. —— —— Bankruptcy of customer—Rights of cestuis que trust.]—Country bankers, with whom A. had a current account, received from their London agents a sum of money to be placed to the credit of A.'s trust account. A. had no trust account with the bankers, & they placed it to the credit of his current account & advised him thereof. A. knew it was trust money, but gave no instructions to the bankers to open a trust account & continued to draw on his account as usual. At the time the trust money was credited to his current account A. was overdrawn on securities deposited with the bankers, & the effect of so crediting him was largely to reduce his overdraft temporarily. A. however was in good credit, & the bankers had no intention of benefiting themselves & no suspicion that A. contemplated a breach of trust, & they continued to allow him a further & extended overdraft on further securities deposited with them until his bkpcy. some time afterwards:—*Held:* the bankers were not liable to make good to A.'s *cestuis que trust* the trust money that had been lost.—COLEMAN *v.* BUCKS & OXON UNION BANK, [1897] 2 Ch. 243; 66 L. J. Ch. 564; 76 L. T. 684; 45 W. R. 616; 41 Sol. Jo. 491.

345. —— Trust money standing to credit of customer—Payment of debt to bank—Bank's knowledge of trust.]—Where trust money standing to the credit of a customer was applied by his banker in payment of his debt:—*Held:* it was a proper case for issues to be directed to inquire how much of the money had been so applied, & whether the banker at the time of the appropriation knew that it was trust money.—TAYLOR *v.* FORBES (1830), 7 Bli. N. S. 417; 5 E. R. 828, H. L.

346. —— Deposit in joint names—Assignment of interests — Rights of assignees.] — A. by his will directed moneys to be paid into the B. Bank to the credit of "the beneficiaries under the will of A." The income was to be paid to C. during her life, & after her death the *corpus* was to be equally divided amongst grandchildren. The exors. drew a cheque for £1,375 upon their exorship. account in favour of C. & each of the twelve grandchildren entitled in remainder with a direction to pay the interest to C. for life. The exors. asked the bank to place the cheque to the credit of a deposit account entitled "the beneficiaries under the will of A." This the bank refused to do, but they accepted the cheque & placed the amount to the credit of a deposit account in the names of C. & each of the twelve grandchildren, annexing a direction to pay the annual interest to C. for life. Two of the grandchildren assigned their interests to pltfs. Plfts. believing C. to be dead, applied to have these shares paid to them, but the bank refused to do so, except on the signature of the beneficiaries. Pltfs. sued the surviving exor. & the bank, & having discovered that C. was alive, asked for a declaration that they were entitled, subject to C.'s life interest, to two-twelfths of the moneys held by the bank. Not one of the persons in whose names the account stood was a party to the action:—*Held:* pltfs. were not entitled to the relief asked.—*Re* EDWARDS, FIELDINGS, LTD. *v.* FRANKLIN (1900), 44 Sol. Jo. 485.

347. Notice of trust—What is—Titles of accounts.]—G., a county treasurer, as such received moneys for various county purposes. He kept a private banking account with the N. Bank, & also separate accounts headed "Police Account" & "Superannuation Account," the cheques drawn against these being similarly headed. He on several occasions transferred special sums from his private account to these accounts. The bank knew that he held the office of county treasurer. He was subsequently made bkpt., & at that time his private account was largely overdrawn, but the Police & Superannuation Accounts were in credit:—*Held:* (1) the titles of the accounts amounted to notice that the moneys paid in were trust moneys; (2) the bank could not combine the accounts against the county authorities or set off the moneys due on the trust accounts against the balance due to the bank on the overdrawn private account.—*Re* GROSS, *Ex p.* KINGSTON (1871), 6 Ch. App. 632; 40 L. J. Bcy. 91; 25 L. T. 250; 19 W. R. 910, L.JJ.

Annotations:—**Consd.** Bailey *v.* Finch (1871), L. R. 7 Q. B. 34. **Apld.** Greenwell *v.* National Provincial Bank (1883), Cab. & El. 56. **Refd.** *Re* Mawson, *Ex p.* Hardcastle (1881), 44 L. T. 523; Bank of New South Wales *v.* Goulburn Valley Butter Co. Proprietary, [1902] A. C. 543, P. C.; Cuthbert *v.* Robarts, Lubbock (1908), 100 L. T. 62. **Mentd.** Coleman *v.* Bucks & Oxon Union Bank, [1897] 2 Ch. 243.

348. —— —— —— Right to set off.]—M. & Co. kept two accounts with applts.: No. 1, which was a general account, & No. 2, which was known as the stock account. The co. subsequently opened a third account known as No. 3, into which trust moneys were paid, & these moneys stood to the credit of that account when the co. failed, owing a large balance to applts. The trustees claimed payment of £1,800 & interest out of the moneys so standing to the credit of the co.:—*Held:* there was nothing on the face of the No. 3 account to indicate a trust, & it not being shown that applts. had otherwise notice of the trust they were at liberty to treat such moneys as belonging to the customer & set them off against the overdrawn accounts.—

the banking account of the trust in this own branch. He secured his co-trustee's signature to a blank cheque upon some misrepresentation, filled up the cheque with an unauthorised sum of money, & cashed it in the branch himself, intending to appropriate the proceeds, which he did:—*Held:* the bank were not entitled to debit the trust account with the amount of the cheque.—MCMAHON *v.* BREWER (1897-8), 18 N. S. W. Eq. 88.—**AUS.**

UNION BANK OF AUSTRALIA, LTD. *v.* MURRAY-AYNSLEY, [1898] A. C. 693; 67 L. J. P. C. 123, P. C.

Annotation:—**Refd.** Bank of New South Wales *v.* Goulburn Valley Butter Co. Proprietary, [1902] A. C. 543, P. C.

349. —— —— Cheque payable to assignees crossed to assignees' banker.]—C. drew a cheque on his banker, payable to A. & B. assignees of P. or bearer, & wrote the name of their bankers across it. B., who had another private account with the bankers, paid the cheque into that account:—*Held:* on the facts the bankers were justified in applying it to that account, the drawer's writing the name of the bankers of the payees of the cheque across it not being, according to the custom of trade, information to the bankers that the money was that of the payees.—STEWART *v.* LEE (1828), Mood. & M. 158, N. P.

Annotation:—**Refd.** Bellamy *v.* Marjoribanks (1852), 7 Exch. 389.

350. —— Effect of—Trust account & private account—Transfer to private account.]—D. kept a trust account with a bank headed "H. P.'s Estate, per J. D., Trustee." On Feb. 14, 1833, D. was indebted to the bankers on his private account in the sum of £71 16*s.* 9*d.*, & on a joint account of himself & B., one of the partners in the bank, in the sum of over £250. D. drew two cheques on the trust account for £71 16*s.* 9*d.* & £236 15*s.* 3*d.*, thereby closing the trust account, & he directed the cheques to be credited to the private & joint accounts respectively:—*Held:* the bankers had notice of the trust apart from the title of the account, & must repay the moneys to the persons entitled, & should pay £308 12*s.* into ct. with interest, at 4 per cent., from Feb. 14, 1833.—PANNELL *v.* HURLEY (1845), 2 Coll. 241; 63 E. R. 716.

Annotations:—**Consd.** Somerset *v.* Cox (1865), 33 Beav. 634; *Re* Gross, *Ex p.* Adair (1871), 24 L. T. 198; Pearson *v.* Scott (1878), 9 Ch. D. 198; Marten *v.* Rocke, Eyton (1885), 53 L. T. 946; Coleman *v.* Bucks & Oxon Union Bank, [1897] 2 Ch. 243; Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A. **Refd.** *Re* Gross, *Ex p.* Kingston (1871), 40 L. J. Bcy. 91, L.JJ.

351. —— —— —— ——.]—A sum of money was standing in the books of a banking co. to the credit of "the account of the trustees of the late W. H." The bank, knowing that the trustees (each of whom had an overdrawn account at the bank) were not beneficially entitled, allowed them to transfer sums at different times from the trust account to their respective private accounts:—*Held:* (1) the *cestuis que trust* were entitled to recover from the bank the sums so allowed to be transferred; (2) it was immaterial whether or not the bank knew what were the circumstances of the

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350 i. *Notice of trust—Effect of—Breach of trust—Benefit to bank.*]—Bankers who pay cheques drawn by the trustee of a trust fund deposited with them as bankers are liable to the beneficiaries of the trust, if such cheques are, to the knowledge of the bankers, drawn by the trustee in breach of his trust. Mere incidental knowledge is insufficient to establish liability on the part of the bank. Any benefit to the bank arising out of an alleged breach of trust is cogent evidence of privity of the bank to a breach of trust, but it is not necessary, to establish the liability of the bank, to prove that the bank benefits by the transaction.

Bankers are not justified in paying to one of two or more trustee depositors moneys deposited by all of them as such trustees, without the consent of the other trustee or trustees to such payment.—LAWSON *v.* COMMERCIAL BANK OF SOUTH AUSTRALIA, LTD. (1888), S. A. L. R. 56, 74.—**AUS.**

350 ii. —— —— *Trust account & private account — Transfer to private account.*]—In June, 1884, a bank received on fixed deposit three sums of £10,000, £5,000 & £500 from A., with notice that they were trust funds. In Dec. the deposit for £5,000 matured, whereupon A. voluntarily & without pressure from the bank directed the bank to pass the amount to his private account, which was then overdrawn, but in a few days the account was placed more than £5,000 in credit. In June, 1885, the deposits for £10,000 & £500 matured & the amounts were on A.'s direction passed to the credit of his private account, which at the time was in credit. Cheques to the amount of £2,100 had previously been drawn by A. on his private account in favour of the trust estate. The deposits not being recovered from A. & being lost to the trust estate, it was sought to make the bank liable as being privy to a misapplication of trust funds:—*Held:* the relation of banker & customer was created as well by the deposit of money for fixed periods as by deposit on current account, & the bank, in the absence of notice of any intended misapplication of the trust funds by A., were bound to honour A.'s order to pay the amount of the deposits on maturity into his private account.—DIXON *v.* BANK OF NEW SOUTH WALES (1896), 17 N. S. W. Eq. 355.—**AUS.**

350 iii. —— —— —— ——.]—A sum of money was standing in the books of a banking co. to the credit of "A., administrator estate B." The bank, knowing that the administrator, who had an overdrawn account at the bank, was not beneficially entitled, allowed him to transfer sums at different times from the trust account to his private account:—*Held:* the representatives of the estate could recover from the bank the sums so allowed to be transferred, & it was immaterial whether or not the bank knew what were the circumstances of the trust, & also whether or not the bank profited by the transfer from one account to the other, so long as they were aware that the money dealt with was trust money.—BERTEAU *v.* JILLARD (LIQUIDATORS UNION BANK) (1898), 8 Nfld. L. R. 53.—**NFLD.**

350 iv. —— —— —— ——.]—M., the assignee of an insolvent estate, kept the estate account as well as his private account at deft. bank. The proceeds of certain notes of the estate were placed to the credit of the estate, which M., as assignee, drew out by cheque, & re-deposited with defts. to his private account, & then used for his own purposes. It did not appear that the bank derived any benefit from the transfer, or that M. was indebted to them:—*Held:* defts. not liable to repay the amount to the estate.—CLENCH *v.* CONSOLIDATED BANK OF CANADA (1880), 31 C. P. 169.—**CAN.**

350 v. —— —— —— —— *No consent of co-trustee.*]—The transfer by a bank of the funds of an insolvent estate from the account of the estate to the private account of one of the two trustees, upon cheques signed by one trustee only, without the consent of his co-trustee, the bank knowing at the time of such transfer that the money had been deposited by such trustee on behalf of the estate, is no valid payment by the bank to the trustees of the insolvent estate of the funds of the estate which have been deposited in the bank. All cheques for the payment by a bank of money belonging to an insolvent estate are required by sect. 100 of the Insolvent Ordinance truly to express the cause of such payment, & the name of the person in whose favour the cheque is drawn, & to be signed by all the trustees, or by one of them for himself & co-trustees, & the bank may refuse to pay the cheques unless signed by all the trustees, or require the production of a power from the co-trustee before paying cheques signed by only one trustee.—MARAIS' TRUSTEE *v.* QUEENSTOWN BANK (IN LIQUIDATION) (1876), Buch. 219.—**S. AF.**

350 vi. —— —— —— *Right to set off.*] — DANIELS *v.* IMPERIAL BANK (1914), 30 W. L. R. 133; 7 W. W. R. 666; 19 D. L. R. 166; 8 Alta. L. R. 26.—**CAN.**

350 vii. —— —— —— ——.] — A., having an overdrawn account at a bank, executed a deed of assignment for the benefit of creditors, whereby he was to be permitted to carry on business. A. then, without the knowledge of the trustees under the deed, opened a new account at the bank in his own name with the words "trust account" added:—*Held:* the bank, as against the trustees under the deed & a subsequent trustee in bkpcy., was entitled to set off the amount standing to the credit of the trust account against the amount of the debit of the overdrawn account.—MCMILLAN *v.* BANK OF NEW ZEALAND (1882), 1 N. Z. L. R. 332.—**N.Z.**

a. —— —— *Trust account overdrawn—Lien on trust deeds against cestuis que trust.*]—One of the trustees of a will, containing no express power to mtge., having secretly embezzled £9,000 of trust moneys, arranged with the bank to overdraw the trust account upon depositing the trust deeds as security for the overdraft, & representing that the overdraft was required for trust purposes. Cheques were subsequently drawn on the account by the two trustees & paid to the *cestuis que trust*, the account thereby becoming overdrawn to the extent of £500:—*Held:* although the cheques drawn on the account were paid by the bank to the *cestuis que trust*, the bank was not entitled to enforce its lien against the *cestuis que trust.*—COOPER *v.* COMMERCIAL BANKING CO. OF SYDNEY (1899), 20 N. S. W. Eq. 75.—**AUS.**

b. —— —— *Authority given to trustee by co-trustee to draw on trust fund—Express authority necessary.*]—A bank paid out the whole of a trust fund to one of two trustees upon his separate cheque, & relied on an authority given by the other trustee to draw cheques on the trust fund. *Semble:* such an authority ought to be direct to the bank from the other trustee, & ought not to be inferred or implied from previous conduct.—JERNINGHAM *v.* M'DOWELL (1858), 3 Ir. Jur. 292.—**IR.**

Sect. 2.—Receipt of money on current account: Subsect. 2, A.]

trust, & also whether or not the bank profited by the transfer from the one account to the other, so long as they were aware that the money dealt with was trust money; (3) Stat. Limitations did not constitute a defence to the action.—FOXTON *v.* MANCHESTER & LIVERPOOL DISTRICT BANKING CO. (1881), 44 L. T. 406.

Annotations:—**Consd.** Coleman *v.* Bucks & Oxon Union Bank, [1897] 2 Ch. 243; Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A. **Refd.** A.-G. *v.* De Winton, [1906] 2 Ch. 106.

352. —— —— —— ——.]—J., a trustee & exor., mtged. land to deft. bank to secure a balance due from R. & Co., a firm of wine merchants of which J. was a member. The bank knew that the property formed part of testator's estate. Subsequently, on pressure from the bank, J. sold the property for £2,384 & paid the proceeds into his private account, drawing a cheque for the amount in favour of R. & Co., which was credited to their account & appropriated by the bank in discharge of the amount due from the firm:—*Held:* the bank knew J. was applying trust money for his own purposes, & they must make good to the persons entitled the £2,384 with interest at 4 per cent. per annum.—*Re* WALL, JACKSON *v.* BRISTOL & WEST OF ENGLAND BANK, LTD. (1885), 1 T. L. R. 522.

353. —— —— **Transfer by bank at direction of tenant for life—No authority from trustees—Liability to replace.**]—A fund was standing to the account of two trustees in the books of bankers, who had notice that it was a trust fund. By the direction of the tenant for life alone, without any sanction or authority from the trustees, the bankers transferred it to his account, & thereby obtained payment of a debt due from him to them:—*Held:* the trustees might sue the bankers to have the trust fund replaced, & Stat. Limitations was inapplicable.—BRIDGMAN *v.* GILL (1857), 24 Beav. 302; 53 E. R. 374.

Annotations:—**Consd.** Coleman *v.* Bucks & Oxon Union Bank, [1897] 2 Ch. 243. **Refd.** Hardy *v.* Metropolitan Land & Finance Co. (1872), 41 L. J. Ch. 257, L.JJ.; Soar *v.* Ashwell, [1893] 2 Q. B. 390, C. A.

354. What constitutes a trust—Complete declaration of trust by depositor—Death of depositor—Rights of cestui que trust.]—A sum of £2,000 was, by the direction of O., carried by her bankers to an account in the joint names of herself, as trustee for pltfs., & pltfs., & the bankers gave a promissory note for the amount payable in 14 days with interest at 2½ per cent. to O., trustee for the persons therein named. After the death of O. her exor. received from the bankers the sum secured by the promissory note:—*Held:* (1) the transaction amounted to a complete declaration of trust; (2) the exor. was a trustee for pltfs., in whose favour the trust was declared.—WHEATLEY *v.* PURR (1837), 1 Keen, 551; 6 L. J. Ch. 195; 1 Jur. 133; 48 E. R. 419.

Annotations:—**Consd.** Vandenberg *v.* Palmer (1858), 4 K. & J. 204. **Refd.** Meek *v.* Kettlewell (1842), 1 Hare, 464; Hughes *v.* Stubbs (1842), 1 Hare, 476. **Mentd.** M'Fadden *v.* Jenkyns (1842), 1 Hare, 458; Coningham *v.* Plunkett (1843), 2 Y. & C. Ch. Cas. 245; Stapleton *v.* Stapleton (1844), 14 Sim. 186; Kekewich *v.* Manning (1851), 1 De G. M. & G. 176, L.JJ.; Dipple *v.* Corles (1853), 11 Hare, 183.

355. —— —— **In favour of children—Accountable receipt from bank.**]—A partner in a bank opened an account in one of the books of the firm, which was headed as follows:—"Dr. Mrs. L. S. (the name of his wife), for the education of B. L. H. & R. S. (the names of his infant children) Cr."; & he caused an accountable receipt to be signed by his co-partner on behalf of the firm, purporting to be for £800 received from his wife for the education of his children, & that sum to be placed to the credit of the account so opened, & his private account with the bank was debited with it:—*Held:* the transaction was a complete & irrevocable declaration of trust in favour of the children.—STAPLETON *v.* STAPLETON (1844), 14 Sim. 186; 60 E. R. 328.

Annotation:—**Refd.** Dipple *v.* Corles (1853), 11 Hare, 183.

356. —— **Appropriation void—Evasion of legacy duty.**]—A. having certain funds standing to his credit at his bankers, by letter directed them to carry some parts of such funds to the account of certain persons, as trustees for his wife, & after her decease, for his son, & other parts thereof to the account of certain persons, as trustees for his son. Such sums were carried over by the bankers to the account of such persons in their books, & the dividends were from time to time carried to the same accounts, but testator never communicated the facts to the trustees, & there was some evidence that testator had directed the transfers under an impression that he should be able, by that means, to evade the legacy duty, & that he had shown an intention to exercise some acts of ownership over the funds:—*Held:* the appropriations were void, & testator might at any time have revoked them.—GASKELL *v.* GASKELL (1828), 2 Y. & J. 502; 148 E. R. 1017, Ex. Ch.

Annotations:—**Expld. & Distd.** Vandenberg *v.* Palmer (1858), 4 K. & J. 204. With regard to *Gaskell* v. *Gaskell*, I apprehend the way in which the case was viewed by the Chief Baron was that, upon the facts in evidence, there must have been a general understanding between the testator & his bankers that, notwithstanding the transfer, the fund was still his & he was still to have control over it; in this case before me there is nothing of the kind (PAGE WOOD, V.-C.). **Refd.** Stapleton *v.* Stapleton (1844), 14 Sim. 186; Kekewich *v.* Manning (1851), 1 De G. M. & G. 176, L.JJ. **Mentd.** Hughes *v.* Stubbs (1842), 1 Hare, 476; Roberts *v.* Roberts (1865), 13 L. T. 492.

357. —— **Purchaser's account at bank — Insolvency of bank — Right of vendor.**] — T. & Co. had been in the habit of sending cotton yarn to N. as N. & Co., upon the terms, not in writing, that N. should subject the material to such process as he chose, & sell the improved product to whatever customers at whatever credit he chose. A list of prices accompanied the goods so sent, & at the end of one month N. rendered an account of the quantity of the yarn which he had sold, & at the end of another month he had to pay T. & Co. for the quantity so reported the previous month, according to the price list above mentioned. This payment was sometimes made by bills drawn by N.'s customers, & on such bills T. & Co. charged discount. The above relations still continuing to subsist between N. & T. & Co., N. entered into partnership with J. as N. J. & Co. N. kept no separate banking account, but paid all moneys received in respect of cotton transactions into the firm's banking account, & when cheques were given by N. in payment to T. & Co., they were signed "N. J. & Co." A deed of arrangement having been entered into by N. J. & Co. with their creditors, T. & Co. sought to prove against the joint estate for the balance standing to the credit of N. in the firm account of N. J. & Co., as being derived from the sale of cotton supplied by them to N. as above & added by him to the partnership fund with full notice of the facts on the part of the rest of the firm:—*Held:* such proof was not admissible against the joint estate, the relation between T. & Co. & N. being that of vendor & purchaser, & not that of principal & agent so as to impress upon the moneys in question any trust in favour of T. & Co.—TOWLE (JOHN) & CO. *v.* WHITE (1873), 29 L. T. 78; 21 W. R. 465, H. L.; *affg.* S. C. *sub nom. Re* NEVILL, *Ex p.* WHITE (1871), 6 Ch. App. 397, L.JJ.

Annotations:—**Distd.** *Re* Cheesebrough, *Ex p.* Blackburn (1871), L. R. 12 Eq. 358. **Mentd.** *Re* Smith, *Ex p.* Bright

(1879), 10 Ch. D. 566, C. A.; *Re* Watson (Wm.), *Ex p.* Atkin, [1904] 2 K. B. 753, C. A.; Gabriel *v.* Churchill & Sim, [1914] 1 K. B. 449.

358. —— Crediting third party on instructions from customers—Conditional credit on sale of goods —Notice to third party.]—L. contracted to supply the French Govt. with cartridges by a given time, & in consequence of his request for some guarantee for the payment of the price, the bankers in London of the Govt. wrote, by direction of the agent of the Govt. a letter advising L. that by such direction a special credit for £40,000 had been opened with them in favour of L., & that it would be paid rateably as the goods were delivered, upon receipt of certificates of reception issued by the agent of the French Govt.: —*Held:* (1) this letter did not constitute an assignment in equity, or a specific appropriation, so as to impress a trust upon the moneys in the bankers' hands, for which they could be used in equity; (2) whatever responsibility they incurred under that letter could be enforced at law.—MORGAN *v.* LARIVIÈRE (1875), L. R. 7 H. L. 423; 44 L. J. Ch. 457; 32 L. T. 41; 23 W. R. 537, H. L.; *revsg.* LARIVIÈRE *v.* MORGAN (1872), 7 Ch. App. 550, L.C.

Annotations:—**Refd.** The Charkieh (1873), L. R. 4 A. & E. 59. **Mentd.** Foreign Bondholders Corpn. *v.* Pastor (1874), 23 W. R. 109; Twycross *v.* Dreyfus (1877), 5 Ch. D. 605, C. A.; The Parlement Belge (1880), 5 P. D. 197, C. A.

359. —— Collection of book debts—Proceeds paid into private account.]—A co. sold its business to W., who, by the agreement for sale, was to get in the book debts of the business then owing, &, on or before Apr. 30, 1913, to pay over to the co. all moneys received by him on account of the book debts, "such amount to be equal to the gross amount of the debts owing on Mar. 1, 1913. Thereafter all debts then standing" were to "belong to the purchaser." The gross amount of the book debts so owing was £623 8*s.* 5*d.*, & W. collected that sum, & before or on May 19, 1913, paid £455 18*s.* 11*d.*, part thereof, into his private general account at a bank. By May 21, 1913, he had drawn out all the money standing to his credit, except £25 18*s.*, & applied it for his own purposes & not in paying the co. as agreed. Subsequently he paid in money of his own, & drew on the account for his own purposes, with the result that on his death there was a credit balance of £358 5*s.* 5*d.* The co. claimed to have a charge on the £358 5*s.* 5*d.* for the £455 18*s.* 11*d.*:—*Held:* (1) W. was a trustee for the co. of the £455 18*s.* 11*d.*; (2) the co.'s charge extended only to the intermediate balance of £25 18*s.*—ROSCOE (JAMES) (BOLTON), LTD. *v.* WINDER, [1915] 1 Ch. 62; 84 L. J. Ch. 286; 112 L. T. 121; [1915] H. B. R. 61.

360. Following trust money—Authority to receive — Receipt by settlement in account.] — Trustees gave authority to a bank to receive £1,600, the proceeds of debentures in a co. which were being paid off. The bank were aware that the money formed part of a trust fund. The bank having other transactions with the co., the proceeds of the debentures were not actually paid over by the co. to the bank, but a mutual balance of account was arrived at, as the result of which the bank paid a sum of £300 to the co., & the trustees' account with the bank was credited with the sum of £1,600. The custom of the bank was to make a daily transfer of their receipts to their London bankers, &, on the date at which the bank suspended payment, a sum of £4,171 was standing to their credit with their London bankers. On an application by one of the trustees for a declaration that of the last-mentioned sum £1,600 was trust money & did not form part of the general estate of the insolvent bank:—*Held:* there was nothing to show a receipt, either by the bank or by their London agents, of any actual sum of £1,600 so as to enable it to be identified & followed as trust money.—*Re* HALLETT & CO., *Ex p.* BLANE, [1894] 2 Q. B. 237; 63 L. J. Q. B. 573; 42 W. R. 305; 10 T. L. R. 287; 1 Mans. 25; 9 R. 278, C. A.

361. —— Improper investment by banking partners—Failure of bank—Liability as trustees.]—A trustee under a will permitted the trust fund, as the money was from time to time realised, to be paid into the hands of a firm of bankers, all of whom knew that such money was subject to the trusts of the will. Two of the partners with the knowledge of the other partners, but without the assent of the trustee, invested part of the fund with other money on mtge. The security was insufficient & improper. By a subsequent deed poll, the two partners declared themselves to hold part of the mtge. money in trust for the trustees of the will. The firm became bkpt. On a petition by the trustees of the will alone:—*Held:* as between the bankers & the trustees, the bankers were not jointly & separately liable in the character of trustees, but they only incurred a liability as between banker & customer, & the trustees could only prove against their joint estate for such balance as was in their hands at the time of the bkpcy.—*Re* BIDDULPH, *Ex p.* BURTON (1843), 3 Mont. D. & De G. 364, Ct. of R.

362. ——————.]—Upon the facts stated in *Re Biddulph, Ex p. Burton*, No. 361, *ante*:—*Held:* the *cestuis que trust* were entitled to prove against the joint estate for the whole of the moneys withdrawn, without giving up the mtge.: but accounting to the joint estate for any moneys realised from the security beyond what was required to pay their demand in full.—*Re* BIDDULPH, *Ex p.* BARNEWALL (1849), 3 De G. & Sm. 587; 64 E. R. 618.

363. —— Mixing trust money with private account — Right of cestui que trust.] — If money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his bankers, the person for whom he held the money can follow it, & has a charge on the balance in the bankers' hands.

If a person, who holds money as a trustee or in a fiduciary character, pays it to his account at his bankers, & mixes it with his own money, & afterwards draws out sums by cheques in the ordinary manner, the rule in *Clayton's Case*, No. 334, *ante*, does not apply, & the drawer must be taken to have drawn out his own money in preference to the trust money.—*Re* HALLETT'S ESTATE, KNATCHBULL *v.* HALLETT (1880), 13 Ch. D. 696; 49 L. J. Ch. 415; 42 L. T. 421; 28 W. R. 732, C. A.

Annotations:—**Consd.** *Re* Miller, *Ex p.* Official Receiver, [1893] 1 Q. B. 327, C. A.; *Re* Hallett, *Ex p.* Blane, [1894] 2 Q. B. 237, C. A. **Folld.** *Re* Wreford, Carmichael *v.* Rudkin, (1897), 13 T. L. R. 153. **Distd.** *Re* Weston, Davies *v.* Tagart (1900), 82 L. T. 591. **Apld.** Wilson's & Furness-Leyland Line *v.* British & Continental Shipping Co. (1907), 23 T. L. R. 397. **Consd.** Sinclair *v.* Brougham, [1914] A. C. 398, H. L. **Distd.** Roscoe *v.* Winder, [1915] 1 Ch. 62. **Refd.** New Zealand & Australian Land Co. *v.* Ruston (1880), 5 Q. B. D. 474; Harris *v.* Truman (1881), 7 Q. B. D. 340; *Re* Mawson, *Ex p.* Hardcastle (1881), 44 L. T. 523; Marten *v.* Rocke, Eyton (1885), 53 L. T. 946; Ellis *v.* Goulton, [1893] 1 Q. B. 350, C. A.; *Re* Stenning, Wood *v.* Stenning (1895), 73 L. T. 207; The Mecca, [1897] A. C. 286, H. L.; Davis *v.* Petrie, [1906] 2 K. B. 786, C. A. **Mentd.** Kirkham *v.* Peel (1880), 43 L. T. 171; New Zealand & Australian Land Co. *v.* Watson (1881), 29 W. R. 694, C. A.; Collins *v.* Stimson (1883), 11 Q. B. D. 142; Lyell *v.* Kennedy (1887), 18 Q. B. D. 796, C. A.; *Re* Murray, Dickson *v.* Murray, (1887), 57 L. T. 223; Hancock *v.* Smith (1889), 41 Ch. D. 456, C. A.; Moss *v.* Hancock, [1899] 2 Q. B. 111; Mutton *v.* Peat, [1899] 2 Ch. 556; *Re* Oatway, Hertslet *v.* Oatway, [1903] 2 Ch. 356; Grunnell *v.* Welch, [1905] 2 K. B. 650; Wimbledon *v.* Eden, *Re* St. Mark's, Wimbledon, [1908] P. 167; Burdett *v.* Horne (1911), 27 T. L. R. 402; Galula *v.* Pintus (1911), 104 L. T. 574; Kreglinger *v.* New Patagonia Meat & Cold Storage Co., [1914] A. C. 25, H. L.; *Re* Dacre, Whitaker *v.* Dacre, [1915] 2 Ch. 480.

364. —— —— ——.]—A stockbroker had a banking account, into which he paid only money belonging to his clients. On Oct. 15, 1888, after two

Sect. 2.—Receipt of money on current account: Sub-sect. 2, A. & B.; sub-sect. 3, A.]

such payments in of moneys belonging to A. & B., the balance to the credit of the account was £522 odd; on Nov. 5 it was £301 odd, but in the meantime £1,367 odd more had been paid in, so that in that period about £1,600 in all had been drawn out. On Nov. 15 a judgment creditor of the stockbroker obtained a garnishee order *nisi* against the balance of £301:—*Held:* A. & B. were entitled to the money as against the judgment creditor, for, the question arising, not as between competing *cestuis que trust* against a deficient fund, but between their trustee & a judgment creditor of his, the rule in *Clayton's Case*, No. 334, *ante*, did not apply.—HANCOCK *v.* SMITH (1889), 41 Ch. D. 456; 58 L. J. Ch. 725; 61 L. T. 341; 5 T. L. R. 459, C. A.

Annotations:—**Distd.** *Re* Stenning, Wood *v.* Stenning, [1895] 2 Ch. 433. **Foild.** *Re* Wreford, Carmichael *v.* Rudkin (1897), 13 T. L. R. 153. **Distd.** Wilsons & Furness-Leyland Line *v.* British & Continental Shipping Co. (1907), 23 T. L. R. 397.

365. —— Payment of proceeds of sale to overdrawn private account — Bank reducing overdraft — Right of vendors.]—An auctioneer received moneys from sales of stock, & paid them into his private account at defts.' bank. His account was overdrawn to an amount not exceeding £2,500, but, under an arrangement which was then subsisting, he was permitted to overdraw up to £2,500, & he had no suspicion at the time when he paid in such moneys of any intention on the part of the bank to close his account. The bank shortly afterwards closed the account, & applied the proceeds of the sales in reduction of the overdraft. The bankers knew that moneys paid in often represented the proceeds of sales, but they did not know what proportion the customer was entitled to retain as commission or otherwise. An action was brought by pltf., on behalf of all the vendors, against the bank, to recover their respective purchase-moneys, less the auctioneer's commission:—*Held:* the auctioneer paid the proceeds of the sale to his private account in the ordinary course of business, & was not guilty of a breach of trust in so doing, & pltf. had no remedy against the bank.—MARTEN *v.* ROCKE, EYTON & CO. (1885), 53 L. T. 946; 34 W. R. 253; 2 T. L. R. 140.

B. Executors' Accounts.

366. Trust account & private account — Bank authorised to realise assets—Debiting & crediting private account—Liability of bank.]—Exors. employed their bankers (with whom they had a private account) to collect & realise assets of testator, & they opened a separate account as exors., which was credited with the proceeds of assets realised. The private account was overdrawn. The exors. subsequently authorised the bankers to sell securities, & drew bills on their bankers in anticipation of the sums they expected would be received. The bankers remitted the amount of the bills to the exors., & the overdraft on the private account was thereby considerably increased. The proceeds of the securities were afterwards credited to the private account, but the overdraft thereon (not taking into account the amounts remitted) was not reduced. The bankers had no notice that the sums remitted had not been applied for the purposes of the will:—*Held:* the bankers incurred no liability.—KEANE *v.* ROBARTS (1819), 4 Madd. 332; 56 E. R. 728.

Annotations:—**Consd.** Wilson *v.* Moore (1834), 1 My. & K. 337. **Extd.** Gray *v.* Johnston (1868), L. R. 3 H. L. 1, H. L. **Consd.** Coleman *v.* Bucks & Oxon Union Bank, [1897] 2 Ch. 243. **Refd.** Fyler *v.* Fyler (1841), 5 Jur. 187; *Re* Blundell, Blundell *v.* Blundell (1888), 40 Ch. D. 370. **Mentd.** Russell *v.* Plaice (1854), 18 Beav. 21; A.-G. *v.* Chesterfield (1854), 18 Beav. 596.

367. —— Balance due on executorship account—Executor also residuary legatee—Right to set off.]—Pltf., as trustee in the bkpcy. of K. & Co., bankers, sued deft. for money lent, the balance due upon his private account. Deft. had another account with the bank as exor. of A., & at the time of the bkpcy. the balance of this account was in his favour. Under the will of A. deft. was both exor. & residuary legatee, & at the time of the bkpcy. he had assets in his hands, exclusive of the balance in the bank, more than sufficient to provide for all bequests which remained unpaid & to leave a balance due to him as residuary legatee:—*Held:* the only effect of opening the account as exor. was to give the bank notice of any equities attaching to the fund, but, there being no such equities, deft. had the right to treat the balance as a fund to which he was beneficially as well as legally entitled, & he could set off the balance on the exorship. account against pltf.'s claim.—BAILEY *v.* FINCH (1871), L. R. 7 Q. B. 34; 41 L. J. Q. B. 83; 25 L. T. 871; 20 W. R. 294.

Annotation:—**Expld.** *Re* Willis, Percival, *Ex p.* Morier (1879), 12 Ch. D. 491, C. A.

368. Breach of trust—Payments to third parties—Notice of breach of trust—Liability of bank.]—R. G. & Co., bankers, had acted as such to J., who carried on business with his son-in-law under the style of J. & M., but whose accounts with them were kept in his own name alone, & were unsettled at his death. He left a will bequeathing all his property to the use of his wife for life, & after her death to be

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PART II. SECT. 2, SUB-SECT. 2.—B.

366 i. *Trust account & private account—Presumption arising from.*]—When an exor. opens an account with a bank for both himself & the estate, in the name of the latter, no presumption arises therefrom of fraudulent complicity or participation by the bank in any improper conversion he makes to his own use of the funds of the estate.—GRATTON *v.* BANQUE D'HOCHELAGA (1912), Q. R. 21 K. B. 97.—**CAN.**

368 i. *Breach of trust—Payment of trust money to private account—Notice of breach of trust—Liability of bank.*]—A. lodged to the credit of his private account at a bank money which belonged to him & B., as exors. of C. The bank had notice that the money so lodged was trust money, but had no notice that A. intended to commit a breach of trust, & placed the money to the credit of A.'s account in the ordinary way. A. afterwards became insolvent, & his account was overdrawn. B. brought an action against the bank & A. to have it declared that the bank were trustees of the money so lodged on behalf of B. & A., as exors. of C.:—*Held:* the bank were not liable.—SHIELDS *v.* BANK OF IRELAND (GOVERNOR & CO.), [1901] 1 I. R. 222.—**IR.**

368 ii. ——————.]—A., who had money in a bank, executed a will, in which he nominated as exor. his son, who was partner of a co. indebted to the bank. The bank, by authority of the son, transferred the money to his individual account, taking a discharge from him *quâ* exor., & then transferred it to an account in name of the co., whereby the debt due to the bank was extinguished. The Ct. of Session having found the bank not liable to account, the House of Lords remitted an issue to ascertain whether the bank knew that the money was part of the funds of testator & held by the son *quâ* exor., & subject to the trusts of the will, & that those trusts were not satisfied.—TAYLOR *v.* FORBES & CO. (1830), 4 Wils. & S. 444.—**SCOT.**

368 iii. —— *Trust money wrongfully withdrawn—Notice of breach of trust—Liability of bank.*]—A bank is liable to repay to the estate an amount which has been wrongfully withdrawn by the exors. from the estate account with the knowledge of the bank manager.—BRADFIELD *v.* BANK OF OTTAWA (1911), 19 O. W. R. 671; 2 O. W. N. 1383.—**CAN.**

c. *Deceased's estate consisting partly of property belonging to first wife—Money from both estates paid into one account—Rights of heirs of first wife.*]—After the death of A. B., his widow, continued to manage his estate without making any distinction between what property belonged to the estate of the husband & what to that of his first wife C. The whole money was paid into one account, headed "succession A," in the hands of applt. bank, of which the heirs of C. claimed half:—*Held:* as between the heirs of C. & the bank there was no relation of creditor & debtor, nor any fiduciary relation, nor any priority whatever, & the claim of C.'s heirs failed.—GIRALDI *v.* BANQUE JACQUES-CARTIER (1883), 9 S. C. R. 597.—**CAN.**

divided among her children. Part of the property consisted of life policies which were put into the hands of the bankers, together with the probate of J.'s will, & they received the amount of the policies, made up their accounts, &, after deducting their own unsettled claims, declared a certain sum to remain due from themselves to the extrix. She continued her husband's business with his late partner under the style of J. & M., & a new account was opened with the bankers in the name of the new firm, & she, as extrix., drew a cheque for the amount due to her & paid it into the bankers, to be credited to the firm of J. & M., & it was so credited & paid out with other money on account of cheques drawn by the new firm :—*Held :* these circumstances were not in themselves sufficient to show that a breach of trust had been committed, & that the bankers knew of the intention to commit it, so as to render them liable (in a suit by the children of testator) to replace the money.—GRAY *v.* JOHNSTON (1868), L. R. 3 H. L. 1 ; 16 W. R. 842, H. L.

Annotations :—**Consd.** *Re* Gross, *Ex p.* Adair (1871), 24 L. T. 198. **Apld.** *Re* Wall, Jackson *v.* Bristol & West of England Bank (1885), 1 T. L. R. 522. **Consd.** Coleman *v.* Bucks & Oxon Union Bank, [1897] 2 Ch. 243 ; Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A. **Refd.** Foxton *v.* Manchester & Liverpool District Banking Co. (1881), 44 L. T. 406 ; Marten *v.* Rocke, Eyton (1885), 53 L. T. 946 ; Bank of New South Wales *v.* Goulburn Valley Butter Co. Proprietary, [1902] A. C. 543, P. C. **Mentd.** *Re* Blundell, Blundell *v.* Blundell (1888), 40 Ch. D. 370.

369. Wife's account as executrix—Husband paying in money—Cheques drawn by wife for husband—Rights of wife on husband's death.]—A wife being extrix. of her father paid money she received as such into a bank to an account as extrix. Her husband paid money of his own to this account, & the wife had drawn cheques upon the account for payment of debts due by the husband & for payment of household expenses. The husband died :—*Held :* the wife was merely the agent of the husband, & the money remaining in the bank belonged to his estate & not to the wife.—LLOYD *v.* PUGHE (1872), 8 Ch. App. 88 ; 42 L. J. Ch. 282 ; 28 L. T. 250 ; 21 W. R. 346, L.C. & L.JJ.

Annotations :—**Distd.** *Re* Eykyn's Trusts (1877), 6 Ch. D. 115. **Refd.** Parker *v.* Lechmere (1879), 12 Ch. D. 256.

See, also, Nos. 389—392, *post.*

SUB-SECT. 3.—OTHER ACCOUNTS.

A. Joint Accounts.

370. Joint account of persons not partners in trade—Payment to one without authority—Liability of bank.]—Where money is paid into a bank on the joint account of persons not partners in trade, the bankers are not discharged by payment to one of those persons without the authority of the others.—INNES (ASSIGNEE OF R. & C. HINGESTON, BANKRUPTS) *v.* STEPHENSON (1831), 1 Mood. & R. 145.

Annotation :—**Distd.** Husband *v.* Davis (1851), 20 L. J. C. P. 118.

371. Joint account of persons not partners—Payment to one.]—The rule that when money is deposited with a banker by two or more persons not partners, payment is insufficient unless made to all, arises out of the relation of banker & customer, & is part of the law merchant (MAULE, J.).—HUSBAND *v.* DAVIS (1851), 10 C. B. 645 ; 2 L. M. & P. 50 ; 20 L. J. C. P. 118 ; 138 E. R. 256.

372. Money advanced to one of three persons jointly interested—Money used for joint speculation—Liability of person interested.]—Where A., B., & C., not being general partners, entered into a joint speculation, & each was to contribute a third :—*Held :* A., who had paid his share, was not liable to the bankers of B. for moneys advanced by such bankers on the individual credit of B., without the knowledge of A., though such moneys were applied in payment of bills drawn upon B. in the course of the joint speculation.—SMITH *v.* CRAVEN (1831), 1 Cr. & J. 500 ; 1 Tyr. 389 ; 9 L. J. O. S. Ex. 174 ; 148 E. R. 1520.

Annotations :—**Consd.** Nicholson *v.* Ricketts (1860), 2 E. & E. 497. **Mentd.** *Re* Adansonia Fibre Co., Miles' Claim (1874), 9 Ch. App. 635, L.JJ. ; Yorkshire Banking Co. *v.* Beatson, Leeds & County Banking Co. *v.* Beatson (1879), 4 C. P. D. 204.

373. Account of managing co-owner of ship—Applying freight money to other purposes—Claim by co-owners—Rights of bank.]—The managing owner of a ship chartered by a co. received the warrants for the freight, & paid them into a bank in his own name, drawing cheques from time to time for various sums out of the proceeds, part of which were applied for the use of the ship & part for other purposes :—*Held :* the other part owners had no lien on this fund in the hands of the bankers, nor any claim against the bankers as their debtors.—*Re* BOND & PATESHALL, *Ex p.* GRIBBLE (1833), 3 Deac. & Ch. 339, Ct. of R. ; *affd.* on appeal, 2 De G. M. & G. at p. 906, L.C.

Annotation :—**Mentd.** Bodenham *v.* Hoskyns (1852), 2 De G. M. & G. 903, L.JJ.

374. Partner's account in own name—Liability to bank as agent of partnership.]—The fact of an account having been opened with a banker by one of two partners in his own name is not conclusive to show that the account was opened on his own behalf ; but it is competent for the banker to prove that he was acting as the agent of the partnership, & that the account was theirs. The mere circumstance, however, of the money deposited being partnership property, is not sufficient for that purpose.—COOKE *v.* SEELEY (1848), 2 Exch. 746 ; 17 L. J. Ex. 286 ; 154 E. R. 691.

Annotation :—**Refd.** Alliance Bank *v.* Kearsley (1871), L. R. 6 C. P. 433.

375. Agreement as to drawing cheques—Payment contrary to agreement—Liability of bank—Measure of damages.]—Pltf. & his partner at the time of opening an account at defts.' bank stipulated that no cheque drawn in the name of the firm by one of the partners should be honoured by the bank unless it bore the initials of the other partner. The bank having, in violation of this contract, paid a cheque drawn in the name of the firm by pltf.'s partner without having the initials of pltf. :—*Held :* pltf. was entitled to sue for this breach of contract, & the proper measure of damages was a moiety of the sum for which the cheque was drawn.—TWIBELL *v.* LONDON SUBURBAN BANK, [1869] W. N. 127.

376. Transfers from partnership to private account—Duty of bank to inquire—As to propriety of transfer.]—Where accounts are kept at a bankers' by a firm, each partner having a right to draw

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PART II. SECT. 2, SUB-SECT. 3.—A.

d. *Cheque payable to named firm—Proceeds placed to new firm on instructions of common partners—Liability of bank.*]—R., a member of the firm of R. M. & C., railway contractors, instructed his partners to finish certain work, collect any balance due, pay the liabilities & divide the balance among them. M. & Co. received $56,000 & over, & formed a new partnership of which R. was not a member. They arranged with the I. bank to open an account with its branch at N., & the cheque payable to R. M. & C. was cashed &, by instructions to the N. branch, placed to the credit of the new firm, & the whole sum was eventually drawn out by the latter firm. R. brought an action against M. & C. & the bank claiming that the latter should pay the amount of the cheque with interest into ct. subject to further order :—*Held :* there was nothing to show that M. & C. had misapplied the proceeds or intended to do so by their dealing with the cheque, & in any case there was no notice to the bank of any intention to misapply the funds & nothing to put them on inquiry, & the action against the bank must fail.—ROSS *v.* CHANDLER (1911), 45 S. C. R. 127.—**CAN.**

Sect. 2.—Receipt of money on current account: Subsect. 3, A. B. C. & D.]

cheques, & also by the individual partners of the firm, it is not the duty of the bankers to inquire into the propriety of any transfer of funds which may be made from & to the different accounts.—BACKHOUSE *v.* CHARLTON (1878), 8 Ch. D. 444.

Annotation :—**Consd.** Morison *v.* London County & Westminster Bank (1913), 108 L. T. 379.

B. Agents.

377. Revocation of agency—Several principals—Claim by one to balance.]—A. having received money as agent for B. & others, in specific proportions for each, placed it with bankers, in his own name, & having drawn out part of it, directed them not to pay away the remainder, except by his order. B. gave the bankers notice that A.'s agency was at an end, & claimed the remaining money as his own :—*Held :* B. had no direct claim against the bankers.—PINTO *v.* SANTOS (1814), 5 Taunt. 447 ; 1 Marsh. 132 ; 128 E. R. 763.

Annotations :—**Refd.** Ogle *v.* Atkinson (1814), 1 Marsh. 323 ; Ireland *v.* Thomson (1847), 4 C. B. 149 ; Walshe *v.* Provan (1853), 8 Exch. 843.

378. —— Money paid in by agent after—Dishonour of agent's cheques—Liability of bank.]—A., the farming bailiff of D. (after his employment as such had ceased), received a cheque for £180 in payment for wheat belonging to D., which he had sold on his account while acting as bailiff, & paid it into his own account with B. & Co., his bankers, who received the cash for it, & gave A. credit for the amount, but afterwards, under an indemnity from D., refused to honour his drafts. At the time when credit was given for the cheque, the bankers were not aware that D. had any concern with A.'s account :—*Held :* even assuming that the cheque had been improperly obtained by A., still, as between him & his bankers, the amount was recoverable by A., as money lent.—TASSELL *v.* COOPER (1850), 9 C. B. 509 ; 14 L. T. O. S. 466 ; 137 E. R. 990.

Annotations :—**Distd.** Société Coloniale Anversoise *v.* London & Brazilian Bank, [1911] 2 K. B. 1024. **Refd.** R. *v.* Hassall (1861), 9 W. R 708, C. C. R. **Mentd.** Hardy *v.* Veasey (1868), L. R. 3 Exch. 107.

379. —— Money paid in by principal—Right to undrawn balance.]—*Semble :* a principal, who pays money into a bank to the account of a person known to the bank to be his agent, upon the terms that the agent shall have authority to draw upon the account, has the power, if he rightly determines the agency & revokes the authority of the agent to draw upon the account, to require the bank to return any undrawn balance to him.—SOCIÉTÉ COLONIALE ANVERSOISE *v.* LONDON & BRAZILIAN BANK, LTD., [1911] 2 K. B. 1024 ; 80 L. J. K. B. 862 ; 104 L. T. 499 ; 27 T. L. R. 354 ; 55 Sol. Jo. 460 ; 16 Com. Cas. 158 ; *affd.* without dealing with this point, 80 L. J. K. B. 1361, C. A.

380. Stockbroker—Payment in of clients' money—Notice—Retention against overdraft.]—A broker was instructed by trustees to sell shares & reinvest the proceeds in the names of the trustees. Instead of doing so, he paid the money into his own account with resp. bank, where his account was largely overdrawn. The bank knew that the money was the proceeds of the sale of shares, but did not know & had made no inquiry whether the money belonged to the broker or was only in his hands as agent :—*Held :* the bank were entitled to apply the money in satisfaction of the broker's overdraft.—THOMSON *v.* CLYDESDALE BANK, LTD., [1893] A. C. 282 ; 62 L. J. P. C. 91 ; 69 L. T. 156 ; 1 R. 255, H. L.

Annotations :—**Refd.** *Re* Sangster, Green *v.* Mockett (1894), 10 T. L. R. 184 ; Bank of New South Wales *v.* Goulburn Valley Butter Co. Proprietary, [1902] A. C. 543, P. C. **Mentd.** Rainford *v.* Kei h & Blackman Co., [1905] 2 Ch. 147, C. A. ; Hooper *v.* Herts (1906), 94 L. T. 324, C. A.

381. Receiver of rents—Transfer to private account—Liability to make good.]—Three accounts were opened by a customer with his bankers, one of which was called the "R. Account." This account was opened by the customer as the receiver of the rents of an estate of that name belonging to pltf., & the bankers, knowing that such was a receivership account, allowed the customer to draw a cheque on that particular account to liquidate a balance due from the customer to the bankers on his "office account" :—*Held :* the bankers were liable to make good to the owner of the estate the balance so allowed by them to be carried over from the R. account to the credit of the customer's private account.—BODENHAM *v.* HOSKINS (1852), 21 L. J. Ch. 864 ; 19 L. T. O. S. 294 ; 16 Jur. 721 ; *affd.* 2 De G. M. & G. 903, L.JJ.

Annotations :—**Consd.** *Re* Gross, *Ex p.* Adair (1871), 24 L. T. 198. **Expld. & Distd.** Macbryde *v.* Eykyn (1871), 24 L. T. 461. **Consd. & Apld.** Greenwell *v.* National Provincial Bank (1883), Cab. & El. 56. **Distd.** Martin *v.* Rocke, Eyton (1885), 34 W. R. 253 ; Coleman *v.* Bucks &

PART II. SECT. 2, SUB-SECT. 3.—B.

e. *Bank acting as estate agents—Payment of money for rents into "agency account"—Fiduciary relation.*]—Defts., a banking co., also carried on the business of estate agents, & as such collected money for rents for pltf. Defts. placed the money so collected in a separate account in their books, entitled "agency account," & credited pltf. with the amount thereof, & mixed it with their own moneys :—*Held :* defts. were in a fiduciary relation to pltf., & the rules as to following trust moneys applied, & pltf. was entitled on defts. going into liquidation to be paid such money in full in priority to the other creditors of defts.—SEELEY *v.* MERCANTILE BANK OF AUSTRALIA (IN LIQUIDATION) (1892), 18 V. L. R. 485.—**AUS.**

380 i. *Stockbroker — Payment in of client's money — Right to follow.*] — Money identified as belonging to a customer of deceased, a stockbroker, was lodged by him to the credit of his current account with his bank. After his death, which occurred on the day after the lodgment, the bank transferred the balance due to deceased on his current account to a loan account, on which he was indebted to the bank, & sold so much of certain stocks & shares (which they held as security for any balance which might be due to them on the loan account) as were sufficient to pay off the entire amount remaining due to them, & thereupon transferred the remaining securities to the credit of the matter to administer deceased's estate : —*Held :* the customer was entitled to follow the money identified as his, & to stand in the place of the bank, & to have the benefit of their lien on the securities lodged in ct.—*Re* REYNOLDS, M'MAHON *v.* FETHERSTONHAUGH, [1895] 1 I. R. 83.—**IR.**

f. *Account naming principal—Second account not naming principa — Right of bank against principal on second account.*]—An agent kept an account in a bank as the agent expressly of his principal, but on a new account being opened it was opened in his name as agent simply, without specifying a principal. In an action by the bank against the principal named in the first account it was proved that in the second account the agent had kept the funds & drawn on account of different principals :—*Held :* deft. not liable.—METROPOLITAN BANK *v.* SYMES ET VIR (1876), 21 L. C. J. 201.—**CAN.**

g. *Agreement to cash drafts for agent—Drafts utilised to reduce agent's indebtedness—Notice of breach of trust—Liability of bank.*]—By special contract defts. agreed to supply currency from one of their branches to pltfs. by "cashing" the drafts drawn by pltfs.' agent Y. upon them at Winnipeg. Y. was to use the proceeds of the drafts to purchase grain for pltfs., & this was known to defts.' manager at the branch in question. Y. had a personal account & a firm account in the same branch bank, both of which were overdrawn. Y. would deposit drafts drawn for the purchase of grain to his own account or his firm account, to the knowledge of the local manager of defts., & frequently upon his insisting upon a reduction of the overdrafts. The drafts were all paid by pltfs. without knowledge of the fraud or breach of trust. Pltfs. upon learning of the transactions sued for & recovered judgment for the full amount of the drafts so dealt with :—*Held :* there was sufficient notice to the bank of the breach of trust & sufficient benefit accruing to defts. to make them liable.

Pltfs.' agent was given a cheque by Y. for $1,000 to settle accounts, & there not being sufficient funds to meet the cheque, Y. deposited a draft upon pltfs. which was duly honoured & out of which the cheque was paid :—*Held :* the bank should not be held liable for this amount.—BRITISH AMERICAN ELEVATOR CO. *v.* BANK OF BRITISH NORTH AMERICA (1916), 33 W. L. R. 625 ; 9 W. W. R. 1368.—**CAN.**

Oxon Union Bank, [1897] 2 Ch. 243. **Refd.** Bailey *v.* Johnson (1871), L. R. 6 Exch. 279; Pearson *v.* Scott (1878), 9 Ch. D. 198; Pierson *v.* Scott (1878), 47 L. J. Ch. 705; Wilson *v.* Bury (1880), 5 Q. B. D. 518, C. A. **Mentd.** Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A.

C. Solicitors.

382. Mixing trust moneys with private account—No notice of trust to bank—Right to set off.]—A., a solr. in the country, received from a client a sum of money, which was to be paid by him into the Ct. of Ch. on the client's account. A. obtained a bill for the sum from a country banker, & remitted it to his bankers in London without stating the reason for which the amount had been paid to him. At the same time he was indebted to his bankers in £450, for which they held securities & as to which they kept an account separate from his general account. A. died, & a few days afterwards the bill became due & was paid, & the bankers carried the amount to A.'s general account. The bankers, for some time after they had received notice from the client of the circumstances in which the amount of the bill had been paid to A., continued to keep the accounts separate, but ultimately they deducted the £450 from the proceeds of the bill & paid the balance to his extrix.:—*Held:* as there was no agreement binding the bankers to keep separate accounts as to the £450 & the amount of the bill, & as they had no notice till after the amount was received of the purpose for which it was intended to be applied, the client was not entitled to recover from them any part of the proceeds of the bill.—GRIGG *v.* COCKS (1831), 4 Sim. 438; 58 E. R. 163.

383. —— —— ——.]—A partner in a firm of solrs. opened three accounts in his own name with defts. which were kept under the titles, "office account," "deposit account," & "private account." Defts. were told that clients' moneys would mostly be paid into the deposit account. In Dec., 1891, the deposit account was closed & the balance transferred to the office account, & thenceforward until June, 1893, clients' moneys were paid into the office account. On that date the office account was in credit £5,287, & the private account was overdrawn to an amount exceeding that sum. The firm of solrs. having claimed payment of £5,287:—*Held:* the bank had no notice of any trust & was entitled to set off the credit balance against the overdraft.—GREENWOOD TEALE *v.* WILLIAMS (WILLIAM), BROWN & Co. (1894), 11 T. L. R. 56.

384. —— Trust moneys unidentified—Right of trustees to follow.]—A solr., having trust moneys in his hands, paid certain sums, part of such moneys, into his banking account without distinguishing them as trust moneys, & subsequently filed a liquidation petition:—*Held:* trust moneys could not be followed unless clearly identified, & the trustee in the liquidation was entitled to the balance of the moneys in the hands of the bank as against the persons claiming to be entitled as trustees of the alleged trust funds under bkpt.'s marriage settlement.—*Re* MAWSON, *Ex p.* HARDCASTLE (1881), 44 L. T. 523; 29 W. R. 615.

385. —— Balance at death—Appropriation of payments.]—A solr. paid money, which he had received for a client, to his own banking account. From that time up to the death of the solr. there was always to the credit of the account a balance exceeding the sum so paid in. But on many days during that period the credit balance was less than the amount of other clients' moneys, which the solr. had paid in subsequently to his payment of the money of the first client & had not withdrawn:—*Held:* the rule in *Clayton's Case*, No. 334, *ante*, applied, & the money of the first client must be taken to have been drawn out by the solr., & not to have formed part of the balance to the credit of the account at the time of his death, & the first client was not entitled to be paid out of that balance specifically.—*Re* STENNING, WOOD *v.* STENNING, [1895] 2 Ch. 433; 73 L. T. 207; 13 R. 807.

Annotations:—**Refd.** Mutton *v.* Peat, [1899] 2 Ch. 556; Roscoe *v.* Winder, [1915] 1 Ch. 62.

See, also, Sect. 2, sub-sect. 2, A., *ante*.

D. Companies and Corporations.

386. Deposit by applicant for shares—Transfer to overdrawn general account—Invalid allotment—Liability of bank.]—Defts. were the bankers of G. Co., Ltd. In 1880 pltf. applied for one thousand preference shares in G. Co., & deposited £500 with defts., the co.'s bankers. The money was acknowledged as "being a deposit of 10*s.* per share," & on instructions from the co. was placed to a separate account headed "G. Co., Preference Shares Account." Other deposits were placed to this account, & when allotments were made, the proper amount was transferred to the co.'s general account. Before allotment the deposits were considered by defts. to be the property of appcts. for shares. On May 25, 1881, the co. passed a resolution to wind up & purported to allot five hundred preference shares to pltf., but pltf. immediately repudiated the allotment & gave notice to defts. not to part with the deposit. After receipt of such notice, defts. at the request of the co. transferred the £500 to the co.'s overdrawn general account. Before doing so defts. knew that a meeting had been held to wind up the co. with a view to its reconstruction. The allotment was invalid:—*Held:* pltf. was entitled to recover the £500 from defts.—GREENWELL *v.* NATIONAL PROVINCIAL BANK (1883), Cab. & El. 56.

387. Company's account & managing director's account—Company cheques improperly credited to private account—Liability of bank.]—A trader carried on his own business in conjunction with that of a co., of which he was managing director, & by himself or his nominees held all the shares. The co.'s account & the trader's account were in the same bank, & blank cheques were given to the bank

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PART II. SECT. 2, SUB-SECT. 3.—C.

382 i. *Mixing trust moneys with private account—No notice of trust to bank—Right to charge up cheques.*]—Pltf. placed a mtge. in the hands of J., a solr., to enable J. to receive payment of the mtge. money, which it was arranged between pltf. & J., in the presence of the local manager of a bank, of which J. was the solr., should be deposited in the bank to the credit of pltf., & a deposit receipt obtained. J. received $6,455, which he deposited in the bank to his private account. About ten days afterwards he drew upon his account for $3,000, which he deposited in the same bank to the credit of pltf., obtained a deposit receipt in favour of pltf., & transmitted same to pltf., telling pltf. that "the balance will be sent next week." He drew upon the fund for his own purposes, & died, without rendering any account:—*Held:* the bank was not affected with notice of the money so deposited being trust moneys, so as to render the bank liable for J.'s misappropriation.

After the deposit of pltf.'s money J. recovered $1,182.95 for S., as her solr., which he also deposited in the same account. Up to the time of J.'s death the amount at his credit always exceeded this sum:—*Held:* the moneys so deposited by J. had been held by him in a fiduciary character, & might be followed, but as between pltf. & S., S. had a first charge upon the sum at the credit of J. for the full amount of her deposit, & the balance was applicable to the discharge of pltf.'s demand.

The bank claimed the right to charge against the account in priority to the claims of pltf. & S. cheques & notes of J. presented or maturing after notice to the bank of J.'s death:—*Held:* they could not do so.—BAILEY *v.* JELLETT (1883), 9 A. R. 187.—**CAN.**

PART II. SECT. 2, SUB-SECT. 3.—D.

j. *Municipal account — Agreement as to.*]—An agreement made by a municipality to keep its current account in a certain bank does not call for the deposit therein of all its money, particularly a sum of money borrowed for a special purpose. The fact that during twenty years it had always deposited all its cash in the bank in question has no bearing on the contract.—CAISSE D'ECONOMIE *v.* QUEBEC (1913), Q. R. 23 K. B. 207; 20 R. de J. 477.—**CAN.**

Sect. 2.—Receipt of money on current account: Sub-sect. 3, D. E. & F. Sect. 3: Sub-sect. 1.]

manager in respect of each account to be filled in with amounts necessary for the purpose of adjustment of the two accounts. Blank cheques of the co. were improperly filled in by the trader with amounts which were credited to his account:—*Held:* in the absence of notice on the part of the bank of the state of accounts between the trader & the co., the bank were not liable to refund the money.—BANK OF NEW SOUTH WALES *v.* GOULBURN VALLEY BUTTER CO. PROPRIETARY, [1902] A. C. 543; 71 L. J. P. C. 112; 87 L. T. 88; 51 W. R. 367; 18 T. L. R. 735, P. C.

388. Company not entitled to commence business—Claim by bank for services rendered—Companies Act, 1900 (c. 48), s. 6 (3).]—A co. incorporated under Cos. Act issued a prospectus inviting applications for shares in the co., & the moneys subscribed were paid into the co.'s bank. The co. never obtained a certificate from the registrar under the above sub-sect. that they were entitled to commence business & never were so entitled. The bank claimed to be paid out of the moneys in their hands a certain sum for services rendered:—*Held:* as the bank must rely upon some contract with the co. & as by the above sub-sect. a contract made by a co. before the date at which it was entitled to commence business was provisional only & not binding until that date, the bank were not entitled to be paid.—NEW DRUCE-PORTLAND CO., LTD. *v.* BLAKISTON (1908), 24 T. L. R. 583.

E. Married Women.

389. Moneys of husband—Deposit by wife in name of infant son—Claim by husband—Liability of bank.]—A. having received a sum of money bequeathed by will to his wife, gave it to her to take care of. The wife, without his knowledge, deposited it in a bank, in the name of her son by a former marriage, who was then an infant, & took from the bankers an accountable receipt in the son's name, bearing interest:—*Held:* the bankers not being bound to pay the money to any other person were liable to A. for the amount in an action for money had & received.—CALLAND *v.* LOYD (1840), 6 M. & W. 26; 9 L. J. Ex. 56; 151 E. R. 307.

Annotations:—**Apld.** Sloper *v.* Cottrell (1856), 6 E. & B. 497. **Folld.** Reid *v.* Rigby, [1894] 2 Q. B. 40. **Refd.** Société Coloniale Anversoise *v.* London & Brazilian Bank, [1911] 2 K. B. 1024.

390. Joint account of husband & wife—Deposit by husband as provision for wife—Death of husband—Title of wife.]—Money deposited in a bank by a husband, in the joint names of himself & his wife, as a provision for her in case of his death, upon his death becomes the absolute property of the wife.—WILLIAMS *v.* DAVIES (1864), 3 Sw. & Tr. 437; 4 New Rep. 301; 33 L. J. P. M. & A. 127; 10 L. T. 583; 28 J. P. 664.

391. —— Transfer of account by husband—Cheques drawn by wife at husband's direction—Title of wife to balance.]—The husband of pltf., being in failing health, transferred his banking account from his own name into the joint names of himself & his wife, & directed the bankers to honour cheques drawn either by himself or his wife, & he afterwards paid in considerable sums to this account. All cheques were afterwards drawn by pltf. at the direction of her husband, & the proceeds were applied in payment of household & other expenses. The husband never explained to pltf. what his intention was in transferring the account, but he was stated by the bank manager to have remarked at the time of the transfer that the balance of the account would belong to the survivor of himself & his wife. After the death of her husband (which took place a few months after the transfer) pltf. claimed to be entitled to the balance:—*Held:* the transfer of the account was not intended to be a provision for pltf., but merely a mode of conveniently managing her husband's affairs, & she was not entitled.—MARSHAL *v.* CRUTWELL (1875), L. R. 20 Eq. 328; 44 L. J. Ch. 504; 39 J. P. 775.

Annotations:—**Distd.** *Re* Eykyn's Trusts (1877), 6 Ch. D. 115; *Re* Warwick, Warwick *v.* Chrisp (1912), 56 Sol. Jo. 253. **Mentd.** *Re* Whitehouse, Whitehouse *v.* Edwards (1887), 37 Ch. D. 683.

392. Account in name of wife—Cheques initialled by husband & paid by bank—Bankruptcy of husband—Liability of bank.]—On a notice of motion a declaration was obtained that certain moneys at the credit of bkpt.'s wife in a bank were the moneys of bkpt., & upon that an order that the bank should pay same to the trustee in bkpcy. Between the date of the receiving order & the date of that order, the bank honoured the wife's cheques to the extent of £216 18*s.*, & the trustee sought to make the bank liable to pay this amount over again to him:—*Held:* as the account had been opened as the wife's (although by arrangement her cheques were to be initialled by bkpt.), the bank, having no notice that the moneys were bkpt.'s, were bound to honour her cheques until the trustee obtained a declaration that the moneys were bkpt.'s, & the bank having so honoured the wife's cheques between the date of the receiving order & the date of the declaration, could not be called upon to pay the amounts over again.—*Re* MONTAGUE, *Ex p.* WARD *v.* LONDON & SOUTH WESTERN BANK (1897), 76 L. T. 203; 45 W. R. 384; 41 Sol. Jo. 352; 4 Mans. 1.

Annotation:—**Consd.** *Re* Teale, *Ex p.* Blackburn, [1912] 2 K. B. 367.

See, also, No. 369, *ante.*

F. Lunatics.

393. Alien domiciled abroad—Refusal by bank to deliver up property—Administrateur provisoire—Order of court.]—G., domiciled & resident in Belgium, deposited with an English bank for safe custody, in his name, certificates & scrip for securities of great value. On his death in 1892 his widow, then also domiciled & resident in Belgium, took out administration in England to his estate, & had the securities then standing to his account, & also a sum of cash representing dividends thereon collected by the bank on his account, transferred to a new account opened by her at the bank in her own name. In 1897 she became lunatic, though she was not so declared judicially, & was placed in a foreign lunatic asylum. D., a Belgian, was appointed by the Belgian ct. her *administrateur provisoire,* with power to collect & get in her personal estate, & subsequently D. obtained in England letters of administration *de bonis non* to G.'s estate, whereupon he brought an action in England against the bank in the names of himself & of Madame G. (the writ not stating that she was of unsound mind or that he was suing as her next friend), claiming, in his double capacity of legal personal representative of G. & of *administrateur provisoire* of Madame G., to have the certificates, scrip & cash standing in her name delivered up to him. Upon the action coming on for trial, a preliminary objection was taken that it was improperly constituted in that Madame G., being of unsound mind, could not sue without a next friend, whereupon D. was appointed next friend, & the title of the action was amended accordingly:—*Held:* (1) as D. & Madame G. had together a clear legal title to the property sought to be recovered, D. was entitled, suing in his own name & as next friend of Madame G., to demand the delivery of her property to him & could give the bank

a good discharge ; (2) the ct. was bound to recognise the order of the Belgian ct. giving D. leave to prosecute the appeal & to obtain & give a good discharge for the property ; (3) the bank were perfectly justified in not complying with D.'s demands without an order of the ct. & must be paid their costs of the action. Form of judgment, including vesting order as to stock in Madame G.'s name.—DIDISHEIM *v.* LONDON & WESTMINSTER BANK, [1900] 2 Ch. 15 ; 69 L. J. Ch. 443 ; 82 L. T. 738 ; 48 W. R. 501 ; 16 T. L. R. 311, C. A.

Annotations :—**Distd.** Thiery *v.* Chalmers, Guthrie, [1900] 1 Ch. 80. **Consd.** Pélégrin *v.* Coutts, Pélégrin *v.* Messel, [1915] 1 Ch. 696. **Refd.** New York Security & Trust Co. *v.* Keyser, [1901] 1 Ch. 666. **Mentd.** *Re* Carr's Trusts, Carr *v.* Carr (1904), 90 L. T. 592, C. A. ; *Re* De Larragoiti, [1907] 2 Ch. 14, C. A.

394. —— —— —— ——.] — Defts. held securities & moneys on behalf of a domiciled Frenchman, who had had business relations with them as bankers & stockbrokers respectively. He became of unsound mind, & P. was appointed provisional administrator of his property by the French ct. P. requested defts. to transfer the property to him, offering to prove the orders of the French ct. appointing him administrator in any manner satisfactory to defts., but they declined to transfer the property without an order of an English ct. :—*Held :* in view of *Didisheim* v. *London & Westminster Bank*, No. 393, *ante*, defts. had shown an undue & unreasonable excess of caution in the attitude which they had assumed, & were not entitled to costs in proceedings by P. & the lunatic for an order for the delivery of the property to P.—PÉLÉGRIN *v.* COUTTS & CO., PÉLÉGRIN *v.* MESSEL (L.) & CO., [1915] 1 Ch. 696 ; 84 L. J. Ch. 576 ; 113 L. T. 140.

395. Advance by bank for maintenance—Right to prove against estate.] — A bank advanced money to a person who had taken upon himself the management of the affairs of a lunatic not so found. The money being applied for the necessary maintenance of the lunatic & his family & for the protection of his estate :—*Held :* the bank could prove against the lunatic's estate for the money advanced, but not for interest or bank charges.—*Re* BEAVAN, DAVIES, BANKS & CO. *v.* BEAVAN, [1912] 1 Ch. 196 ; 81 L. J. Ch. 113 ; 105 L. T. 784.

Annotation :—**Mentd.** Lloyd *v.* Coote & Ball [1915] 1 K. B. 242, C. A.

SECT. 3.—RECEIPT OF MONEY ON DEPOSIT ACCOUNT.

SUB-SECT. 1.—THE DEPOSIT ACCOUNT.

396. Change in banking partnership—Liability of former or deceased partner—Novation.]—Pltf. deposited money with bankers & took their accountable receipts. One of the partners retired, & a new firm was constituted consisting of the continuing partners & other persons. Pltf. left his money with the new firm, kept the accountable receipts of the old firm, made fresh deposits with the new firm, & received interest from the new firm upon the old & new deposits for four years :—*Held :* these facts were insufficient to establish any agreement to discharge the former partner.—GOUGH *v.* DAVIES & GIBBONS (1817), 4 Price, 200 ; 146 E. R. 439.

Annotation :—**Distd.** David *v.* Ellice (1825), 7 Dow. & Ry. K. B. 690.

397. —— —— ——.]—Previously to 1872 A. & B. were partners as bankers. In that year they took in two new partners. Very shortly after the partners were taken in A. died. In 1874 B. died. In 1875 the bank went into liquidation. The bank were in the habit of issuing deposit receipts to customers who left money with them. When the account on deposit was altered the note was changed. The depositors at the time of the bkpcy. all proved

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PART II. SECT. 3, SUB-SECT. 1.

k. *Deposit distinguished from loan.*]—The giving of deposit receipts, payable on time for money loaned, does not alter the nature of the transaction, & such loans are not properly classified under the head of "other deposits payable after notice or on a fixed day."—R. *v.* HINCKS (1879), 2 L. N. 421 ; 24 L. C. J. 116.—**CAN.**

l. ——.] — A writing whereby a banker acknowledges the receipt of a sum of money repayable in ten years, after one year's notice in writing, bearing interest at 15 per cent., payable monthly, is not a deposit, but is a loan at interest.—ALLARD *v.* DEMERS (1915), Q. R. 48 S. C. 54.—**CAN.**

m. *At what place payment enforceable.*]—L. whose domicil was in Nova Scotia, had, when he died, $90,000 on deposit in the branch of the B. Bank at St. John, N.B. The deposit receipt provided that the amount would be accounted for by the bank on surrender of the receipt & would bear interest at the rate of 3 per cent. per annum. Fifteen days' notice was to be given of its withdrawal. L.'s exors., on demand of the manager at St. John, took out ancillary probate of his will in that city & were paid the money :—*Held :* no obligation rested on the bank in London, or at any agency, except at St. John, to repay the money covered by the deposit receipt.—R. *v.* LOVITT, [1912] A. C. 212, P. C.—**CAN.**

n. *Deposit on trust—No acceptance by bank on behalf of donees.*]—A grandfather deposited a sum of money with a bank in trust for or in the name of his grandchildren, who were still under the guardianship of their mother :—*Held :* the receipt by the bank of the deposit without any intention to accept it on behalf of the alleged donees as a donation to them did not amount to such an inchoate acceptance as would become complete upon its being ratified on their behalf after the death of the donor.—DE KOCK *v.* VAN DE WALL'S EXECUTORS & OTHERS (1899), 16 S. C. 463 ; 9 C. T. R. 496.—**S. AF.**

o. —— *Not established.*]—O., parish priest of B., on June 15, 1905, lodged £60 for Masses on deposit receipt in the branch of the K. Bank. The deposit receipt was as follows : "Received from the parish priest of B. the sum of £60 for Masses, to be accounted for at our office here." On the same day he lodged on deposit receipt in the same bank in a similar form a sum of £50 for repairs & building to church. On the same day he also lodged two sums of £385 each in the joint names of himself & each of two nieces. This was done in consequence of a conversation with the bank manager, during which O. stated that he wished to give the two sums of £50 & £60 for the purposes mentioned, but he did not wish to make a will. Two days after O. drew out the £50 lodged on deposit receipt for repairs to the church, & placed the amount to the credit of his current account. On Sept. 21, 1905, O. lodged a sum of £100 on deposit receipt in the same bank for repairs & building to the church. This was done in consequence of a conversation with the bank manager, at which two other persons were present, in which O. stated that he desired to leave this sum of money to his successor for repairs to the church. This £100 was made up by taking £50 from each of the deposit receipts in favour of the nieces. O. died on Nov. 15, 1905 :—*Held :* as the money on deposit receipt remained in the possession & under the control of O. during his life, the relationship of the bank & O. was that of debtor & creditor, & a valid trust had not been created.—O'FLAHERTY *v.* BROWNE, [1907] 2 I. R. 416.—**IR.**

p. *Insurance of money on deposit—"Default in repayment" by bank.*]—Pursuer, having lent money on deposit-receipt to a bank, insured the deposit with defenders, an insurance co., who guaranteed payment of the deposit with interest, if the bank made default in repayment of the deposit for more than twenty-one days after the date named in the receipt. The policy was subject (*inter alia*) to the condition that the assured on receiving payment should hand over to the assurers "the deposit & all his rights in respect thereof." The deposit was due to be paid on May 15 1893. On Apr. 4 the bank suspended payment. On Apr. 26 a scheme of compromise was sanctioned, which transferred the liability of the bank to a new co. On June 19 this scheme was approved :—*Held :* the bank made default by failing to repay the deposit when it became due, & pursuer satisfied the condition of the policy by offering to transfer the deposit & his rights in respect thereof as then existing, & was entitled to a decree for the amount of his deposit receipt.—LAIRD *v.* SECURITIES INSURANCE CO., LTD. (1895), 32 Sc. L. R. 319.—**SCOT.**

q. *Payment to duly authorised person—Effect.*]—Where money mentioned in a deposit receipt is immediately payable & the receipt is presented duly indorsed together with an order to pay a given individual, that individual becomes the owner of the money upon payment by the banker or upon his promise to hold the money at the disposal of the payee.—SETHNA *v.* HEMINGWAY (1914), I. L. R. 38 Bom. 618.—**IND.**

Sect. 3.—Receipt of money on deposit account: Subsects. 1 & 2.]

against the estate of the two surviving partners for the amount of their claims, but those who had deposits prior to the admission of the new partners desired to prove against the estate of A. Three test cases were taken, one in which the deposit receipt had not been changed since the new partners had been admitted; another, where the note had been changed & the account increased; another, where the note had been changed & the account diminished. All the depositors had received interest from the new partners:—*Held:* in all three cases there had been complete novation, & the depositors were not entitled to prove against A.'s estate.—BILBOROUGH *v.* HOLMES (1876), 5 Ch. D. 255; 46 L. J. Ch. 446; 25 W. R. 297; *sub nom.* BILLBOROUGH *v.* HOLMES, 35 L. T. 759.

Annotations:—**Consd.** Rouse *v.* Bradford Banking Co., [1894] 2 Ch. 32, C. A. **Refd.** Scarf *v.* Jardine (1882), 7 App. Cas. 345, H. L.; *Re* Head, Head *v.* Head, [1893] 3 Ch. 426.

398. —— —— ——.]—The acceptance by a customer, from the surviving partner of a banking firm, of a fresh deposit note for the balance of a debt due from the firm, one of whose partners is dead, is not sufficient evidence of novation to discharge the estate of the deceased partner.—*Re* HEAD, HEAD *v.* HEAD, [1893] 3 Ch. 426; 63 L. J. Ch. 35; 69 L. T. 753; 42 W. R. 55; 3 R. 712.

Annotations:—**Distd.** Friend *v.* Young, [1897] 2 Ch. 421. **Refd.** Rouse *v.* Bradford Banking Co., [1894] 2 Ch. 32, C. A.

399. —— —— —— **Transfer from current account.**]—A customer of a banking partnership, after the death of one of the partners, removed money from his current account to a deposit account bearing interest at the same bank, & received a deposit note from the surviving partner:—*Held:* there was sufficient evidence of novation to discharge the estate of the deceased partner from liability for the amount placed on deposit.

This case is the same as if the customer had drawn a cheque for the £500, & received the money across the counter, & then gone to the other side of the bank where the deposit accounts were kept, & opened a deposit account there by depositing the same £500. There was in effect payment out from the current account when the customer gave notice for the money to be on deposit, & a new contract was then entered into (LOPES, L.J.).—*Re* HEAD, HEAD *v.* HEAD, [1894] 2 Ch. 236; 63 L. J. Ch. 549; 70 L. T. 608; 42 W. R. 419; 38 Sol. Jo. 385; 7 R. 167, C. A.

400. Payment to unauthorised person—Liability of bank.]—A., deceased, deposited with a bank £200 for which he held two accountable receipts, carrying interest. After his death, B., his nephew, having got possession of the receipts, fraudulently indorsed his own name thereon, & the bank in ignorance cashed same, & then cancelled them. The administrator of A. filed his bill against the bank, praying an account, discovery, & payment; or, in the alternative, the delivery up of the documents:—*Held:* (1) pltf. was entitled to delivery up of the receipts, which had wrongfully come into

400 i. *Payment to unauthorised person—Liability of bank.*]—A factor, who had power to superintend the management of the estate, but not to draw the money of his constituent out of his bank account, uplifted from a bank a sum standing in his constituent's name on a deposit receipt. No action was brought till the factor was dead, & till thirteen years had elapsed. Factorial accounts had been settled between the constituent & the exors. of the factor, & the constituent failed to prove that the factor had unwarrantably obtained possession of the bank receipt & drawn the money:—*Held:* the constituent not entitled to recover as against the bank.—STEWART *v.* CENTRAL BANK OF SCOTLAND (1859), 21 Dunl. (Ct. of Sess.) 1180; 31 Sc. Jur. 644.—**SCOT.**

400 ii. —— ——.]—A., who had placed £100 on deposit receipt with a bank, wrote from abroad to the bank requesting them to pay £60 out of the £100 to his brother, who was unknown to the bank, on presentation of the indorsed receipt. At the same time A. wrote to his brother, enclosing the indorsed receipt & a letter addressed to the bank in similar terms to the letter sent direct to them. The letter to the brother was stolen in the course of post. Thereafter a person, pretending to be the brother, presented the indorsed receipt & letter to the bank, & after having been required to indorse the receipt himself, which he did in the brother's name, received payment of the money:—*Held:* the bank, being authorised to pay the money only to A.'s brother, & having in fact paid it to someone else, must bear the loss.—WOOD *v.* CLYDESDALE BANK, LTD., [1914] S. C. 397.—**SCOT.**

400 iii. —— ——.]—A sum forming part of a trust estate was deposited with a bank on a consignation receipt bearing that the money was received from the truster's exors. & was to be payable on the signature of a legal firm, who were the law agents to the trust. The firm was subsequently dissolved; & some years afterwards B., one of the former partners, indorsed the receipt with the firm name, & uplifted & embezzled the money. In an action against the bank at the instance of the beneficiaries under the trust for payment of the sum deposited:—*Held:* as the uplifting of the deposit was necessary, either to wind up the affairs of the partnership or to complete transactions begun but unfinished at the time of the dissolution of the firm, within Partnership Act, 1890 (c. 39), s. 38, the bank was warranted in paying over to B. the money deposited; & action dismissed as irrelevant.—DICKSON *v.* NATIONAL BANK OF SCOTLAND, [1917] S. C. (H. L.) 50; 54 Sc. L. R. 449, H. L.—**SCOT.**

400 iv. —— —— *Payment after depositor's death.*]—In an action by L.'s administratrix to recover a sum deposited by L. in his lifetime with defts., defts. pleaded that (1) the moneys were claimed under a deposit receipt, which, after L.'s death & before defts. had any notice or knowledge thereof, was duly presented to defts. properly indorsed by L., & defts. in due course of business, & in their usual mode of dealing with such receipts, paid the sum mentioned therein to the person presenting same with L.'s indorsement thereon, & defts. took up & had ever since held same, as they were entitled to do; (2) L. in his lifetime indorsed & delivered the receipt to B., his wife & afterwards his widow, who, being possessed thereof by virtue of the indorsement, presented it to defts., who, without any notice or knowledge of L.'s death, duly paid same to her:—*Held:* both pleas were bad.—LEE *v.* BANK OF BRITISH NORTH AMERICA (1879), 30 C. P. 255.—**CAN.**

400 v. —— —— *Whether depositor estopped from claiming.*]—Pltf., an ignorant man, & a foreigner, deposited a sum of money with defts. on Sept. 24, 1884, & received from them a non-negotiable deposit receipt for the amount, in which it was stated that defts. would "account to" pltf. therefor, etc., & pltf.'s signature was left with defts. for the purpose of identification. Pltf. left the receipt with S. for safe keeping, & went away. In Apr., 1885, S. informed him that he had drawn the money, & promised to return it. Defts. had paid the money without proper identification, & without comparison of the signature of S. with that of pltf. Ignorant of the method by which the money had been obtained & of his rights against defts., pltf. did nothing further until Dec., when pltf. was informed of his rights, & consulted a solr., who failed to attend to the matter. In Apr. 1886, pltf. consulted another solr., when a demand was made on defts., & on their refusal an action was brought:—*Held:* (1) pltf.'s failure to make a demand or sue defts., when he first heard his money had been obtained by S., did not operate against him so long as his claim was not barred by Stat. Limitations; (2) no legal duty was cast on pltf. to notify defts.—SADERQUIST *v.* ONTARIO BANK (1887), 14 O. R. 586; 15 A. R. 609.—**CAN.**

400 vi. —— —— ——.]—S., a shipmaster, deposited $1,000 with a bank in 1883, & received a deposit receipt. He left the receipt with R., the managing owner of his vessel. Soon afterwards he went to sea & remained away till July, 1887. In Dec. 1884, R. took the receipt to the bank with the name of S. indorsed on it, & gave the receipt to the bank, receiving a deposit receipt for the same amount payable to himself. On the return of S., R. admitted that he had drawn the money & used it, & upon S. threatening him with criminal proceedings he begged S. not to expose him, & said that if he would wait he would pay him, & he gave R. a bill of exchange & a mtge. S. said nothing to the bank about the matter, but went away again & did not return for two years. R. left the country in Nov., 1888. On the return of S. in July, 1889, finding that the bill was dishonoured & that nothing was realised on the mtge., he demanded the money from the bank, & on their refusal to pay brought an action for the amount:—*Held:* S. was estopped by his conduct from recovering against the bank.—SCOTT *v.* BANK OF NEW BRUNSWICK (1891), 31 N. B. R. 21.—**CAN.**

r. *Payment refused — Claim by third party—Interpleader.*]—Pltf. deposited with defts. a sum of money on fixed deposit for six months. It was afterwards claimed by the assignees of the insolvent estate of pltf.'s father, but no notice of the nature of the claim was given. Pltf. presented the deposit receipt & demanded payment, which was refused. She then commenced an action against defts. for damages for

the possession of the bank; (2) equity would assume jurisdiction at once to decree payment, though the demand was purely legal.—PEARCE *v.* CRESWICK (1843), 2 Hare, 286; 12 L. J. Ch. 251; 7 Jur. 340; 67 E. R. 118.

Annotations:—**Consd.** Lawrence *v.* Austin, Durell *v.* Pritchard (1865), 6 New Rep. 308. **Refd.** Green *v.* Pledger (1844), 3 Hare, 165; Cooke *v.* Darwin (1853), 18 Beav. 60. **Mentd.** Shepard *v.* Brown (1862), 4 Giff. 208.

401. —— ——.]—Pltf. held a deposit receipt upon the terms that the money should be accounted for to her or anyone authorised by her to receive it, on production of the document with her receipt indorsed thereon. Pltf. parted with the deposit receipt to L., to secure (as she alleged) a trifling loan. L. subsequently obtained payment from defts. on delivery up of the deposit receipt purporting to be signed by pltf. Pltf. alleged her signature was a forgery. Defts. cashed the note after requiring proof of identity:—*Held:* (1) pltf. was entitled to recover & was not estopped, even if the signature was genuine, because defts. had not relied on the signature; (2) the document was a receipt & did not purport to be an authority.—EVANS *v.* NATIONAL PROVINCIAL BANK OF ENGLAND (1897), 13 T. L. R. 429.

402. Withdrawal conditional on production of deposit note—Statute of Limitations.—*Semble:* where money is paid to a deposit account upon the terms that it shall be repayable upon notice or production of the deposit note, Stat. Limitations will only commence to run after the money has become repayable in accordance with the prescribed conditions.—*Re* TIDD, TIDD *v.* OVERELL, [1893] 3 Ch. 154; 62 L. J. Ch. 915; 69 L. T. 255; 42 W. R. 25; 9 T. L. R. 550; 37 Sol. Jo. 618; 3 R. 657.

403. Deposit in foreign currency—Repayment.]—A deposit of roubles equivalent to £7,000 at the rate of ten roubles to the pound, which had been lodged with defts.' head office in Petrograd, was credited to an account in London & held at pltf.'s disposal in Russian currency according to statement made in 1914 to pltfs. by the London branch of defts. In Feb., 1918, pltfs. demanded payment from defts. in London in specie, but defts. refused & denied that they were, by any agreement or by the practice of bankers in London or in Petrograd, under any obligation to pay in London the amount either in Russian currency, or in Russian gold or silver specie. Metallic coinage was no longer current in Russia:—*Held:* (1) defts. were not bound to pay in Russian coin, but must pay in English currency such a sum as was represented by the roubles held by them, both Imperial Russian notes & Kerensky (but not Bolshevist) notes being treated as currency; (2) pltfs. were not entitled to be paid in specie.—LINDSAY, GRACIE & CO. *v.* RUSSIAN BANK FOR FOREIGN TRADE (1918), 34 T. L. R. 443.

SUB-SECT. 2.—RECEIPTS ON DEPOSIT.

404. Promissory note given—Material alteration in note.]—A. deposited money with B., a banker,

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not paying the deposit receipt & for money lent:—*Held:* an order staying proceedings & ordering pltf. & claimants to interplead was rightly made.—MCGUINESS *v.* BANK OF NEW SOUTH WALES & CHERRY (1880), 1 N. S. W. L. R. 97.—**AUS.**

s. —— —— ——.]—A. lodged money of B.'s at a bank, took a deposit receipt in the name of B., & afterwards lodged a small additional sum, & took a deposit receipt for the whole, by B.'s authority, in the name of B.'s daughter, X., stating it was a provision for her. After B.'s death, A. refused to give the deposit receipt to X., & set up a claim to the money as B.'s administrator. The bank refusing to pay X. without the receipt, X. & A. brought actions against it:—*Held:* the effect of the dealing was conclusively to constitute the bank debtor of X. only, & they could not sustain an interpleader suit.—COCHRANE *v.* O'BRIEN (1845), 8 I. Eq. R 241; 2 Jo. & Lat. 380.—**IR.**

t. —— *Deposit subject to special notice of withdrawal — Measure of damages.*]—A bank having received a deposit subject to a special notice of withdrawal, if required, cannot set up as a defence to an action for the deposit the absence of such notice, unless the refusal to pay was based on that ground.—HENDERSON *v.* BANK OF HAMILTON (1895), 25 O. R. 641; 22 A. R. 414.—**CAN.**

u. *Set-off of debt on promissory note against deposit.*]—A testator, having a deposit to his credit in a bank at the time of his death, was indebted to the bank on a note under discount, which had not then matured. The deposit remained with the bank until after the maturity of the note:—*Held:* the deposit not having been withdrawn or demanded before maturity of the note, the bank was entitled to set off the debt on the note against the deposit, & to rank for the balance.—ONTARIO BANK *v.* ROUTHIER (1900), 32 O. R. 67.—**CAN.**

w. *Deposit account changed into joint names—Presumption of gift to survivor.*]—Testator, having moneys on deposit in certain banks, some time before his death, with the consent of the banks, made such moneys payable either to himself or his wife, & in two instances took new deposit receipts in their joint names with the right to the survivor to withdraw the moneys:—*Held:* as the deposit accounts were changed & put in their joint names as a matter of convenience & not with the intention of vesting the moneys in testator's wife, no presumption of advancement was to be raised.—BELYEA *v.* DIOCESAN SYNOD OF FREDERICTON (1912), 10 E. L. R. 48.—**CAN.**

a. *Order to bank — Whether direction to change deposit account into joint names.*]—Six months before her death, & when laid up in hospital with bronchitis, A. wrote to a bank, "Arrange my money in B.'s name so she can draw it":—*Held:* such order did not constitute B. a joint owner of the money on deposit, but was only given for the convenience of A.—EVERLEY *v.* DUNKLEY (1912), 23 O. W. R. 415; 4 O. W. N. 406; 27 O. L. R. 414; 8 D. L. R. 839.—**CAN.**

b. *Joint deposit by two—Death of one—Right of survivor—Against administrator.*]—A sum of money was deposited in a bank, for which a receipt was given in the following words: "Received from P. C. & H. C., to be drawn by either of them, or the survivor. $1,400, for which we are accountable, with interest, on receiving fifteen days' notice." On P. C.'s death:—*Held:* the right to receive the money vested in H. C., & P. C.'s administrators could not recover it from the bank.—CONDON *v.* BANK OF BRITISH NORTH AMERICA (1870), N. B. Dig. 376.—**CAN.**

c. —— —— —— *To sue — Set-off.*]—Where moneys are deposited in a bank in the joint names of two depositors, & nothing more is said when the deposits are made, the liability as between the depositors & the bank is to the two jointly, & the right to sue in respect of it inures to the surviving creditor only.

A bank held a number of notes made by the survivor of two such depositors which it had discounted for deceased depositor. These notes all matured before the deposit receipts matured. On Mar. 3, 1895, the day on which the depositor died, one of these notes was overdue; the others were of various dates & current. On Mar. 4, 1895, notice was given to the bank that the deposits were affected by a trust. When the deposits were made the bank had no notice of any trust:—*Held:* the rights of the parties were fixed on Mar. 4, when the bank first received notice of the trust, & the bank entitled to set off the amount of the notes against the deposits.

By memorandum dated Jan. 17, 1895, deceased depositor agreed to sub-mtge. to the bank, to secure his overdraft, mtges. representing a sum of £300 given to him by the surviving depositor. The sub-mtge. was never executed, & it did not appear that on Mar. 4 1895, the surviving depositor had any knowledge of the agreement. The principal moneys secured by the mtges. did not necessarily become due till after the maturity of the deposit receipts:—*Held:* the mtge. moneys could not be set off against the deposits.—DOWNES *v.* BANK OF NEW ZEALAND (1895), 13 N. Z. L. R. 723.—**N.Z.**

d. —— *Claim to retain against debt due by one.*]—A deposit receipt was granted by a bank, bearing that a sum of money had been received from A. & B., "payable to either or the survivor of them." In an action by B. with concurrence of A. against the bank for payment of the sum in deposit receipt, the bank averred that the money truly belonged to A., & pleaded that they were entitled to retain it in security of a debt of larger amount due to them by A.:—*Held:* the defence stated was irrelevant, & the bank was bound in respect of the express terms of their deposit receipt to make payment to B.—ANDERSON *v.* NORTH OF SCOTLAND BANK (1901), 4 F. (Ct. of Sess.) 49; 39 Sc. L. R. 75 9 S. L. T. 249.—**SCOT.**

PART II. SECT. 3, SUB-SECT. 2.

e. *Obtained by misrepresentation — Rights of bank.*]—Money was lodged in a bank on deposit receipts in the names of M. & E., who at the time of the lodgment represented herself to be a widow, although the wife of F., & M. & E. subsequently exchanged such receipts for a new one in the name of M. alone. E. still representing herself as a widow. The money originally lodged was admitted by M. & E. to be money of W

Sect. 3.—Receipt of money on deposit account: Subsects. 2 & 3.]

on the terms of having a deposit note, by which B. should engage to pay the principal, at ten days' sight, with 3 per cent. interest, until the day of acceptance. A note was given accordingly. On receiving interest on this note, A. was told that B. could not afford to pay more than 2½ per cent. in future, & "3" was struck out, & "2½" inserted instead:—*Held:* (1) the note became void by the alteration for want of a fresh stamp, but it could be used to show the terms on which the money was deposited, & deft. was liable on the debt created by the original loan; (2) the term "acceptance" in such instrument meant "demand"; & as the maker had no option to exercise, the note need not be left with him for acceptance.—SUTTON *v.* TOOMER (1827), 7 B. & C. 416; 1 Man. & Ry. K. B. 125; 6 L. J. O. S. K. B. 49; 108 E. R. 779.

Annotations:—**Expld.** Serle *v.* Norton (1842), 9 M. & W. 309; Ashling *v.* Boon, [1891] 1 Ch. 568.

405. —— Presentment for payment of interest—Statute of Limitations.]—From 1825 to 1837 A., B. & C. carried on business in partnership as bankers, & during that period D. deposited with them various sums of money, for which the bank gave him promissory notes in the following form:—"I promise to pay three months after sight D. or order £——, with interest at £3 10*s.* per cent. per annum, Jan. 21, 1826. For A. & Co. (signed) B." A. died in 1837, & B. & C. continued the business until 1842. Interest was paid yearly on the notes by A., B. & C., & by B. & C. after A.'s death up to Dec., 1842, the payment being indorsed upon the notes & the indorsement signed by one of the partners or their clerk. D. filed a bill against the exors. of A. & the devisees under his will to recover the amount of the notes. Defts. set up Stat. Limitations:—*Held:* the presentment of the notes for payment of the interest was a "sight," & the stat. began to run from such presentment.—WAY *v.* BASSETT (1845), 5 Hare, 55; 15 L. J. Ch. 1; 6 L. T. O. S. 118; 10 Jur. 89; 67 E. R. 825.

Annotations:—**Mentd.** Brown *v.* Gordon (1852), 16 Beav. 302; Fordham *v.* Wallis (1853), 10 Hare, 217; *Re* Macdonald, Dick *v.* Fraser, [1897] 2 Ch. 181.

406. Given under mistake of fact—Rights of bank.]—A banker is at liberty to prove that a deposit receipt was given under a mistake of fact.—TIMMINS *v.* GIBBINS (1852), 18 Q. B. 722; 21 L. J. Q. B. 403; 19 L. T. O. S. 181; 17 Jur. 378; 118 E. R. 273.

Annotation:—**Mentd.** Woodland *v.* Fear (1857), 7 E. & B. 519.

407. Whether "securities for money"—Drawing cheques against deposit note payable on demand.]—Bankers' deposit notes in the following form:—"Received of A. B. £150 to account for or on demand" are not "securities for money" so as to pass under a bequest in a will of all testator's "bonds, promissory notes & other securities for money & the money secured thereon."

Semble: a cheque can be drawn against deposit note payable on demand.—HOPKINS *v.* ABBOTT (1875), L. R. 19 Eq. 222; 44 L. J. Ch. 316; 31 L. T. 820; 23 W. R. 227.

408. Subject of donatio mortis causâ—Death of testator before completion of gift—Practice of bank.]—A testator, who held a banker's deposit note for £2,700, in his last illness, two days before his death, expressed a wish to give £500, part of the amount, to his wife. At his request a friend filled up a seven days' notice to the bank to withdraw the deposit, & testator signed it. The friend then took the notice to the bank. Testator afterwards signed a form of cheque, which was on the back of the note, "Pay self or bearer £500." The note was then handed to the wife. Testator died before the expiration of the seven days' notice. The practice of the bank was, when a customer withdrew part of a sum which he had placed on deposit, to give him a fresh note for the balance:—*Held:* there had not been a valid *donatio mortis causâ* of the £500, as the cheque for that amount was not payable till after testator's death.—*Re* MEAD, AUSTIN *v.* MEAD (1880), 15 Ch. D. 651; 50 L. J. Ch. 30; 43 L. T. 117; 28 W. R. 891.

Annotations:—**Follid.** Clement *v.* Cheesman (1884), 54 L. J. Ch. 158. **Distd.** *Re* Dillon, Duffin *v.* Duffin (1890), 44 Ch. D. 76, C. A. **Refd.** *Re* Farman, Farman *v.* Smith (1887), 57 L. J. Ch. 637; *Re* Beaumont, Beaumont *v.* Ewbank, [1902] 1 Ch. 889.

409. Assignment by indorsement & delivery—Appointment of assignee as executor.]—The indorsement & delivery over of a banker's receipt, with the intention to make a gift, constitute a good equitable assignment, even though the receipt itself is on its face declared to be not transferable, & no notice is given to the bank. Such an assignment, even if incomplete, is perfected after the death of the assignor by the appointment of the

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F. apprised the bank that E. was his wife after the deposit receipt had been given to M., & brought an action against the bank for the money which was originally lodged by E. M. also brought an action against the bank on his deposit receipts:—*Held:* as the deposit receipt to M. had been obtained by a misrepresentation, the bank was entitled to an injunction to stay the actions.—COSTELLO *v.* MARTIN (1867), 1 I. L. T. Jo. 82.—**IR.**

f. *Re-issue of—Not new investment.*]—*Semble:* the re-issue by a bank, according to its practice, of new deposit receipts, whenever interest is drawn, does not amount to a new investment.—FOX *v.* F. (1863), 15 I. Ch. R. 90.—**IR.**

g. *Transfer of beneficial interest in—Assignment unnecessary.*]—In order to transfer the beneficial interest in a deposit receipt, a written assignment is unnecessary. It is sufficient if the deposit receipt is surrendered to the bank, & a new deposit receipt taken out, with intent to pass the beneficial interest, in the names of the persons to whom the depositor intends to pass the beneficial interest.—MCENEANEY *v.* SHEVLIN, [1912] 1 I. R. 278.—**IR.**

h. *Not testamentary disposition.*]—A brother invested £400 belonging to himself & his sister on a deposit receipt with a bank in England in their joint names repayable to them or the survivor of them. The brother survived the sister four days. The deposit receipt was in the possession of the sister at the time of her death; & in her will she declared that "it was never my intention that the deposit receipt should be issued as repayable to the survivor":—*Held:* (1) while any question between the depositors & the bank might very well be governed by English law, any question between the depositors themselves or their representatives must be governed by Scots law; (2) by Scots law, a deposit receipt taken in the name of the depositor & another or the survivor was not liable as a testamentary disposition, & the property was not effectually transferred from the predecessor to the survivor.—DINWOODIE'S EXECUTORS *v.* CARRUTHERS' EXECUTOR (1895), 23 R. (Ct. of Sess.) 234; 3 S. L. T. 188.—**SCOT.**

408 i. *Subject of donatio mortis causâ.*]—A deposit receipt in the ordinary form used by banks may be the subject of a *donatio mortis causâ*, & this is so although the receipt is expressed to be not transferable.—CASSIDY *v.* BELFAST BANKING CO. (1887), 22 L. R. Ir. 68.—**IR.**

408 ii. —— *What amounts to donatio mortis causâ.*]—M., shortly before his death, indorsed a bank deposit receipt & delivered it to S., stating that it was for his (M.'s) niece K.; S. indorsed the document, &, after M.'s death, presented it to the bank, who transferred the amount to S. without having had notice of M.'s death:—*Held:* the transaction did not amount to a *donatio mortis causâ.*—MOORE *v.* ULSTER BANKING CO. (1877), I. R. 11 C. L. 512.—**IR.**

408 iii. —— ——.]—A sum of money deposited in bank in the name of an unmarried woman continued so deposited for twenty years after her marriage with her husband's knowledge, & to the date of his death. It was questionable whether he knew that the money was his, or whether he believed it to belong to his wife, but he evinced an intention that she should succeed to all his property in the event of her surviving him:—*Held:* these circumstances, combined with the parol testimony of the wife, sufficiently established a *mortis causâ* donation in her favour.—GIBSON *v.* HUTCHISON (1872), 10 Macph. (Ct. of Sess.) 923.—**SCOT.**

assignee as his exor.—*Re* GRIFFIN, GRIFFIN *v.* GRIFFIN, [1899] 1 Ch. 408; 68 L. J. Ch. 220; 79 L. T. 442; 15 T. L. R. 78; 43 Sol. Jo. 96.

Annotation:—**Refd.** *Re* Smith, Bull *v.* Smith (1901), 84 L. T. 835.

410. Whether negotiable instrument.]—A deposit note is not a negotiable instrument.—*Re* DILLON, DUFFIN *v.* DUFFIN (1890), 44 Ch. D. 76; 59 L. J. Ch. 420; 62 L. T. 614; 38 W. R. 369; 6 T. L. R. 204, C. A.

Annotations:—**Refd.** *Re* Andrews, Andrews *v.* Andrews, [1902] 2 Ch. 394. **Mentd.** *Re* Weston, Bartholomew *v.* Menzies, [1902] 1 Ch. 680; *Re* Beaumont, Beaumont *v.* Ewbank, [1902] 1 Ch. 889; *Re* Wasserberg, Union of London & Smiths Bank *v.* Wasserberg, [1915] 1 Ch. 195; *Re* Lee, Treasury Solicitor *v.* Parrott (1918), 87 L. J. Ch. 594.

411. Loss of deposit note—Refusal of bank to pay.]—*Semble:* if a deposit note is lost a banker cannot refuse to pay.—*Re* DILLON, DUFFIN *v.* DUFFIN (1890), 44 Ch. D. 76; 59 L. J. Ch. 420; 62 L. T. 614; 38 W. R. 369; 6 T. L. R. 204, C. A.

Annotations:—**Mentd.** *Re* Weston, Bartholomew *v.* Menzies, [1902] 1 Ch. 680; *Re* Beaumont, Beaumont *v.* Ewbank, [1902] 1 Ch. 889; *Re* Andrews, Andrews *v.* Andrews, [1902] 2 Ch. 394; *Re* Wasserberg, Union of London & Smiths Bank *v.* Wasserberg, [1915] 1 Ch. 195; *Re* Lee, Treasury Solicitor *v.* Parrott (1918), 87 L. J. Ch. 594.

SUB-SECT. 3.—INTEREST ON DEPOSITS.

412. Compound interest—Annual balance of accumulated interest—Death of customer.]—A Scotsman in Calcutta opened an account with a banking house there in 1786, & died in May, 1810, having been insane from 1793. In 1812 the firm rendered an account current from 1787 to Apr. 30, 1810, to the customer's relatives, bringing out annual balances in his favour, composed of annual accumulations of Indian interest, the last balance expressed "to bear interest at 9 per cent. per annum." In 1835 the personal representatives of the customer sued on the account current, claiming interest at 9 per cent. on the last balance & upon the annual accumulations thereof:—*Held:* the debt did not carry compound interest from 1810.—FERGUSSON *v.* FYFFE (1841), 8 Cl. & Fin. 121; 8 E. R. 49, H. L.

Annotations:—**Consd.** Crosskill *v.* Bower, Bower *v.* Turner (1863), 32 Beav. 86; Williamson *v.* Williamson (1869), 20 L. T. 389. **Refd.** Barfield *v.* Loughborough (1872), 8 Ch. App. 1, L.C.

413. Ordered by court—Judgment for balance of money deposited—Rate usually allowed by bank.]—On a judgment recovered against bankers for a balance due from them of money deposited in their bank by a customer:—*Held:* interest should be added, after the same rate at which it was the usage of the bank to allow it to their customers.—IKIN *v.* BRADLEY (1818), 5 Price, 536; 8 Taunt. 250; 2 Moore, C. P. 206; 146 E. R. 687, Ex. Ch.

414. Agreement that interest not payable—Refusal to repay—Whether subsequent interest payable.]—V. & Co., bankers, were assignees of a judgment obtained in Scotland against H. for £4,100. In 1829 H. deposited with V. & Co. £4,100, & by a memorandum in writing it was agreed that that sum should be deposited in their hands for safe custody on account of H., & that from the time such deposit should be made & during its continuance V. & Co. were not to pay any interest thereon, & all interest should cease in respect of the amount due upon the judgment. H. afterwards became bkpt., & his assignees demanded from V. & Co. the £4,100, which they refused to pay:—*Held:* they were not liable to pay interest on that sum from the time when payment of the principal was demanded.—EDWARDS *v.* VERE (1833), 5 B. & Ad. 282; 2 Nev. & M. K. B. 120; 2 L. J. K. B. 190; 110 E. R. 795.

415. Claim to increased rate—Uncommunicated resolution before stoppage—Power of liquidator to allow.]—In the winding-up of a joint-stock banking co. the creditors on deposit claimed interest at 4½ per cent., being an increase on the previous rate, by virtue of a resolution passed by the directors shortly before the stoppage of the bank, but not communicated to the depositors, & a subsequent

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410 i. *Whether negotiable instrument.*]—Deposit receipts for money, given by a bank, are not negotiable instruments in equity any more than at law so as to entitle the holder to demand payment of the fund secured by them.—MANDER *v.* ROYAL CANADIAN BANK (1871), 20 C. P. 125; 21 C. P. 492.—**CAN.**

410 ii. ——.]—A certificate of deposit in a bank is a negotiable instrument, & is transferable by indorsement & delivery.—VOYER *v.* RICHER (1873), L. R. 5 P. C. 461; 5 R. L. 591.—**CAN.**

410 iii. ——.]—A bank issued deposit receipts in the following form: "Received from . . . the sum of $ . . ., which this bank will repay to . . . or order, with interest at 4 per cent. per annum, on receiving fifteen days' notice. No interest will be allowed unless the money remains with this bank six months. This receipt to be given up to the bank when payment of either principal or interest is required":—*Held:* it was competent under Bank Act, R. S. C., c. 120, to issue such deposit receipts, &, even if they did not possess all the incidents of promissory notes, yet they were so far negotiable as to pass a good title to a *bonâ fide* purchaser for value taking without notice of any infirmity of title. *Semble:* the deposit receipts were negotiable instruments under which the holders were entitled to recover as upon a promissory note made by the bank.—*Re* CENTRAL BANK, MORTON & BLOCK'S CLAIMS (1889), 17 O. R. 574; 30 C. L. T. 424.—**CAN.**

410 iv. ——.]—Circumstances (*see ante*) in which held the deposit receipt was not a negotiable instrument passing by indorsement.—MOORE *v.* ULSTER BANKING CO. (1877), I. R. 11 C. L. 512.—**IR.**

k. *Deposit receipt unable to be produced—Refusal of bank to pay.*]—M. deposited a sum with pltfs., & absconded. The bank had given him a receipt, stating that the money was payable on the production of that document. L. was appointed official assignee, & demanded the money without producing the receipt, which never came into his possession. Pltfs. had notice of the attachment & of L.'s appointment:—*Held:* pltfs. ought to have paid over the money, & must do so.

A condition, on a bank deposit receipt, that the receipt shall, on payment, be given up to the bank, may not be void, but it does not entitle the bank to retain the money in case the receipt is not forthcoming; & the depositor is entitled, on proof of loss & indemnity (if required), to relief in equity.—BANK OF MONTREAL *v.* LITTLE (1870), 17 Gr. 685.—**CAN.**

l. *Market value less than sum payable on face—Value for probate.*]—Where the market value of a deposit receipt is less than the sum appearing as payable on the face of it, executors may treat the market price as the value for purposes of probate, though the bank in which the deposit is made is not insolvent.—MASTER IN EQUITY *v.* PEARSON (1896), 75 L. T. 526, P. C.—**AUS.**

m. *Evidence of payment into bank—Duplicate slip initialled.*]—A duplicate bank deposit slip initialled by a clerk & coming from the possession of pltfs. is admissible in evidence to prove a payment into a bank authorised by defts. to receive payments on their account.—CASEY *v.* WENTWORTH (1877 Knox, 16.—**AUS.**

n. *Liable to stamp duty.*]—Certain fixed deposit receipts were issued by deft. bank, upon its reconstruction under Joint Stock Cos. Arrangement Act, 1894, to persons who had deposited money with the bank before suspension. At the time of issuing the receipts no money passed between the bank & the depositors, the receipts being given simply in substitution for the receipts issued by the old bank for similar amounts in the aggregate, but payable at different & later dates:—*Held:* these receipts were liable to pay stamp duty.—A.-G. *v.* AUSTRALIAN JOINT STOCK BANK, LTD. (1894), 15 N. S. W. L. R. 240.—**AUS.**

PART II. SECT. 3, SUB-SECT. 3.

o. *On winding up of bank.*]—*Re* COMMERCIAL BANK OF MANITOBA, *Re* CLAIMS FOR INTEREST ON DEBTS PROVED (1894), 10 Man. L. R. 187.—**CAN.**

p. *Rate of interest in account stated—Estoppel.*]—Pltf. deposited money with defts., bankers, on Aug. 30, 1863. On Jan. 2, 1867, an account was stated & a balance found to be due to pltf. consisting of the original deposit & interest at 6 per cent. per annum. On Feb. 11, 1876, defts. proposed to pay pltf. such balance, together with interest on the original deposit at only 4 per cent. per annum:—*Held:* defts. were estopped from disputing pltf.'s demand for interest at 6 per cent.—MAKUNDI KUAR *v.* BALKISHEN DAS (1880), I. L. R 3 All. 328.—**IND.**

Sect. 3.—Receipt of money on deposit account: Sub-sect. 3. Sect. 4: Sub-sect. 1.]

letter from the liquidator to the effect that the increased rate would be allowed :—*Held :* the uncommunicated resolution was inoperative, & the liquidator had no power to make the bank liable for an increased rate of interest.—*Re* EAST OF ENGLAND BANKING CO. (1868), 4 Ch. App. 14 ; 38 L. J. Ch. 121 ; 19 L. T. 299 ; 17 W. R. 18, L.C. & L.JJ.

Annotations :—**Consd.** *Re* Bank of South Australia, [1895] 1 Ch. 578, C. A. ; Powell *v.* Lee (1908) 99 L. T. 284, D. C. **Mentd.** *Re* International Contract Co., Hughes' Claim (1872), L. R. 13 Eq. 623.

416. Agreement as to rate of interest—Moratorium—Effect of agreement.]—Pursuant to contracts between pltfs. & defts., who were bankers, pltfs., in July, 1914, deposited with defts. two sums of money, which were to bear interest at agreed rates less than 6 per cent. per annum & to be repayable on Aug. 14, 1914. Subsequently, on Aug. 6, 1914, a royal proclamation was made, which provided that such payments might be postponed to a specified date later than Aug. 14, 1914, & that payments so postponed should, "if not otherwise carrying interest," carry interest at the Bank of England rate current on Aug. 7, 1914, which proved to be 6 per cent. per annum. Defts. repaid the deposited sums on Oct. 31, 1914, before the period of postponement had expired :—*Held :* (1) between Aug. 14 & Oct. 31, 1914, the deposits did not carry interest under the express contract above mentioned, or any implied contract, or otherwise apart from the proclamation, & between those dates they were "not otherwise carrying interest" within the proclamation ; (2) pltfs. were entitled to interest upon them between those dates at the rate of 6 per cent. per annum.—COATS (J. & P.), LTD. *v.* DIRECTION DER DISCONTO GESELLSCHAFT (1916), 85 L. J. K. B. 973 ; 114 L. T. 594 ; 32 T. L. R. 351, C. A.

SECT. 4.—BANK-NOTES GENERALLY, BANKERS' DRAFTS, AND BANK POST BILLS, ETC.

Bank of England notes, *see* Part I., *ante*.

SUB-SECT. 1.—ISSUE AND PAYMENT OF BANK-NOTES.

417. Issue of notes—Country bank—Death of partner—Right of surviving partner.]—Under Bank Charter Act, 1844 (c. 32), the right of a country bank to issue notes belongs beneficially, on the death of a partner, to the surviving partner.—SMITH *v.* EVERETT (1859), 27 Beav. 446 ; 29 L. J. Ch. 236 ; 34 L. T. O. S. 58 ; 5 Jur. N. S. 1332 ; 7 W. R. 605 ; 54 E. R. 175.

Annotations :—**Mentd.** Mellersh *v.* Keen (1860), 28 Beav. 453 ; Robertson *v.* Quiddington (1860), 28 Beav. 529.

418. Retained banker's note—Interest payable—Whether express agreement necessary.]—Circumstances may show that interest is payable on a banker's note, which is retained, although there is no evidence of an express agreement to pay interest.—JACOMB *v.* HARWOOD (1751), 2 Ves. Sen. 265 ; 28 E. R. 172.

Annotations :—**Mentd.** Taner *v.* Ivie (1752), Belt's Sup. 386 ; Hoare *v.* Contencin (1779), 1 Bro. C. C. 27 ; Farr *v.* Newman (1792), 4 Term Rep. 621 ; Devaynes *v.* Noble, Sleech's Case (1816), 1 Mer. 539 ; Kendall *v.* Hamilton (1878), 3 C. P. D. 403, C. A. ; *Re* Hodgson, Beckett *v* Ramsdale (1885), 31 Ch. D. 177, C. A.

419. Unstamped note—Admissibility in evidence.]—An unstamped banker's promissory note may be given in evidence without any proof by the party tendering it that the bankers, by whom such note was issued, have complied with those rules which must be observed to enable bankers to issue their notes unstamped.—R. *v.* WILLIAMS (1845), 5 L. T. O. S. 433.

420. Loss of bank-note—Presumption of loss—Lapse of time.]—W. lost a bearer note of defts. He informed them of the loss & asked them to pay. They agreed to do so, if he entered into a bond with sureties to indemnify them. He never did so, but advertised his loss & subsequently died. More than six years afterwards his administratrix brought a bill insisting that there was a presumption of loss & that defts. were not entitled to require security :—*Held :* pltf. was not entitled to relief in equity.—WALMSLEY *v.* CHILD (1749), 1 Ves. Sen. 341 ; 27 E. R. 1070.

Annotations :—**Consd.** Grant *v.* Vaughan (1764), 1 Wm. Bl. 485. **Mentd.** Mossop *v.* Eadon (1810), 16 Ves. 430 ; Cockell *v.* Bridgeman (1841), 4 Beav. 499 ; Wright *v.* Maidstone (1855), 1 K. & J. 701.

421. Cut note—Loss of one half—Liability of bank.]—A traveller received a country bank-note in a provincial town, which he cut in two, & sent the halves on different days by the post, addressed to his employers in London. One half was stolen from the mail coach, & his employers received the other :—*Held :* they could not maintain an action against the makers of the note on producing the

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PART II. SECT. 4, SUB-SECT. 1.

417 i. *Issue of notes—Limited liability.*]—Companies Act, 1890 (No. 1,074), s. 162, indicates that the Legislature determined to allow banking cos. to be registered with limited liability in respect of their note issue provided they were formed under Companies Stat., 1864, but did not allow them to be registered with limited liability in respect of their note issue if they were existing cos. at the time of the passing of that Act, or were formed afterwards, but not under that Act, & decided to take advantage of the authority given to them to register under that Act.

No banking co. formed under Companies Act, 1890 (No. 1,074), has unlimited liability in respect of its note issue.—*Re* COMMERCIAL BANK OF AUSTRALIA (1893), 19 V. L. R. 333.—**AUS.**

417 ii. —— *Irish bank.*]—Action against the public officer of the Provincial Bank of Ireland for issuing notes in violation of Bank of Ireland Acts.—NICHOLS *v.* MURRAY, 2 Ir. L. Rec. (1st Ser.) 181.—**IR.**

417 iii. —— ——.]—The issue of notes is not an essential characteristic of a banker as defined in the several Acts constituting the banking Code of Ireland.—DAVIES *v.* KENNEDY (1868), 17 W. R. 305.—**IR.**

q. *Bank note payable to bearer—Rights of holder.*]—The holder of such a note may maintain an action on it though he has no beneficial interest in it, & holds it merely as the agent of the owner for the purpose of demanding payment.—ALLISON *v.* CENTRAL BANK (1859), 4 All. 270.—**CAN.**

r. *Notes suppressed—Putting into circulation retired notes.*]—A partner in a joint stock co. the notes of which have been suppressed by 7 Will. 4, c. 13, having retired the notes which were in circulation after the suppression, cannot put them into circulation again so as to bind the partnership.—HALL *v.* BUCK (1839), 1 Ont. Dig. 777.—**CAN.**

420 i. *Loss of bank-note—Bank restrained from setting up loss as defence.*]—In an action upon bank-notes made by defts., payable to bearer on demand at defts.' office, & lost before action, the ct. made an order, under Common Law Procedure Act, 1857, s. 53, restraining defts. from setting up as a defence the loss of such notes, upon indemnity given.—AUSTRALIAN JOINT STOCK BANK *v.* ORIENTAL BANK (1866), 5 N. S. W. S. C. R. 129.—**AUS.**

420 ii. —— ——.]—Bankers, upon an indemnity being given, will be restrained from setting up the loss of a bank-note as a defence to an action upon the note.—M'DONNELL *v.* MURRAY (1859), 9 I. C. L. R. 495 ; 5 Ir. Jur. 19.—**IR.**

420 iii. *S. P.* JEFFERSON *v.* ULSTER BANK (1900), 34 I. L. T. 58.—**IR.**

421 i. *Cut note—Loss of one half—Liability of bank.*]—The several Bank Acts in force in 1828 contained no authority for the banks requiring the affidavits, which they were in the habit of requiring, from persons claiming payment of half notes, viz., that the whole note was their property, & that the other half was lost or mislaid.—R. *v.* RORKE, 1 Ir. L. Rec. (1st Ser.) 519.—**IR.**

421 ii. —— —— —— *Note cut maliciously.*]—A person having cut in two the notes of the bank, for more safe transmission (as he alleged), & one set of the halves having been stolen, the Ct. of Session found that the bank was not bound to pay on production of the other set of halves, although the value of the

half of it which reached them safely, as the other half might have got into the hands of a *bonâ fide* holder for value.—MAYOR *v.* JOHNSON & EATON (1813), 3 Camp. 324, N. P.

Annotations :—**Refd.** Davis *v.* Tunnicliff (1838), 7 L. J. C. P. 238. **Mentd.** Ramuz *v.* Crowe (1847), 1 Exch. 167.

See, also, No. 443, *post.*

422. —— —— ——.]—A bank is bound to pay on production of the half of a bank-note upon being indemnified by the holder. In an action against country bankers to recover the amount of certain of their notes the halves of which were lost in transmission through the post, pltfs. applied for an order that, upon giving an indemnity, defts. might be restrained from setting up the loss of the notes as a defence. The order having been granted: —*Semble:* defts. would have been liable to pay without an indemnity, as any person taking a half-note would take it with notice.—REDMAYNE *v.* BURTON, LLOYD & Co. (1860), 2 L. T. 324.

423. Bank promissory note payable to bearer—Evidence of money had & received.]—The production of a bank promissory note, though it be payable to A. or bearer, is *primâ facie* evidence, in an action against the banker, of money had & received by him for the use of pltf.—KERR *v.* JAMES (1835), 1 Gale, 21.

424. Presentment for payment—Stoppage after cancellation—Subsequent renewal.] — Pltf., who kept cash with the bank, on Saturday left a note for £50 on C. & Co. On Monday the bank gave it to the runner, who left it at C. & Co.'s in the morning, where they cancelled the note, but when he called in the afternoon for the money according to his usual practice, he found C. & Co. had stopped payment, whereupon he took a new note of the same tenor & date:—*Held:* it would be dangerous to suffer persons to deal with notes in such manner, & the jury should only find the value of the note when cancelled.—HAWARD *v.* BANK OF ENGLAND (1723), 1 Stra. 550; 93 E. R. 693.

425. —— **Note payable at particular place.**]—A promissory note of defts., who were bankers, promising to pay so much at their banking house at W., requires a demand of payment there, in order to give the holder a cause of action if it be not paid.—SAUNDERSON *v.* BOWES (1811), 14 East, 500; 104 E. R. 693.

Annotations :—**Expld.** Butterworth *v.* Le Despencer (1814), 3 M. & S. 150. **Consd.** Rowe *v.* Young (1820), 2 Bli. 391, H. L. **Refd.** Gibb *v.* Mather (1832), 8 Bing. 214, Ex. Ch.

426. *S. P.* DICKINSON *v.* BOWES (1812), 16 East, 110; 104 E. R. 1030.

Annotations :—**Consd.** Rowe *v.* Young (1820), 2 Bli. 391, H. L. **Mentd.** Longridge *v.* Brewer (1823), 7 Moore, C. P 522.

427. —— **Note payable at two places—Option of holder.**]—The K. Bank issued a note payable at their banking house at M. & at R. & Co.'s in London. Pltfs., bankers at T., changed the note for deft. on Mar. 5, & sent it to London in the evening. On the 6th it was presented at R. & Co.'s, who stopped payment on that day, & dishonoured. The M. Bank, which had issued the note, paid the whole of the 5th & stopped on the 6th:—*Held:* pltfs. had an option to present the note at either place & were entitled to recover its amount from deft.—BEECHING *v.* GOWER (1816), Holt, N. P. 313.

Annotations :—**Consd.** Camidge *v.* Allenby (1827), 6 B. & C. 373. **Refd.** Bailey *v.* Bodenham (1864), 16 C. B. N. S. 288. **Mentd.** Firth *v.* Brooks (1861), 4 L. T. 467.

428. Interest on notes—Failure of bank—Necessity of demanding payment.]—The stopping payment by a bank, which issues notes payable on demand, does not preclude the necessity of demanding payment in order that interest may be payable under Civil Procedure Act, 1833 (c. 42), s. 28.—*Re* HEREFORDSHIRE BANKING Co. (1867), L. R. 4 Eq. 250; 36 L. J. Ch. 806; 17 L. T. 58; 15 W. R. 1056.

Annotations :—**Mentd.** *Re* East of England Banking Co. (1868), L. R. 6 Eq. 368; *Re* International Contract Co., Hughes' Claim (1872), L. R. 13 Eq. 623; Whittingstall *v.* Grover (1886), 55 L. T. 213.

429. —— —— ——.]—In the voluntary winding up of a bank (all debts having been paid in full), the holders of the bank's notes payable at a particular place & current at the time of stoppage were allowed interest at 5 per cent. per annum from the dates of the claims made by them respectively to the liquidator. The notes had not been previously presented for payment:—*Held:* the holders were not entitled to interest from the date of the stoppage of the bank, on the ground that it did not render a demand for payment unnecessary.—*Re* EAST OF ENGLAND BANKING Co. (1868), 4 Ch. App. 14; 38 L. J. Ch. 121; 19 L. T. 299; 17 W. R. 18, L.C. & L.JJ.

Annotations :—**Mentd.** *Re* International Contract Co., Hughes' Claim (187[illegible] L. R. 13 Eq. 623; *Re* Bank of South Australia, [189[illegible]] 1 Ch. 578, C. A.; Powell *v.* Lee (1908), 99 L. T. 284.

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stamp & charges for issuing new notes were offered, & security against any demand being made for the lost halves. The House of Lords reversed the judgment, & remitted to allow a proof of an averment that the notes had been cut maliciously & designedly to injure the bank.—MABERLEY *v.* BANK OF SCOTLAND (1825), 1 Wils. & S. 10.—**SCOT.**

s. *Amalgamation of banks.*] — The E. Bank having become amalgamated with the C. Banking Co.:—*Held:* the C. Banking Co. were not entitled to issue notes or bills thereafter at places where the E. Bank had carried on business, under the licences which had been previously held by that bank, but were bound to take out annual licences.—CLYDESDALE BANKING Co. *v.* LORD ADVOCATE (1860), 22 Dunl. (Ct. of Sess.) 621; 32 Sc. Jur. 234.—**SCOT.**

t. *Licence taken out by mistake—Repayment of duty.*]—The N. Bank had in 1844 a licence in force applicable to the town of G. In 1871 the bank opened a branch at S., & took out a separate licence. By an Act passed in 1872 S. was included in the municipal boundary of G., but the bank by inadvertence continued to take out a licence & pay duty in respect of S. till 1890. In that year they claimed repayment of the duties so paid, in respect that, S. having been since 1872 included in G., such licence was unnecessary, & the duty had been paid in error:—*Held:* the licence duty could not be recovered unless the application for relief was made within six months after the date of the licence. *Semble:* the bank, having annually applied for a licence, & paid a duty, while it might have ascertained that it was unnecessary had any inquiry been made, was barred from recovering.—NATIONAL BANK OF SCOTLAND *v.* LORD ADVOCATE (1892), 30 Sc. L. R. 579.—**SCOT.**

u. *Return of notes—Act of Cape Colony (No. 6 of 1864).*]—Applt. bank, which had a branch within the province of Griqualand West, put in circulation there notes issued by the bank in the colony payable in the colony, but did not issue any notes payable in the province:—*Held:* the bank not liable, under the above Act, to make any return to resp., the treasurer of the province, or to pay duty on the notes put into circulation by its branch.

Although by s. 10 of the Act banks of issue liable to make the return prescribed by the Act must include within such return such notes also as they have put into circulation, yet banks which, not issuing any notes purporting to be locally issued, & not liable to make a return, put into circulation within the province their own notes, issued elsewhere, are not in respect thereof liable to the duty imposed by the Act.—ORIENTAL BANK CORPN. *v.* WRIGHT (1880), 5 App. Cas. 842; 50 L. J. P. C 1 43 L. T. 177, P. C.—**S. AF.**

w. —— ——.]—A bank consisted of a head office & several branches, some of which as well as the head office issued notes:—*Held:* (1) by the true construction of the above Act a return of notes in circulation or outstanding need not include bank notes, whether issued by the head or branch office, which at the date of such return were in possession of any office of the bank; (2) s. 9 merely directed the mode of making the returns, & did not enlarge the basis of returns, nor treat every office of issue as, for the purposes of the Act, a separate & independent bank.—BANK OF AFRICA, LTD. *v.* COLONIAL GOVERNMENT (1888), 13 App. Cas. 215; 57 L. J. P. C. 66; 58 L. T. 427; 4 T. L. R. 291 P. C.—**S. AF.**

Sect. 4.—Bank-notes generally, bankers' drafts, and bank post bills, etc.: Sub-sect. 2.]

SUB-SECT. 2.—PAYMENT OF DEBTS AND LIABILITIES BY BANK AND OTHER NOTES.

430. Tender of country bank-note—Objection to amount—Waiver of objection to validity.]—Pltf. sued for a debt of £40, but was not able to prove a debt of more than £10. Deft. pleaded a tender of £10, & proved a tender to pltf. of a £10 Liverpool Bank bill of exchange, which pltf. refused, insisting on being paid the whole of his debt:—*Held:* a bank-note was no tender, if objected to by the creditor, but pltf. having originally objected, not on account of the form in which it was made, but because it was not sufficient to cover his demand, was precluded from afterwards objecting to the validity of the tender.—LOCKYER *v.* JONES (1796), Peake, 239, n.

Annotations:—**Consd.** Polglass *v.* Oliver (1831), 2 Cr. & J. 15. **Mentd.** Finch *v.* Brook (1834), 1 Bing. N. C. 253.

431. ——— ——— ———.]—A tender in country bank-notes is good if not objected to at the time on account of the form, but refused by reason of the amount.—POLGLASS *v.* OLIVER (1831), 2 Cr. & J. 15; 2 Tyr. 89; 1 L. J. Ex. 5; 149 E. R. 7.

Annotation:—**Refd.** *Re* Farley, *Ex p.* Danks (1852), 1 W. R. 57, L.JJ

432. —— Right of bank to refuse own notes in payment.]—*Semble:* a banker may refuse to receive his own notes in payment.—FORSTER *v.* WILSON (1843), 12 M. & W. 191; 13 L. J. Ex. 209; 152 E. R. 1165.

Annotations:—**Mentd.** Boddington *v.* Castelli (1853), 15 Jur. 781, Ex. Ch.; Campanari *v.* Woodburn (1854), 17 C. B. 400; *Re* Davies, *Ex p.* Cleland (1867), 2 Ch. App. 808, L.J.; *Re* Duckworth, *Ex p.* Cooper (1867), 15 W. R. 363; *Re* Trust-Deed, *Ex p.* Cooper (1867), 15 L. T. 637; Bailey *v.* Finch (1871), L. R. 7 Q. B. 34.

433. Payment—Difference between payment for present value & for pre-existing debt.]—If a man contract for goods, & after carrying them away give the seller a goldsmith's note for the money, it does not amount to a payment; but if it were given at the very time of the contract, it would be *primâ facie* evidence that it was taken in payment (HOLT, C.J.).—ANON. (1700), 12 Mod. Rep. 408; 88 E. R. 1414.

434. —— —— Laches.]—If a note be given in payment for value received at the time, the payment is complete; but when a note is taken for a pre-existing debt payment is conditional upon its being met, unless the creditor by his laches makes the note his own.—WARD *v.* EVANS (1703), 2 Ld. Raym. 928; 1 Com. 138; 6 Mod. Rep. 36; 12 Mod. Rep. 521; 2 Salk. 442; 3 Salk. 118; Holt, K. B. 120; 92 E. R. 120.

Annotations:—**Apprvd.** Thorold *v.* Smith (1706), Holt, K. B. 462. **Refd.** Smith *v.* Wilson (1738), Andr. 187; Tatlock *v.* Harris (1789), 3 Term Rep. 174. **Mentd.** Nickson *v.* Brohan (1713), 10 Mod. Rep. 109; Grant *v.* Vaughan (1764), 3 Burr. 1516; Hennings *v.* Rothschild (1827), 4 Bing. 315; Nicholl *v.* Thomas (1850), 2 Rob. Eccl. 157.

435. —— Sale of goods—Failure of bank.]—A. agreed to buy some plate of B. A. at the time of the agreement paid the price of the goods in country bank-notes. The bank was closed for the day at the time of payment & never opened again. B. having refused to deliver the goods to A. without payment of the price, as the notes given were worthless, A. sued in trover for the goods:—*Held:* if the seller of goods took notes for them without agreeing to run the risk of the notes being paid, & the notes turned out to be worth nothing, this would not be considered as payment.—OWENSON *v.* MORSE (1796), 7 Term Rep. 64; 101 E. R. 856.

Annotation:—**Refd.** Dutton *v.* Solomonson (1803), 3 Bos. & P. 582.

436. —— Notes held by bank's creditor—Failure of bank—Whether creditor's debt extinguished.]—Bankers' notes payable on demand, held by a creditor of the bankers, if not sufficient before demand made to constitute a good petitioning creditor's debt, do not extinguish the prior debt due from the bankers.—SIMPSON *v.* SIKES (1817), 6 M. & S. 295; 105 E. R. 1253.

437. —— Failure of bank—Laches.]—A banker's note for £500 was paid to pltf. after dinner, who sent it the next morning at nine, when the banker had stopped payment:—*Held:* there was no laches in pltf., so as to fix the loss on him, & in all such cases there must be a reasonable time allowed, consistent with the nature of circulating paper credit.—FLETCHER *v.* SANDYS (1746), 2 Stra. 1248; 93 E. R. 1161.

438. —— —— ———.]—Deft., being previously indebted to pltf., paid to him the debt in country bank-notes on a Friday, several hours before the post went out. Pltf. transmitted them, cut in halves, partly by a coach on Saturday & partly by Sunday night's post, & both parts arrived in London on Monday, & were presented for payment & dishonoured on the Tuesday:—*Held:* (1) the true rule was, that a party, in order to avoid laches, must give notice by the next day's post, & not by the next possible post; (2) pltf., in so transmitting the notes, although some delay was caused, had been guilty of no laches, & might consider them as no payment, & recover for the original debt.—WILLIAMS *v.* SMITH (1819), 2 B. & Ald. 496; 106 E. R. 447.

Annotation:—**Refd.** Prideaux *v.* Criddle (1869), 10 B. & S. 515.

439. —— —— —— **Payment to servant.**] — A servant received on behalf of his master, in payment of goods sold, country bank-notes at one o'clock on a Friday afternoon, & paid them to his master after banking hours on Saturday evening. Between three & four in the afternoon of Saturday, the bank stopped payment:—*Held:* the servant could not be identified with the master, & the master was not guilty of laches in not presenting the notes before the bank stopped on the Saturday.—JAMES *v.* HOLDITCH (1826), 8 Dow. & Ry. K. B. 40.

440. —— —— —— **Notes not circulated or presented.**]—Goods were sold at Y. in the morning of Dec. 10, 1825, & on the same day, at three o'clock in the afternoon, the vendee delivered to the vendor, as & for a payment of the price, certain promissory notes of the bank of D. & Co. at H., payable on demand to bearer. D. & Co. stopped payment on the same day at eleven o'clock in the morning, &

PART II. SECT. 4, SUB-SECT. 2.

y. *Payment—Failure of bank—Sale of land mortgaged to bank.*]—Lands, subject to a mtge. to the bank for more than the value thereof, were sold, & the bank, before becoming insolvent, assented to the sale & received the first instalment of the purchase money. By the trust deed, which the bank executed on becoming insolvent, it was made the duty of the bank trustees to accept in payment & liquidation of any debt due to the estate the notes or bills of the bank:—*Held:* as the money was coming to the bank, the trustees were bound to accept payment in the notes of the bank at par.—BANK OF UPPER CANADA TRUSTEES *v.* CANADIAN NAVIGATION CO. (1869), 16 Gr. 479.—**CAN.**

437 i. —— —— *Laches.*]—A person receiving bank notes in payment of property, or in exchange for cash, or on deposit to the credit of the payer, has the right, in case of failure of the bank, to return the notes, if he does so within a proper time after receipt.—CONN *v.* MERCHANTS BANK OF CANADA (1879), 30 C. P. 380.—**CAN.**

a. —— *By uncertified notes.*] — A debtor of the late pretended U. C. Bank at K. having called upon the bank comrs. to arbitrate under 10 Geo. 4, c. 7, an award was made for £900, to be paid in notes & other securities of the bank:—*Held:* debtor had a right to pay in notes for which no certificates had been issued pursuant to the Act.—DALTON *v.* MCNIDER (1856), 5 Gr. 501.—**CAN.**

never afterwards resumed their payments, but neither of the parties knew of the stoppage or of the insolvency of D. & Co. The vendor never circulated the notes, or presented them to the bankers for payment, but on the 17th he required the vendee to take back the notes & to pay him the amount, which the latter refused :—*Held :* the vendor of the goods was guilty of laches, & had thereby made the notes his own, & they operated as a satisfaction of the debt.—CAMIDGE *v.* ALLENBY (1827), 6 B. & C. 373 ; 9 Dow. & Ry. K. B. 391 ; 5 L. J. O. S. K. B. 95 ; 108 E. R. 489.

Annotations :—**Consd.** Turner *v.* Stones (1843), 1 Dow. & L. 122. **Distd.** Robson *v.* Oliver (1847), 10 Q. B. 704. **Apld.** Lichfield Union Grdns. *v.* Greene (1857), 1 H. & N. 884. **Distd.** Leeds & County Bank *v.* Walker (1883), 11 Q. B. D. 84. **Refd.** Rogers *v.* Langford (1833), 1 Cr. & M. 637 ; Timmins *v.* Gibbins (1852), 18 Q. B. 722. **Mentd.** Smith *v.* Mercer (1867), L. R. 3 Exch. 51.

441. —— —— —— Notice.]—In an action for the price of goods sold, deft. pleaded that he gave to pltf. notes of L. & Co., which pltf. accepted on account of the debt, & that pltf. did not present them within a reasonable time. Replication that on the day before the transfer of the notes, & without the knowledge of pltf., L. & Co. became bkpt. & unable to pay the notes, that afterwards, & before a reasonable time for presentment had elapsed, pltf. discovered the bkpcy., & within a reasonable time after such discovery he gave deft. notice of the fact, & offered to return the notes :—*Held :* pltf. was only bound to give such notice within a reasonable time after he acquired the knowledge, & not necessarily before the expiration of a reasonable time for presenting the notes for payment.—ROBSON *v.* OLIVER (1847), 10 Q. B. 704 ; 16 L. J. Q. B. 437 ; 9 L. T. O. S. 197 ; 11 Jur. 1056 ; 116 E. R. 268.

442. —— —— Notes treated as cash—Position of surety.]—The treasurer to the guardians of the L. Union was a banker, & one of the duties prescribed by the orders of the poor law comrs. was to pay out of the money for the time being in his hands, belonging to the guardians, all orders for money properly drawn upon him. On Friday several orders of the guardians were presented by their clerk at the treasurer's bank, & paid partly in £5 bank-notes of the bank. At about eleven o'clock in the morning of the following Monday other orders of the guardians were presented by their clerk, & paid partly in £200 of similar bank-notes, & a common banker's draft upon bankers in London was received in exchange for a draft by the guardians in favour of persons in London. At three o'clock in the afternoon of the same Monday the bank stopped payment, & on the following day the treasurer was declared a bkpt. At the time the orders were presented the treasurer had in his hands money of the guardians sufficient to meet them. At the time the bank stopped payment the guardians had in their hands £95 of the notes received on the Friday, & the £200 received on the Monday ; the draft on London was returned dishonoured. The guardians brought an action against the surety of the treasurer to recover these amounts :—*Held :* the surety was not liable, because (1) as to the notes received on Friday, the guardians by keeping them in their hands over the Saturday had elected conclusively to treat them as payment ; (2) as to the notes received on Monday (as well as those of Friday) by receiving notes, & as to the draft upon London by receiving the draft, when they might have demanded cash, they had satisfied the obligation of the surety.—LICHFIELD UNION GUARDIANS *v.* GREENE (1857), 1 H. & N. 884 ; 26 L. J. Ex. 140 ; 28 L. T. O. S. 371 ; 21 J. P. 198 ; 3 Jur. N. S. 247 ; 5 W. R. 370 ; 156 E. R. 1459.

443. Conditional payment—Halved notes sent by post—Sender demanding return.]—Pltf., having entered into a contract for a partnership with W., & having agreed with W. to discharge a debt due from him to deft., sent the halves of two bank-notes in a letter to deft. Deft. wrote that, on receipt of the second half, he would send a stamped acknowledgment. The arrangement with W. afterwards went off, & pltf. required deft. to return the half-notes :—*Held :* the property in the half-notes had not passed to deft., as there was a mere inchoate & conditional payment to be completed on the arrival of the other halves, & neither pltf. nor deft. intended that the half-notes should be treated as payment or half-payment of W.'s debt.—SMITH *v.* MUNDY (1860), 3 E. & E. 22 ; 29 L. J. Q. B. 172 ; 2 L. T. 373 ; 6 Jur. N. S. 977 ; 8 W. R. 561 ; 121 E. R. 352.

Bank of England notes, generally, *see* Part I., *ante*.

444. Payment of notes into bank—Credit given by paying bank—Failure of paying bank—Rights of customer.]—A. on Mar. 18, 1824, paid into the T. country bank a quantity of notes of a bank at D., to bear interest from that day. The T. bankers sent the notes early on the following morning to the D. Bank. Upon the receipt of them there the latter, according to their usual course of dealing with the T. bankers, gave them credit in account for the amount of the notes. The course of business between the two banks was that if the T. Bank received notes of the D. Bank in the course of the day, they sent the notes on the following morning to the D. Bank. If the D. Bank received notes of the T. Bank, they, at the close of the business of the day, sent them to the T. Bank. If the balance of the day was in favour of either bank, the amount was paid by a bill upon their respective agents in London. The D. Bank continued to pay their notes until the evening of the 19th :—*Held :* as between A. & the T. bankers, the taking of credit in account for the amount of the D. notes was equivalent to payment to the T. bankers, & A. was entitled to recover the amount from them.—GILLARD *v.* WISE (1826), 5 B. & C. 134 ; 7 Dow. & Ry. K. B. 523 ; 4 L. J. O. S. K. B. 88 ; 108 E. R. 49.

Annotation :—**Mentd.** Atkins *v.* Owen (1834), 2 Ad. & El. 35.

445. —— Acceptance as money's worth—Failure of paying bank—Notice of dishonour to customer.]—Pltf. deposited with defts., a banking co., £80, consisting partly of certain notes of a country bank, payable either at that bank or in London, & representing £65. The co. gave a receipt as follows :—"Received of W. £80, for which we are accountable. £80, at £3 per cent. interest, with fourteen days' notice." The co. sent the notes, on the same day, to their agents in London, who presented them on the following day, when they were dishonoured. The agents sent them back by that evening's post to the co., who, on the following day, gave notice of dishonour to pltf. &, on pltf.'s giving fourteen days' notice of withdrawal, tendered the notes back, which pltf. refused. The co. refused to pay the amount of the notes. The country bank, which was about five miles from the office of the co., had stopped payment from the close of the day on which the notes were deposited, but neither party at the time of the deposit was aware of the bank being about to stop payment :—*Held :* pltf. could not recover the amount of the notes from the co., either as money lent or as money had & received.—TIMMINS *v.* GIBBINS (1852), 18 Q. B. 722 ; 21 L. J. Q. B. 403 ; 19 L. T. O. S. 181 ; 17 Jur. 378 ; 118 E. R. 273.

Annotation :—**Apld.** Woodland *v.* Fear (1857), 7 E. & B. 519.

446. Presentment excused — Bank abandoning place of business.]—*Semble :* if bankers, who have become insolvent, shut up & abandon their shop,

Sect. 4.—*Bank-notes generally, bankers' drafts, and bank post bills, etc.: Sub-sects.* 2, 3 & 4. *Sect.* 5: *Sub-sect.* 1.]

that is evidence of a declaration to all the world of their refusal to pay their notes there, & presentment for payment, though otherwise necessary, is dispensed with.—HOWE *v.* BOWES (1812), 16 East, 112; 104 E. R. 1031; *revsd.* on other grounds, *sub nom.* BOWES *v.* HOWE (1813), 5 Taunt. 30.

Annotations:—**Consd.** Turner *v.* Stones (1843), 1 Dow. & L. 122; *Re* Agra Bank, *Ex p.* Tondeur (1867), L. R. 5 Eq. 160; *Re* East of England Banking Co. (1868), L. R. 6 Eq. 368. **Refd.** Crosse *v.* Smith (1813), 1 M. & S. 545; Rowe *v.* Young (1820), 2 Bli. 391, H. L.; Sands *v.* Clarke (1849), 8 C. B. 751.

447. —— Bank suspending payment.]—Where a bank has suspended its payments, & notes of such bank have been promptly returned or tendered back to the party from whom they were received, the want of presentment at the bank is no defence to an action for money had & received brought to recover the amount of the notes.—TURNER *v.* STONES (1843), 1 Dow. & L. 122; 12 L. J. Q. B. 303; 7 Jur. 745.

Annotations:—**Distd.** Sands *v.* Clarke (1849), 8 C. B. 751. **Refd.** Robson *v.* Oliver (1847), 11 Jur. 1056; Timmins *v.* Gibbons (1853), 19 L. T. O. S. 181.

448. Changing notes—No return or presentment—Recovery of amount.]—On Nov. 23 country bank-notes were paid by A., a purchaser of goods, to B., the vendor. On the 28th B. requested A.'s shopman as a favour to exchange the notes for money, & received the amount accordingly. The bank, which was situated at a considerable distance from the place where the shopman gave the money, had stopped paying two hours before A. heard of it on the 29th, & on the 30th he wrote to B. to inform him of the event, & that B. was to be liable for the notes, but did not tender them to him then or for some days after, nor were they ever presented at the bank:—*Held:* A. should have returned them to B. without delay, or presented them at the bank as holder, & having done neither, he could not recover the amount from B.—ROGERS *v.* LANGFORD (1833), 1 Cr. & M. 637; 3 Tyr. 654; 149 E. R. 555.

Annotations:—**Consd.** Turner *v.* Stones (1843), 1 Dow. & L. 122. **Refd.** Robson *v.* Oliver (1847), 10 Q. B. 704; *Re* East of England Banking Co. (1868), L. R. 6 Eq. 368.

449. —— —— Notice & tender but no presentment—Recovery of amount.]—Where a bank have suspended their payments, & notes of such bank have been promptly returned or tendered back to the party from whom they were received, the want of presentment at the bank is no defence to an action for money had & received brought to recover the amount of the notes. Deft., after banking hours on Saturday, sent a £5 note of P.'s Bank to the public-house of pltf. requesting change, which was given in money. On Monday morning the bank was open for two hours, but no payments were made, & a placard held before the door intimated that they had suspended payment. Early on the same day pltf. sent back the note requesting to have the money returned, which deft. promised, but on Wednesday refused. An action was brought to recover the money, when the jury found that (1) the bank stopped payment on Saturday; (2) the note would not have been paid if presented on Monday, & (3) in fact "it was not presented":—*Held:* (1) pltf. had done all he was bound to do; (2) where a presentment on the bank could not reasonably be expected to produce payment, the material obligation was to give notice promptly & to tender back the note to the party from whom he received it, as that enabled that party not merely to present it at the bank, but to have recourse to the former holder if he himself should have so dealt with the note while he held it, as to have preserved any rights against such holder.—TURNER *v.* STONES (1843), 1 Dow. & L. 122; 12 L. J. Q. B. 303; 7 Jur. 745.

Annotations:—**Distd.** Sands *v.* Clarke (1849), 8 C. B. 751. **Refd.** Robson *v.* Oliver (1847), 11 Jur. 1056; Timmins *v.* Gibbons (1853), 19 L. T. O. S. 181.

450. —— —— Servant's disregard of instructions—Liability of master.]—A master sent his clerk with a note drawn upon a banker, with orders to obtain bank bills or money from the banker, but to save himself trouble the clerk went to B. & prevailed upon B. to give him a bank bill for the note, & the clerk, in pursuance of his master's instructions, then invested the bill in exchequer notes. The master did not know that his instructions had not been followed. The banker failed:—*Held:* the master was liable to B. for the loss.—NICKSON *v.* BROHAN (1712), 10 Mod. Rep. 109; 88 E. R. 649.

See, generally, MASTER & SERVANT.

SUB-SECT. 3.—BANKERS' DRAFTS AND BANK POST BILLS, ETC.

451. Tender—Objection to amount—Waiver of objection to validity.]—A tender in bank post bills, if only objected to in respect of the amount, is good.—TILEY *v.* COURTIER (1817), 2 Cr. & J. 16, n.; 149 E. R. 7.

Annotation:—**Apprvd.** Polglass *v.* Oliver (1831), 2 Cr. & J. 15.

452. Lost bill—Cashed negligently for stranger—Exercise of reasonable diligence.]—Defts., bankers at Brighton, cashed a £100 bank post bill for a stranger, having only inquired his name & address (which he wrote in an illiterate hand on the bill & which proved to be fictitious) & whither he was going. The bill had been lost by pltf. in London. In an action of trover defts. contended pltf. had not used diligence in making known the loss, & that the bill having been received by defts. in the ordinary course of their business, in circumstances not calculated to excite suspicion, they were not liable to the real owner for the amount:—*Held:* (1) defts. were liable, as they did not exercise reasonable caution in taking it; (2) the want of caution by the person who lost the note did not preclude him from recovering against another who had been guilty of negligence in taking it, & the kind of notice to be given depended on the manner of the loss.—STRANGE *v.* WIGNEY (1830), 6 Bing. 677; L. & Welsb. 337; 4 Moo. & P. 470; 130 E. R. 1442.

Annotation:—**Distd.** *Re* Bentley, *Ex p.* Vere (1835), 4 Deac. & Ch. 295.

453. Draft treated as cash—Mercantile usage.]—Pltf.'s attorney wrote to deft. requesting the remittance of a debt, & 13*s.* 4*d.* for the attorney's costs. Deft. sent a banker's draft for the amount of the debt, but took no notice of the attorney's charges. The attorney kept the draft:—*Held:* the evidence was sufficient to support a plea of payment.

The banker's draft by mercantile usage is money (MARTIN, B.).—CAINE *v.* COULTON (1863), 1 H. & C. 764; 1 New Rep. 285; 32 L. J. Ex. 97; 7 L. T. 636; 11 W. R. 239; 158 E. R. 1092.

454. Draft on head office—Right to treat as bill or cheque.]—A draft drawn by a country branch on the head office cannot be treated by the bank as a bill of exchange or cheque within Bills of Exchange Act, 1882 (c. 61), s. 3, but a holder may treat it either as a bill of exchange or promissory note under sect. 5 (2).—CAPITAL & COUNTIES BANK, LTD. *v.* GORDON, LONDON, CITY & MIDLAND BANK, LTD. *v.* GORDON, [1903] A. C. 240; 72 L. J. K. B. 451; 88 L. T. 574; 51 W. R. 671; 19 T. L. R. 462; *sub nom.* LONDON, CITY & MIDLAND BANK, LTD. *v.*

GORDON, CAPITAL & COUNTIES BANK, LTD. *v.* GORDON, 8 Com. Cas. 221, H. L.

Annotations :—**Apld.** Brown, Brough *v.* National Bank of India (1902), 18 T. L. R. 669. **Mentd.** Akrokerri (Atlantic) Mines *v.* Economic Bank, [1904] 2 K. B. 465 ; Bevan *v.* National Bank, Bevan *v.* Capital & Counties Bank (1906), 23 T. L. R. 65 ; Holland *v.* Manchester & Liverpool District Banking Co. (1909), 14 Com. Cas. 241 Jones *v.* Coventry, [1909] 2 K. B. 1029 ; Crumplin *v.* London Joint Stock Bank (1913), 109 L. T. 856 ; Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

SUB-SECT. 4.—FORGED OR ALTERED BANK-NOTES.

455. Effect as payment.]—If a person gives a forged bank-note, although ignorant of the fact, there is no payment.—JONES *v.* RYDE (1814), 5 Taunt. 488 ; 1 Marsh. 157 ; 128 E. R. 779.

Annotations :—**Folld.** Bruce *v.* Bruce (1814), 5 Taunt. 495. **Apld.** Gompertz *v.* Bartlett (1853), 2 E. & B. 849. **Refd.** Smith *v.* Mercer (1815), 6 Taunt. 76 Wilkinson *v.* Johnson (1824), 3 B. & C. 428 ; Cocks *v.* Masterman (1829), 9 B. & C. 902 ; Leeds & County Bank *v.* Walker 1883), 11 Q. B. D. 84. **Mentd.** Westropp *v.* Solomon (1849), 19 L. J. C. P. 1 ; Gurney *v.* Womersley (1854), 4 E. & B. 133.

456. Changing for favour—Right to recover.]—*Semble :* if change is given for a bank-note which both parties believe to be genuine, & it turns out to be forged & worthless, an action will lie to recover back the money advanced.—WOODLAND *v.* FEAR (1857), 7 E. & B. 519 ; 26 L. J. Q. B. 202 ; 29 L. T. O. S. 106 ; 3 Jur. N. S. 587 ; 5 W. R. 624 ; 119 E. R. 1339.

Annotations :—**Mentd.** Prince *v.* Oriental Bank Corpn. (1878), 3 App. Cas. 325, P. C. ; Fielding *v.* Corry (1897), 77 L. T. 453, C. A. ; R. *v.* Lovitt, [1912] A. C. 212, P. C.

SECT. 5.—COLLECTION OF CHEQUES.

SUB-SECT. 1.—OBLIGATION TO PRESENT PROMPTLY.

457. Due presentment—Dishonour of cheque—Right of collecting bank to recover sum advanced on cheque.]—Deft. asked pltfs., country bankers, to cash a cheque for him drawn on London bankers by M. & Co. Pltfs. gave him country notes, which were duly paid, & sent off the cheque by coach on the morning of the following day instead of by post on the same day. The London bankers, who were pltfs.' agents in town, presented the cheque for payment on the day after its receipt, when it was dishonoured :—*Held :* the cheque was duly presented for payment & pltfs. were entitled to recover the sum advanced on it.—RICKFORD *v.* RIDGE (1810), 2 Camp. 537, N. P.

Annotations :—**Apld.** Moule *v.* Brown (1838), 4 Bing. N. C. 266. **Distd.** Alexander *v.* Burchfield (1842), 7 Man. & G. 1061. **Apprvd.** Hare *v.* Henty (1861), 10 C. B. N. S. 65. **Refd.** Prideaux *v.* Criddle (1869), 38 L. J. Q. B. 232 ; Heywood *v.* Pickering (1874), 43 L. J. Q. B. 145. **Mentd.** Firth *v.* Brooks (1861), 4 L. T. 467 ; Bank of Van Diemen's Land *v.* Bank of Victoria (1871), L. R. 3 P. C. 526, P. C.

458. —— —— Cheque given for debt after banking hours—Debt still due.]—A cheque for £4,700 drawn upon the L. Bank was given to A. at L. on Apr. 20, after banking hours, in payment for an estate. A., who lived three miles from L., immediately handed the cheque to B. to be placed to A.'s account at the R. Bank. R. was six miles from L. On the arrival of the cheque the same day at R., the R. Bank had closed, but the cheque was deposited with one of the partners of that bank for the night, & in the morning of Apr. 21 it was paid into the bank, & on the same day transmitted by post to the L. Bank with directions to send the amount to London. The L. Bank received the cheque early on the 22nd. At half-past one o'clock on that day they stopped payment :—*Held :* the deposit of the cheque with the R. Bank was a reasonable & probable course on the part of A., & the presentment to the L. Bank was in time to prevent the cheque from becoming his cheque, & the debt was still due to him.—BOND *v.* WARDEN (1845), 1 Coll. 583 ; 14 L. J. Ch. 154 ; 4 L. T. O. S. 351 ; 9 Jur. 198 ; 63 E. R. 553.

459. —— —— —— No unreasonable loss of time.]—On Friday, at nine o'clock p.m., deft.'s son called at the residence of pltfs.' salesman, five miles from Blackburn, & paid him a cheque on a Liverpool bank. The salesman was ill at the time, but on the following Monday he handed the cheque to pltfs. at their place of business at Blackburn, & it was sent off the same day by pltfs. to their agents at Liverpool, & on Tuesday morning it was presented & payment refused :—*Held :* there was no unreasonable loss of time on pltfs.' part in presenting the cheque for payment.—FIRTH *v.* BROOKS (1861), 4 L. T. 467.

460. —— Collection through London agent — "Country clearing-house."]—A country banker

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PART II. SECT. 5, SUB-SECT. 1.

457 i. *Due presentment—Dishonour of cheque—Recovery of amount paid.*]—Pltf., having a bank account with defts. at S., deposited with them on Saturday morning, about 11.30, a cheque of C. on another bank in the same place, for $350, payable to pltf. or bearer, & not indorsed. The sum was credited in the pltf.'s pass-book as cash, & the cheque stamped "The property of the Q. Bank, S." On Monday morning it was presented for payment, & dishonoured, but it would have been paid if presented on Saturday before the bank closed, which was about one o'clock. Defts. charged the amount of the cheque to pltf., who sued them for money had & received & money lent :—*Held :* he could not recover, for defts. were not guilty of laches. *Semble :* they could have recovered back the amount from pltf. even if they had paid it to him.—OWENS *v.* QUEBEC BANK (1870), 30 U. C. R. 382.—**CAN.**

457 ii. —— —— *Transmission to drawee by post.*]—The Dominion Govt. having a deposit account of public moneys with the P. E. I. Bank upon which they were entitled to draw at any time, the Deputy Minister of Finance drew a cheque thereon, which he sent to the branch of the M. Bank. The branch bank thereupon placed the amount of the cheque to the credit of the Dominion Govt. in the books of the bank, & the cheque was sent by mail from the head office of the M. Bank to the P. E. I. Bank for collection, but was not paid by the latter bank, which, subsequently to the presentment of the cheque, suspended payment generally : —*Held :* (1) the M. Bank were entitled on the dishonour of the cheque to reverse the entry in their books & charge the amount thereof against the Govt. ; (2) the mode of presenting a cheque on a bank by transmitting it to the drawee by mail was a legal & customary mode of presentment ; (3) there was no unreasonable delay in presentment & in giving notice of non-payment, & the Crown was not relieved from liability as drawer of the cheque.—R. *v.* BANK OF MONTREAL (1886), 1 Exch. C. R. 154.—**CAN.**

457 iii. —— *According to local usage.*]—There was a usage amongst local bankers with respect to the presentment of cheques for payment by exchange at certain hours known as the exchange :—*Held :* if cheques were presented by one bank to another for payment in such manner, they must be presented within the hours recognised by such usage, but, notwithstanding any such usage or arrangement, a bank was at liberty to present instruments for payment in the ordinary way at any time during business hours in precisely the same manner as an individual.—BIRD *v.* NATIONAL BANK OF NEW ZEALAND, 2 J. R. N. S. 96.—**N.Z.**

b. *Delay in presentment — Suspension of drawee bank after acceptance, but before payment.*]—On July 11 defts. gave L. & Co. a cheque drawn upon the Quebec branch of the P. Bank. The next day L. & Co. deposited the cheque to the credit of their account in pltfs.' bank at Montreal, & pltfs. on July 13 sent it by mail to their branch at Quebec. The cheque was received there on the 14th, on Sunday, & the next day, instead of having it paid by the branch of the P. Bank, which had sufficient funds on hand, the Quebec manager contented himself with having it accepted, intending the next day to have a general settlement with the P. Bank of the cheques of which the two banks were respectively the holders. The same evening the P. Bank closed its doors, & the cheque was never paid :—*Held :* pltfs. could not recover from defts. the amount of the cheque.—BANQUE JAQUES-CARTIER *v.* LIMOILU CORPN. (1899), Q. R. 17 S. C. 211.—**CAN.**

Sect. 5.—Collection of cheques: Sub-sects. 1 & 2.]

receiving from a customer a cheque for presentment drawn upon another country banker not resident in the same town, is not bound to transmit it for presentment by the post of the day on which he receives it, but has until post time of the next day for so doing.

A., a banker at W., received from B., a customer, a cheque drawn upon C., a banker at L. (which was distant about eighteen miles from W.), on the morning of July 8, & sent it that evening by post to his London correspondent, D., for presentment through the "country clearing-house." D.'s clerk handed the cheque at the clearing-house on the morning of the 9th to the clerk of E., the London correspondent of C., who sent it down by the post of that evening to C.:—*Held:* the presentment was in due time.—HARE *v.* HENTY (1861), 10 C. B. N. S. 65; 30 L. J. C. P. 302; 4 L. T. 363; 25 J. P. 678; 7 Jur. N. S. 523; 9 W. R. 738; 142 E. R. 374.

Annotations:—**Apld.** Prideaux *v.* Criddle (1869), L. R 4 Q. B. 455. **Refd.** Bailey *v.* Bodenham (1864), 16 C. B. N. S. 288; Bank of Van Diemen's Land *v.* Bank of Victoria (1871), L. R. 3 P. C. 526, P. C.; Heywood *v.* Pickering (1874), 43 L. J. Q. B. 145; Wilts & Dorset Bank *v.* Cook (1899), 53 J. P. 791.

461. —— —— Dishonour of cheque.]—The payee of a cheque drawn upon a bank at F. paid it on Tuesday to the credit of his account in a bank at T., which was about ten miles from F. The T. Bank having no agents at F., sent the cheque by the post of the same day to their London agents, who received it on Wednesday morning. On the same day the cheque was handed by the agents through the clearing-house to the London agents of the F. Bank, & by the latter forwarded by the post of the same day to the F. Bank, who received it on Thursday morning. On the same morning the London agents of the F. Bank failed, & the agents of the T. Bank wrote at once to the F. Bank requesting them to pay the cheque or return it. The F. Bank replied by letter on Friday, refusing to pay the cheque or return it. On Saturday the F. Bank stopped payment. On the same day the manager of the T. Bank informed the payee of the non-payment of the cheque, & subsequently informed him that his account had been debited with the amount of it, though it was not so debited till about a fortnight afterwards. It was the usage of bankers, when a cheque was paid in by a customer, to enter the amount to his credit, & if the cheque was not paid, then immediately upon its dishonour to return it to the customer, & upon so doing to debit his account with it. With regard to cheques drawn upon one Cornwall bank & paid into another, there had been during several years an arrangement by which the cheque was sent by post to the bank upon which it was drawn, & the accounts between the two banks adjusted at a weekly settlement. The T. Bank had never been a party to this arrangement, & if they had followed it, the cheque in question would have been received by the F. Bank on Wednesday, & the payee credited with the amount:—*Held:* the T. Bank were entitled to debit the payee with the amount of the cheque, as the cheque had been presented within reasonable time, & the payee had received reasonable notice of its dishonour.—PRIDEAUX *v.* CRIDDLE (1869), L. R. 4 Q. B. 455; 10 B. & S. 515; 38 L. J. Q. B. 232; 20 L. T. 695.

Annotation:—**Mentd.** Heywood *v.* Pickering (1874), L. R. 9 Q. B. 428.

462. —— —— —— Usual course of business.]—It is the usual course of business for bankers in the country to send up cheques to be presented to the agents in London & cleared in the usual way. The time occupied in such an operation would not be considered such delay as to constitute laches on the part of the country banker should the cheque, by reason of such delay, be dishonoured on presentation.—WILTS & DORSET BANK *v.* COOK (1889), 53 J. P. 791; 5 T. L. R. 703, D. C.

463. —— Stoppage of bank—Cheque for debt—Debt not paid.]—Deft., on Jan. 27, gave to pltf., in payment of a debt, a cheque drawn upon a Jersey bank. On the 28th pltf. paid it into his bankers in London, who, as was customary with English bankers, sent it to Jersey, where it was received by the bankers on the 29th, on which day deft. had funds in their hands. No notice was taken by them of a request for payment sent with the cheque. Pltf.'s bankers had not any agent in Jersey. They applied again for the cheque or the amount thereof on Feb. 6. In answer to this application the cheque was sent back to them with the words "refer to drawer" written upon it. The Jersey bank had stopped payment on Feb. 1:—*Held:* there had been a good presentment of the cheque, no laches on the part of pltf. or his bankers, & the receipt of the cheque by pltf. did not amount to payment of the amount due.—HEYWOOD *v.* PICKERING (1874), L. R. 9 Q. B. 428; 43 L. J. Q. B. 145.

464. Delay in presentment—Dishonour of cheque.]—It is not necessary to present for payment a cheque payable on demand till the day following the day on which it is given. A person receiving a cheque on a banker is equally authorised in lodging it with his own banker to obtain payment as he would be in paying it away in the course of trade, although in consequence thereof the notice of its dishonour is postponed a day, one day being allowed for notice from the payee to the drawer, after the day on which notice is given by the bankers to the payee.—ROBSON *v.* BENNETT (1810), 2 Taunt. 388; 127 E. R. 1128.

Annotations:—**Folld.** Moule *v.* Browne (1838), 1 Arn. 79. **Refd.** Boddington *v.* Schlenker (1833), 2 L. J. K. B. 138.

465. —— —— Cheque cashed by collecting bank—Right to recover amount paid for cheque.]—Deft., on Apr. 5, paid pltfs., bankers, a cheque for £20 drawn on the M. Bank & received pltfs.' notes in exchange. Pltfs. kept the cheque all the 5th & 6th & sent it by carrier to M. on the morning of the 7th. The carrier reached M. at nine o'clock on the 7th; but the M. Bank had not opened that morning. If the cheque had been sent by the post of the 6th it would have reached M. at eight o'clock on that day:—*Held:* pltfs. had been guilty of laches & could not recover the value of the cheque from deft.—BEECHING *v.* —— (1816), Holt, N. P. 315, n.

Annotations:—**Apld.** Camidge *v.* Allenby (1827), 6 B. & C. 373. **Consd.** Firth *v.* Brooks (1861), 4 L. T. 467.

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464 i. —— *Dishonour of cheque — Clearing house regulations.*]—A firm drew two cheques upon a Toronto branch of the S. Bank in favour of defts. The cheques were dated Sept. 30 & Oct. 1, 1913, & were indorsed by defts. & cashed by pltf. bank at one of its branches in Toronto, early in the forenoon of Oct. 1. On the 2nd, at 10 a.m., the cheques were taken by the representatives of pltf. bank to the Toronto clearing house, & formed part of the claim there presented against the S. Bank, & so entered into the clearing that then took place. The cheques were received at the branch of the S. Bank upon which they were drawn during the forenoon of the same day. There were not sufficient funds to the credit of the drawers to pay the cheques, & the manager kept them till the 3rd, & then presented the cheques at his own bank, & they were dishonoured. At a quarter to twelve on the 4th he sent the cheques to pltf. bank; & on the same day pltf. bank handed the cheques to its notary, who again presented them & protested them. Notices of dishonour were sent to defts. on the 6th, but did not reach them until Oct. 8:—*Held:* (1) the presentment on Oct. 4 was not a presentment within a reasonable time of cheques indorsed to pltf. bank on the 1st; (2) the clearing house was an institution created for the benefit of bankers, & its regulations could not modify Bills of Exchange Act, R. S. C., 1906, c. 119.—BANK OF BRITISH NORTH AMERICA *v.* HASLIP, BANK OF BRITISH NORTH AMERICA *v.* ELLIOTT (1914), 25 O. W. R. 622; 5 O. W. N. 684; 30 O. L. R. 299; *affd.* 20 D. L. R. 922; 31 O. L. R. 442.—**CAN.**

466. ——————.]—A cheque drawn on a bank at Bath was cashed for deft. by a branch of the N. W. Bank at Malmesbury, on Mar. 28. The same day it was forwarded to the principal N. W. Bank at Melksham, twelve miles from Bath; on the 31st it was presented at Bath & dishonoured:—*Held:* the presentment was not in time to give the N. W. Bank any claim against deft., the town in which the cheque was cashed having the ordinary mode of conveyance by the daily post.—MOULE *v.* BROWN (1838), 4 Bing. N. C. 266; 1 Arn. 79; 5 Scott, 694; 7 L. J. C. P. 111; 2 Jur. 277; 132 E. R. 790.

Annotations:—**Distd.** Robinson *v.* Hawksford (1846), 9 Q. B. 52. **Refd.** Mullick *v.* Radakissen (1854), 23 L. T. O. S. 25, P. C.; Hare *v.* Henty (1861), 10 C. B. N. S. 65.

467. ——— **Collection through London agent—Notice of dishonour.**]—On May 6 A. received at M. a cheque drawn upon M. & Co., bankers at R., about ten miles distant. On the 8th he paid it into his bankers at M., & they on the same day sent it by post to their London agents, the C. Bank, to be passed through the country clearing-house there. The drawees' London agents were B. & Co., whose names appeared in a printed memorandum at the foot of the cheque, but their account with them was closed on the 7th. The cheque being refused by B. & Co. at the clearing-house, the C. Bank sent it by post on the 9th for payment to the drawees, who kept it until the 15th & then returned it to the C. Bank, who received it on the 16th, & sent it by that day's post to their correspondents, the M. Bank, who, receiving it on the 17th, sent notice of the dishonour by the post on the 19th to the drawer, whom it reached on the 20th. A run upon the bank of M. & Co. commenced on the 11th, & on the 13th, at noon, they finally stopped payment. In an action by the M. Bank against the drawer, it was proved that the drawees sent cash through the post to country bankers, in payment of cheques drawn upon them, as late as the 11th, but did not honour any cheques forwarded to them by London bankers after the 7th, that if the cheque in question had been received by them by post from the C. Bank on the 8th, it would not have been paid, but that if presented across the counter at any time before the final stoppage on the 13th, it would have been paid:—*Held:* (1) the presentment was not in due time; (2) the mention of the names & address of the London agents in a memorandum at the foot of a country banker's cheque did not make the cheque payable at the place so indicated. *Semble:* the notice of dishonour was too late.—BAILEY *v.* BODENHAM (1864), 16 C. B. N. S. 288; 33 L. J. C. P. 252; 10 L. T. 422; 10 Jur. N. S. 821; 12 W. R. 865; 143 E. R. 1139.

Annotations:—**Refd.** Prideaux *v.* Criddle (1869), L. R. 4 Q. B. 455; Heywood *v.* Pickering (1874), L. R. 9 Q. B. 428.

468. ——— **Rights as between holder & drawer.**]—By the usage in the City of London a person receiving a cheque with his banker's name written across it paid it in at the banker's, & the banker, if he received it in time, presented it at the clearing-house & obtained payment the same day. A debtor paid his creditor by a crossed cheque, & the latter on the same day transmitted it to his banker. The banker negligently (as was alleged) omitted to present it at the clearing-house in time for that day (when it would have been paid), & on the next it was dishonoured, the firm on which it was drawn having stopped payment:—*Held:* the supposed negligence of the banker, though it might render him liable to his customer, did not discharge the drawer, the holder of the cheque being entitled to present it the day after its receipt.—BODDINGTON *v.* SCHLENCKER (1833), 4 B. & Ad. 752; 1 Nev. & M. K. B. 540; 2 L. J. K. B. 138; 110 E. R. 639.

Annotation:—**Folld.** Moule *v.* Brown (1838), 4 Bing. N. C. 266.

469. ——— ——— ———.]—The holder of a cheque paid it in to his bankers on the day after its receipt, & they presented it for payment on the day following but after the stoppage of the drawer's bankers:—*Held:* the drawer was discharged, as the holder of a cheque was, in general, bound to present it for payment not later than the day following that on which he received it, whether the presentment was made by himself or through his bankers.—ALEXANDER *v.* BURCHFIELD (1842), 7 Man. & G. 1061; 3 Scott, N. R. 555; 11 L. J. C. P. 253; 135 E. R. 431.

Annotations:—**Refd.** Laws *v.* Rand (1857), 3 C. B. N. S. 442; Heywood *v.* Pickering (1874), L. R. 9 Q. B. 428. **Mentd.** Hare *v.* Henty (1861), 10 C. B. N. S. 65.

See, now, Bills of Exchange Act, 1882 (c. 61), ss. 45, 74.

SUB-SECT. 2.—OPEN CHEQUES.

470. Rights of bank as holders—Dishonour of cheque—Notice of dishonour.]—In an action on a banker's cheque it appeared that pltfs., bankers, had received the cheque on account of a railway co., who kept an account with them. One of the witnesses stated his belief that the action was brought for the railway co.:—*Held:* sufficient evidence for the jury that pltfs. were holders, & entitled to sue upon the cheque.

Deft., after drawing & issuing the cheque, directed his bankers not to pay it:—*Held:* good evidence of a notice of dishonour.—LAURIE *v.* DAVIS (1846), 8 L. T. O. S. 90.

471. ——— ——— **Cheque overdue when given for collection—Bona fides of bank.**]—A cheque for £98, dated Aug. 21, 1880, directing the N. Bank to pay that sum to A. or bearer, was handed by deft., the drawer, to C. in circumstances which, if C. had been suing upon it, would have been an answer to his claim. In fraud of deft., C. on the 29th paid it into his account with L. Banking Co., who, upon the presentment & dishonour of the cheque on the same or the following day, sued the drawer for the amount. There was no evidence of the absence of *bona fides* on the part of pltfs., or that they had notice of the alleged fraud of C.:—*Held:* pltfs. were entitled to recover.—LONDON & COUNTY BANKING CO. *v.* GROOME (1881), 8 Q. B. D. 288; 51 L. J. Q. B. 224; 46 L. T. 60; 46 J. P. 614; 30 W. R. 382.

472. ——— **Giving customer immediate credit.**]—When a customer pays a cheque to his bankers with the intention that the amount of it shall be at once placed to his credit, & the bankers carry the

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PART II. SECT. 5, SUB-SECT. 2.

470 i. *Rights of bank as holders—Dishonour of cheque.*]—Pltfs., a bank, declared as holders upon a cheque of deft.'s, payable to bearer & dishonoured. Deft. pleaded that it was made for the accommodation of S. & delivered to him without consideration in terms of his giving security for repayment, which he did not give, that S. delivered it to pltfs., his bankers, with whom his account was already overdrawn, & that pltfs. had not given S. any further credit in respect of it:—*Held:* the pre-existing debt from S. to pltfs., without further advance, did not entitle them to sue nor place them in any better position than S.—ENGLISH, SCOTTISH & AUSTRALIAN CHARTERED BANK *v.* LEVINGER (1867), 4 W. W & A'B. 208.—AUS.

472 i. ——— *Giving customer immediate credit.*]—The account of M. at pltfs.' bank was $409.53 overdrawn. On May 23 he posted to pltfs. from Chicago a cheque of W. & Co. for $1,000, dated May 16, with instructions to place the amount to his credit, which pltfs. did on receipt on May 26. On the same day pltfs. sent the cheque for collection to the clearing house, but it was returned dishonoured on May 27, W. & Co.

Sect. 5.—Collection of cheques: Sub-sects. 2 & 3. Sect. 6: Sub-sect. 1.]

amount to his credit accordingly, they become immediately holders of the cheque for value, even though the customer's account is not overdrawn.—*Re* PALMER, *Ex p.* RICHDALE (1882), 19 Ch. D. 409; 51 L. J. Ch. 462; 46 L. T. 116; 30 W. R. 262, C. A.

Annotations:—**Folld.** Royal Bank of Scotland *v.* Tottenham, [1894] 2 Q. B. 715, C. A.; Gordon *v.* London City & Midland Bank, Gordon *v.* Capital & Counties Bank, [1902] 1 K. B. 242, C. A. **Mentd.** Bence *v.* Shearman, [1898] 2 Ch. 582, C. A.

Immediate credit, *see* Sect. 8, sub-sect. 3, A., *post.*

473. —— —— Post-dated cheque.]—Where a customer pays a post-dated cheque into his account at his bankers, so that the bankers may at once give him credit upon it, & the bankers place the amount to his credit accordingly, the bankers become holders of the cheque for value.—ROYAL BANK OF SCOTLAND *v.* TOTTENHAM, [1894] 2 Q. B. 715; 64 L. J. Q. B. 99; 71 L. T. 168; 43 W. R. 22; 10 T. L. R. 569; 38 Sol. Jo. 615; 9 R. 569, C. A.

Annotations:—**Folld.** Gordon *v.* London City & Midland Bank, Gordon *v.* Capital & Counties Bank, [1902] 1 K. B. 242, C. A. **Mentd.** Robinson *v.* Benkel (1913), 29 T. L. R. 475.

474. Drawer & payee both customers of bank—Bank acting as agents for payee—Appropriation of payments in.]—Pltf. paid into his own bankers a cheque of £250, drawn upon them by a third person, which they received without any objection, & in the course of the same day the drawer of the cheque paid in a sum of money, part of which he particularly appropriated, leaving a balance unappropriated of £237. The bankers, who were then creditors of the drawer to a large amount, wrote on the next morning to pltf. stating that the cheque was not paid, but that they would keep it in the hope of there being money to pay it, & on that day a further unappropriated balance was paid in, making altogether a sum exceeding pltf.'s cheque:—*Held:* pltf. might maintain money had & received against the bankers, & the latter, being his agents for receipt of the money, could not appropriate the balance to the payment either of their own general account against the drawer, or of two cheques presented on the same day, but subsequently to that of pltf., & paid by them.—KILSBY *v.* WILLIAMS (1822), 5 B. & Ald. 815; 1 Dow. & Ry. K. B. 476; 106 E. R. 1388.

Annotation:—**Consd.** Boyd *v.* Emmerson (1834), 2 Ad. & El. 184.

475. —— —— Duty of bank to payee—Time for obtaining payment & giving notice of dishonour.]—A cheque drawn by one customer in favour of another was paid into the bankers on whom it was drawn by the payee, & he requested that the amount might be placed to his credit. The bankers, at the time when it was so paid in, knew that the drawer of the cheque had no effects in their hands, but gave no intimation to the payee whether it would be placed to his credit or not:—*Held:* the bankers must be considered as having received the cheque as agents of the payee, & not of the drawer, & they were not bound to tell the payee at the time when he so presented it that they had no funds, but they had the same time to obtain payment & give notice of the dishonour of the cheque as if it had been drawn on any other bankers.—BOYD *v.*

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having stopped payment on May 23. On May 28 certain cheques drawn by M. on his account came in, which pltfs. paid & charged up. Pltfs. twice sent the $1,000 cheque to the clearing house, but it was on each occasion returned unpaid, pltfs. on each occasion crediting & debiting M.'s account with the $1,000. Pltfs. sued W. & Co. on the cheque. M. had not given consideration for it, &, if he were holder, he could not recover on it:—*Held:* pltfs., by crediting M.'s account with $1,000 on receipt of the cheque sued on, became holders for value of the latter.—BANK OF BRITISH NORTH AMERICA *v.* WARREN (1909), 14 O. W. R. 325; 19 O. L. R. 257.—**CAN.**

472 ii. —— ——.]—In the absence of evidence establishing notice of any defect in the title of the transferor, the banker of a broker, whose extravagance & transactions have become notorious through exposure in the daily Press, who receives & places to the credit of his client a cheque of one of the latter's dupes, is a holder in due course, & has a right of action to recover the amount thereof against the drawer of the cheque.—GARAND *v.* WEST (1911), Q. R. 40 S. C. 323; 18 R. L. 159.—**CAN.**

472 iii. —— ——.]—A. having given his cheque for $491,25 to B., the latter indorsed it to C.; he deposited it to her credit in a bank, which accepted it & paid $450 to C., & credited her deposit with the balance:—*Held:* C. being a holder in due course, the bank taking title through her possessed all the rights of a holder in due course against the maker & indorsers.—GAUTHIER *v.* REINHARDT (1904), Q. R. 26 S. C. 134.—**CAN.**

472 iv. —— —— *Notice of defective title.*]—A cheque in favour of R., M., & C. was placed by a bank to the credit of a new firm, M., C., & N., of which pltf. was not a member. C. indorsed the cheque in the name of both the old & new firm, adding his signature each time, & gave the bank instructions to place the proceeds to the credit of the new firm. Pltf. urged he was entitled to succeed on the ground that the bank was not a holder in due course:—*Held:* the bank had no notice of any defect in the title of the person negotiating it.—ROSS *v.* CHANDLER (1909), 14 O. W. R. 898; 1 O. W. N. 104; *affd.* 45 S. C. R. 127.—**CAN.**

472 v. ——————.]—The directors of a building society, the rules of which were silent as to the indorsement of cheques, authorised H., the secretary of the society, to indorse on their behalf all cheques drawn in favour of the society or order, but instructed him to pay the proceeds to the S. Bank. H., who had a private account with deft. bank, deposited with deft. bank cheques amounting in value to several thousands of pounds drawn in favour of the society or order, & indorsed by himself as secretary. Deft. bank received the proceeds of the cheques from the drawers, & allowed H. to draw the same in the usual course in his individual capacity. Deft. bank had no notice or suspicion of H.'s dishonesty, but might, on inquiry from the society, have ascertained that the secretary's instructions were to pay all cheques indorsed by him to the society's bankers:—*Held:* the bank had taken the cheques in good faith & for value & without notice of any defect in H.'s title, & was a holder in due course.—CAPE OF GOOD HOPE BUILDING SOCIETY LIQUIDATORS *v.* BANK OF AFRICA (1900), 17 S. C. 480; 10 C. T. R. 597.—**S. AF.**

d. *Cheque presented for collection & remittance—Cheque charged to drawer's account—Drawer discharged.*]—When a holder presents a cheque for "collection & remittance," not for payment, & it is in fact collected & charged to the drawer's account, the drawer is discharged.—WELLESLEY *v.* MCFADDIN (1911), 19 O. W. R. 637; 2 O. W. N. 1337.—**CAN.**

e. *Indorsement forged—Bank collecting on third party's behalf—Right of bank.*]—M., having a cheque on New York payable to his order, of which he claimed to be owner, indorsed & handed it to H. to collect & pay amount over to him. H., believing M. to be owner & entitled to receive the money, handed it to pltfs. to be collected, telling their manager that he saw M. indorse it & that he knew him, but when the manager offered to cash it at once if H. would indorse it, he declined, stating that he knew nothing of it, & it might not be paid. For purpose of collection H. signed his name as witness to the indorsement, writing beneath his signature "without any recourse to me whatever." Pltfs. collected the money & credited proceeds to H., who accounted for them to M. The New York bank subsequently demanded the money back, alleging M.'s indorsement to be a forgery, & pltfs. paid back amount received & brought an action against H. & M.:—*Held:* M. was liable to repay the amount.—BANK OF OTTAWA *v.* HARTY (1906), 12 O. L. R. 218; 6 O. W. R. 925; 7 O. W. R. 869.—**CAN.**

f. *Bank not collecting full amount—Liability to payee.*]—Pltf. was payee of a cheque for $250 on the H. Bank. He indorsed it to J. C. & Co., of Montreal, who deposited it for collection with deft. bank, who remitted it to the N. Bank with instructions to collect only $2.50 on it, & they so collected. At the time the drawer had sufficient funds to pay the full amount, but he subsequently failed:—*Held:* the bank was liable to pltf. for $247.50 with interest & costs.—NADEAU *v.* BANK OF TORONTO (1907), 2 E. L. R. 529; Q. R. 32 S. C. 178.—**CAN.**

g. *Action for detinue against collecting bank—Cheque alleged to be forged.*]—Detinue for a cheque. "Plea, that defts. received the cheque from pltf. to present & collect it from the bank on which it was drawn, that they did present it, but payment was refused by the bank manager, who retained & kept same, alleging that the names of the drawers thereto were forged:—*Held:* a good defence, for if the cheque was forged, the detention was rightful, & if genuine, defts. lost control over it by no wrongful act, & pltf.'s remedy was against the bank.—BROWN *v.* LIVINGSTONE (1862), 21 U. C. R. 438.—**CAN.**

EMMERSON (1834), 2 Ad. & El. 184; 4 Nev. & K. B. 99; 4 L. J. K. B. 43; 111 E. R. 71.

Annotations:—**Refd.** Chambers *v.* Miller (1862), 13 C. B. N. S. 125. **Mentd.** Carr *v.* Smith (1843), 5 Q. B. 128.

476. Cheque lost in collection — Obligation of drawer to give fresh cheque—Right of bank against drawer—To recover amount paid to payee.]—A. & Co., bankers of B., received on his account a cheque for £100 from C., drawn upon C.'s bankers, & lost it. C. was called upon by A. & Co. to give another cheque for the same amount, upon receiving an indemnity against the cheque that was lost, & C. promised from time to time to give another cheque, & also desired his bankers would not pay the lost cheque, if presented. A. & Co., being called upon, were obliged to pay the amount of the lost cheque to B. In an action by A. & Co. against C. for money paid & on an account stated:—*Held*: the action would not lie.—LUBBOCK *v.* TRIBE (1838), 3 M. & W. 607; 1 Horn & H. 160; 7 L. J. Ex. 158; 150 E. R. 1287.

Annotations:—**Expld.** Garrard *v.* Cotterell (1847), 10 Q. B. 679; Lewis *v.* Campbell (1849), 8 C. B. 541.

477. ——— ———.]—A. paid to the credit of his account with L. Banking Co. a cheque drawn by B. The cheque was lost, & B. having refused to give another, leave was given to the official manager of the banking co. to file a claim to compel him to do so on being indemnified.—RHODES *v.* MORSE (1850), 15 L. T. O. S. 295; 14 Jur. 800.

SUB-SECT. 3.—CROSSED CHEQUES.

478. Effect of crossing.]—*Semble*: the custom of writing the name of a banker across a cheque is only for the purpose of securing that the payment shall be made to some banker, not to the banker originally named, for the holder may substitute another for him; and this even when the name of the particular banker is originally written, not by himself, but by the drawer.—STEWART *v.* LEE (1828), Mood. & M. 158, N. P.

Annotation:—**Apprvd.** Bellamy *v.* Marjoribanks (1852), 7 Exch. 389.

479. Cheque crossed to account of customer — Amount placed to customer's account—Dishonour of cheque—Rights of bank.]—S. gave a cheque to M., which he sent to his bankers, the N. Bank, to be placed to his credit. The cheque was payable to his order, & was crossed "Account of M. N. Bank." The bank placed the amount to M.'s credit, & allowed him to draw on account of it before the amount had been paid to them. On presentation at the bank of S. the cheque was dishonoured, which left M.'s account at the N. Bank overdrawn. As M. did not refund the amount, the N. Bank sued S. for the amount of the cheque:—*Held*: the words written across it did not render the cheque not negotiable, & it having been sent to the bank to be placed to the credit of M., & M. having been allowed to draw on account of it, the bank were *bonâ fide* holders of the cheque for value in due course, & could sue S. for the amount.—NATIONAL BANK *v.* SILKE, [1891] 1 Q. B. 435; 60 L. J. Q. B. 199; 63 L. T. 787; 39 W. R. 361; 7 T. L. R. 156, C. A.

Annotation:—**Consd.** Gordon *v.* London City & Midland Bank, Gordon *v.* Capital & Counties Bank (1900), 83 L. T. 762.

See, also, Nos. 674, 677, 678, 691, *post*.

480. Delay in presentment—Dishonour of cheque—Rights of holder.]—A cheque crossed in blank, being given in payment of a bill, was duly paid by the holder into his bankers, who, two days afterwards, presented it for payment, when it was returned dishonoured. In an action on the bill:—*Held*: the plea alleging that the cheque had not been presented within a reasonable time could not be sustained, as the crossing of the cheque was a direction to the holder to pay it only through a banker, & the holder had done all that was required of him to comply with that request by paying it into his bankers within a reasonable time, & could not be held responsible for any delay that afterwards took place.—STRINGFIELD *v.* LANEZZARI (1867), 16 L. T. 361.

SECT. 6.—COLLECTION OF BILLS OF EXCHANGE AND PROMISSORY NOTES.

SUB-SECT. 1.—IN GENERAL.

481. Presentment for acceptance — By London bank for country correspondents—Receipt of cheque in payment from acceptor—Liability on dishonour of cheque.]—A banker in London receiving bills from his correspondents in the country, to whom they had been indorsed, to present for payment is not guilty of negligence in giving up such bills to the acceptor upon receiving a cheque upon a banker for the amount, although it turn out that such cheque is dishonoured.—RUSSELL *v.* HANKEY (1794), 6 Term Rep. 12; 101 E. R. 409.

Annotation:—**Refd.** Pape *v.* Westacott, [1894] 1 Q. B. 272, C. A.

PART II. SECT. 6, SUB-SECT. 1.

h. *Rights of bank as holders — Giving customer credit for specific amounts.*]—A bank which has received a negotiable instrument for a customer, who has overdrawn his account, but does not take it in respect of the overdrawn account, crediting the customer with a specific amount, is not a holder in due course for valuable consideration, & is not entitled to sue on the instrument.—NATIONAL BANK OF CHINA, LTD. *v.* LEMAIRE & CO. (1906), 1 Hong Kong L. R. 167.—**HONG KONG.**

481 i. *Presentment for acceptance—Liability of bank for failing to present.*]—*Held*: the bank liable to pltfs. for want of presentment of a note indorsed to them for collection, notwithstanding a notice issued by them, which pltfs. had received, that all notes delivered to them for collection should be wholly at the risk of the persons leaving them, & that defts. would be responsible only for moneys actually received in payment of such notes, but not for any omissions, informalities, or mistakes, in respect of such notes.—BROWNE *v.* COMMERCIAL BANK (1853), 10 U. C. R. 129.—**CAN.**

k. *Acceptance by & failure of drawee bank—Rights of collecting bank against payee.*]—Deft. indorsed a draft to pltf. bank & received the money thereon. The bank sent the draft to the clearing house, & it was accepted by the drawee bank, which failed, & pltf. bank brought an action to recover the amount paid deft.:—*Held*: pltfs. had accepted the drawee bank as their debtor & could not recover from deft., as there was no evidence to render deft. subject to the rules of the clearing house.—STERLING BANK *v.* LAUGHLIN (1912), 21 O. W. R. 221; 3 O. W. N. 643.—**CAN.**

l. *Collecting bank agent of payee — To receive payment.*]—A bank, to which a promissory note is indorsed "for collection,' becomes for that purpose the agent of the indorser, to whom it is bound to account for the amount collected.—PERREAULT *v.* MERCHANTS' BANK (1905), Q. R. 27 S. C. 149.—**CAN.**

m. ——— ——— *Not of maker.*]—Promissory notes made payable at the N. S. Bank were given to the agent of the K. Bank for collection. The agent testified these notes "were in the head office at H. when they became due, & after they became due were returned" to him. There was no evidence deft. or any one representing him was at the place where the notes were made payable to meet his engagement:—*Held*: the bank was agent of the payee to receive payment & not of the maker to pay.—PULLEN *v.* SANFORD (1883), 4 R. & G. 242.—**CAN.**

n. *Collecting bank agent of drawee—Not of drawer.*]—A bill was sent to a bank for collection, & notice was sent on a Saturday to the drawee that it lay there for payment. The drawee was not able to go to the bank until Monday, when he paid the sum, & was told that the bill had been returned to the bank's correspondents, but that the bank would get it & hand it over to him. The bank did not do so, but by some mistake denied that they had the money, & refused to pay it to the drawee of the bill. In an action by the drawer against the drawee for payment of the sum:—*Held*: the bank received the money as the agents of the drawee & not of the drawer, & though no blame was imputable to him, he must suffer for the mistake of the bank.—MAYER *v.* HAMILTON

Sect. 6.—Collection of bills of exchange and promissory notes: Sub-sect. 1.]

482. —— Acceptance refused—Omission to notify customer—Damages.]—A. & Co., resident in America, employed B., resident in England, to purchase & ship goods for them. On account of such purchases they sent to B. a bill, drawn by C. in America on D. in London, but did not indorse it. B. employed his bankers to present the bill for acceptance. D. refused to accept, but of this the bankers did not give notice until the day of payment, when it was again presented, & dishonoured. Before the bill arrived in England C. became bkpt., & he had not, either when the bill was drawn, or at any time before it became due, any funds in the hands of D., the drawee. In an action by B. against the bankers for neglecting to give notice of the non-acceptance of the bill:—*Held:* (1) A. & Co., not having indorsed the bill, were not entitled to notice of the dishonour, & remained liable to B. for the price of the goods sent to them, & the drawer was not entitled to notice, as he had no funds in the hands of the drawee; (2) B. could not recover the whole amount of the bill, but such damages only as he had sustained in consequence of having been delayed in the pursuit of his remedy against the drawer.—VAN WART *v.* WOLLEY (1824), 3 B. & C. 439; 5 Dow. & Ry. K. B. 374; 3 L. J. O. S. K. B. 51; 107 E. R. 797.

483. —— Negligence of agent—Cancellation of acceptance—Damages.]—The A. Bank were indorsers of a bill drawn by G. on G. & Co. at Melbourne at 15 days after sight. The bill was transmitted by the bank to the B. Bank, their agents at Melbourne, for presentment. The B. Bank received the bill at one o'clock on Friday, & at two o'clock on the same day the bill was presented by their clerk to the drawees, G. & Co., for acceptance, & left with them for that purpose. On Saturday, the following day, an acceptance was written by

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(1865), 3 Macph. (Ct. of Sess.) 1066; 37 Sc. Jur. 561.—**SCOT.**

o. *Lien note left for collection & payment received—Liability of bank purchasing assets of collecting bank.*]—A lien note or agreement in favour of pltf. was left at the T. Bank for collection, & the note was surrendered at the bank upon payment by one of the makers. The bank afterwards sold & transferred all its assets to the R. Bank, which, as part of the consideration, covenanted to assume & pay all the liabilities of the T. Bank. Pltf. demanded a return of the note or the money due thereunder:—*Held:* the covenant by the R. Bank to pay the liabilities of the T. Bank became a statutory obligation after the agreement containing it had been approved by the Governor in Council.—CAMERON *v.* ROYAL BANK OF CANADA (1915), 30 W. L. R. 865; 8 W. W. R. 375.—**CAN.**

p. *Must receive payment in money—Cannot set off.*]—Bankers, to whom as agents a bill of exchange is forwarded for collection, can receive payment in money only, & cannot bind the prinpals by setting off the amount of the bill of exchange against a balance due by them to the acceptor.—DONOGH *v.* GILLESPIE (1894), 21 A. R. 292.—**CAN.**

q. *Remitting bank indebted to collecting bank—Insolvency of remitting bank—Rights of collecting bank.*]—A bank, creditor of another bank for the amount of a note discounted for it, received from the bank indebted to it (then solvent) sundry drafts for collection:—*Held:* debtor bank having become insolvent before any amounts were received on the drafts, compensation did not take place between the amount collected by creditor bank and the debt due to such bank.—EXCHANGE BANK OF CANADA *v.* CANADIAN BANK OF COMMERCE (1885), M. L. R. 2 K. B. 476; 10 L. N. 110.—**CAN.**

r. *Bill specially indorsed to bank for collection—Bill transferred to third party without indorsement.*]—A bill of exchange drawn by the A. Co. was indorsed "Pay to the order of the N. S. Bank, A.," & by the agent of the bank at A. "Pay to the order of the N. S. Bank, H., for collection." The bill was not paid, & was returned to A. While the bill was still in the hands of the agency of the bank there it was purchased by deft. & was handed over to him, but without any indorsement being made other than those already on the bill:—*Held:* the bill having been specially indorsed to the bank, could not be transferred to the deft. except by indorsement.—FORSYTH *v.* LAURENCE (1886), 7 R. & G. 148; 7 C. L. T. 174.—**CAN.**

s. *Note lost—In post — Liability of bank.*]—Where a bank receives a note for collection, & in the regular course of business places the same in the hands of a responsible & perfectly solvent agent, it is not liable for the loss of the note in the mails. In any case, the bank's offer to give security to the makers & indorser that they will never be troubled if they pay the note is sufficient.—LITMAN *v.* MONTREAL CITY & DISTRICT SAVINGS BANK (1897), Q. R. 13 S. C. 262.—**CAN.**

t. —— *Through criminal act of bank's servant—Liability of bank.*]—A. sent a hundi by post to a bank. The bank presented it for payment by one of its servants, B., who brought it back, reporting that payment had been refused. The manager of the bank, with the intention of returning it to A., placed it in an envelope, sealed & stamped, which was laid upon the table ready for the post, it being the custom of the bank to post all letters in that manner. B. presented the hundi for payment the following day, & obtained cash for it:—*Held:* the bank was guilty of such neglect as to render it liable to A. for the amount of the hundi.—PEOPLE'S BANK *v.* OBBARD (1864), 2 Hyde, 57.—**IND.**

u. *Crediting proceeds to wrong erson — Liability of bank.*] — Pltfs. drew upon J. a bill for £200, payable to their order, which they indorsed to the G. Bank, by whom it was sent to the agent of defts. for collection. When it fell due J., with the agent's consent, drew upon pltfs. to meet it, but the proceeds of such draft, contrary to J.'s direction, were placed to his credit with defts. against other acceptances of his, & pltfs. paid both drafts:—*Held:* they might recover the proceeds of the second bill from defts. as money had & received. *Qu.:* whether they might also recover as for money paid.—RIDDELL *v.* BANK OF UPPER CANADA (1859), 18 U. C. R. 139.—**CAN.**

w. *Bill of exchange sent with bill of lading—Duty to retain bill of lading until payment.*]—Pltfs. sent to defts., a bank at T. for collection, a bill drawn by A. at M. on B. at T., payable forty-five days after date, together with a bill of lading indorsed by A. for wheat consigned by A. to B.:—*Held:* (1) in the absence of any instructions to the contrary, defts. not bound to retain the bill of lading until payment of the draft by B., but were right in giving it up to him on obtaining his acceptance; (2) evidence as to the custom of merchants in such cases in the United States could not be material.—WISCONSIN MARINE & FIRE INSURANCE CO. BANK *v.* BANK OF BRITISH NORTH AMERICA (1861), 21 U. C. R. 284; 2 E. & A. 282.—**CAN.**

y. —— ——.]—A. gave a draft & bill of lading to defts., with the following indorsement on the latter, "Deliver to I. & J. L., subject to a draft drawn by me at thirty days from Aug. 10, for $2,259.10." Defts. discounted the draft, & on non-acceptance thereof handed over the bill of lading to the acceptors, who failed to pay the draft at maturity: *Held:* defts. not responsible for the loss.—GOODENOUGH *v.* CITY BANK (1860), 10 C. P. 51.—**CAN.**

a. —— *Instructions to hold goods till payment—Goods stored in warehouse of consignee—Liability of bank to consignor.*]—Where bills of lading are transmitted to a bank with instructions to hold the goods forwarded therewith until bills of exchange drawn against such goods have been met, & the bank, during the currency of the bills, store the goods in a bonded warehouse kept by the consignee, & the consignee improperly disposes of the goods, the bank are liable to the consignor if the bills are not met.—BANQUE FRANCO-EGYPTIENNE *v.* BANK OF NEW ZEALAND (1886), 4 N. Z. L. R. 281.—**N.Z.**

b. *Bank's right of action against customer on bills deposited for collection.*]—Bills of exchange deposited by a customer with his banker for collection, & indorsed for that purpose, cannot be put in suit against the customer, although the banker may have a right to indorse payment of the bills against all other persons liable thereon. Nor does the circumstance that the customer's account with the banker is overdrawn give the banker a right of action on the bills against the customer.—COMMERCIAL BANK *v.* DYER, Mac. 509.—**N.Z.**

c. *Right of collecting bank to prove on liquidation of customer & original giver of bills.*]—A co., being the holder of bills of exchange indorsed to it by another co., which in turn had received the bills from a third co., lodged the bills with its bankers for collection at maturity. At the time of lodging the bills the co. depositing them was indebted to its bankers in a sum exceeding the amount of the bills lodged. The bills were dishonoured at maturity, & all the cos. subsequently went into liquidation. As between the depositing co. & the original givers of the bills they were otherwise satisfied:—*Held:* the bankers entitled to prove against the assets of the original givers of the bills.—*Re* CITY SAWMILLING CO., LTD. (1898), 17 N. Z. L. R. 14.—**N.Z.**

d. *Expenses of collection—In addition to interest—Whether usurious.*]—Under C. S. U. C. c. 58, if a bank procure a note to be made payable elsewhere solely for the purpose of obtaining the rate allowed by s. 5, for the expenses of collection, in addition to the 7 per cent. interest, the transaction is usurious & void. They are not called upon to inquire as to the reason for making a note thus payable when the parties themselves have so chosen to draw it.—BANK OF MONTREAL *v.* REYNOLDS (1866), 25 U. C. R. 352.—**CAN.**

one of the firm of G. & Co. across the face of the bill, & the bill so accepted was handed to a clerk to be delivered in the usual course of business, & at half-past eleven o'clock on that day a clerk of the B. Bank called upon the drawees & asked for the bill. He was told by the clerk of the drawees that the bill had been mislaid, & requested to call again on Monday, which he agreed to do, as according to the custom in Melbourne business closed at twelve o'clock on Saturdays. On Monday the clerk of the B. Bank called again upon the drawees, & was told that the bill was ready to be delivered, but that in the absence of the clerk who had charge of it, it could not then be got at, & he was requested to call on Tuesday. The clerk called on that day & obtained the bill, but the acceptance of the drawees was cancelled on the face of the bill, the drawees having obtained the information in the interval that the remittance was not likely to be forwarded by G. to meet the bill. G. became insolvent, & the A. Bank having received nothing in respect of the bill, brought an action against the B. Bank, as their agents, for negligence. The evidence did not show any uniform usage at Melbourne to present bills the same day for acceptance. The custom to close at twelve o'clock on Saturdays was proved. The judge put it to the jury whether they thought that the B. Bank were guilty of negligence or a breach of duty in not demanding that the bill should be delivered up on Saturday accepted or unaccepted, & the jury answered that, strictly speaking, there was a neglect, but considering the respectability of the drawees, & Saturday being a short day, the B. Bank were excusable in leaving the bill. The jury found for pltfs. with nominal damages, & pltfs. applied to increase the damages to £3,000, the amount of the bill:—*Held:* (1) there was no such negligence by defts. as agents as to entitle pltfs. to substantial damages; (2) although the judge was wrong in directing the jury on what was a matter of law & not fact, yet the substance of the answer of the jury was, that it being the ordinary course to leave a bill for acceptance for 24 hours, & the 24 hours running out on Saturday, but not before twelve o'clock, it was an excusable neglect to postpone the demand for an answer until the opening of the drawees' counting-house on Monday.—BANK OF VAN DIEMEN'S LAND *v.* BANK OF VICTORIA (1871), L. R. 3 P. C. 526; 7 Moo. P. C. C. N. S. 401; 40 L. J. P. C. 28; 19 W. R. 857; 17 E. R. 152, P. C.

484. Unauthorised indorsement—Payment to bank by acceptor—Recovery of amount by drawee—Rights of acceptor against bank.]—An English merchant, resident at Fort St. George, in the East Indies, executed a power of attorney to his correspondent in England, in the common general form. A servant of the East India Co., by the direction of the Governor in Council, drew three bills of exchange on the co., payable in London in favour of that merchant. The correspondent received the bills; they were accepted by the co., & the correspondent indorsed & delivered them to a firm of merchants, who, having also indorsed them, paid them in account to their bankers, but almost immediately drew the amount thereof out of the hands of the bankers. The bankers, having put their names on the back of the bills, sent them when due to the co. for payment. The co., after inspecting the power of attorney, paid the amount of the bills. The English merchant died, & his administrator *de bonis non* recovered the amount of the bills from the co., in consequence of the ct. deciding that the correspondent had not authority by the power of attorney to indorse bills. The co. gave notice of that judgment to the bankers, who at that time had no proceeds in their hands of their customers. The co. brought an action against the bankers on the ground that their names being on the bills was a warranty that the prior indorsements were legal. The jury having found that the co. paid the bills, not on the faith of the indorsements of the bankers, but on the faith of the power of attorney:—*Held:* the action could not be maintained, for no such warranty could be implied from the indorsement, & if it could, the facts of the case showed that the co. did not act upon it.—EAST INDIA CO. *v.* TRITTON (1824), 3 B. & C. 280; 5 Dow. & Ry. K. B. 214; 3 L. J. O. S. K. B. 24; 107 E. R. 738.

485. Payment to sub-agent of bank—Omission to credit customer—Failure of sub-agent—Liability of bank.]—M. employed R. & Co., bankers in Edinburgh, to obtain for him payment of a bill drawn on a person resident in Calcutta. R. & Co. accepted the employment, & wrote promising to credit him with the money when received. R. & Co. transmitted the bill in the usual course of business to C. & Co., of London, & by them it was forwarded to India, where it was duly paid. R. & Co. wrote to M. announcing the fact of its payment, but never actually credited him in their books with the amount. The house in India failed:—*Held:* R. & Co. were the agents of M. to obtain payment of the bill, & payment having been actually made, they became *ipso facto* liable to him for the amount received, & he could not be called on to suffer any loss occasioned by the conduct of their sub-agents, as between whom & himself no privity existed.—MACKERSY *v.* RAMSAYS, BONARS & CO. (1843), 9 Cl. & Fin. 818; 8 E. R. 628, H. L.

Annotations:—**Apld.** Prince *v.* Oriental Bank Corpn. (1878), 3 App. Cas. 325, P. C. **Refd.** Beatie *v.* Carmichael (1857), 29 L. T. O. S. 228; Meyerstein *v.* Eastern Agency Co. (1885), 1 T. L. R. 595. **Mentd.** West Ham Grdns. *v.* St. Matthew, Bethnal Green, [1896] A. C. 477, H. L.

486. Restrictive indorsement on bill—"For collection per account"—Payment by bank to indorser—Right to sue acceptor.]—D. drew a bill on defts. payable 60 days after sight & discounted it with the M. Bank in America. The M. Bank indorsed the bill to pltfs., bankers, "for collection *per* account of the M. Bank." Pltfs. presented the draft to defts. for acceptance, & they accepted same. Pltfs. thereupon allowed the M. Bank to draw upon them for the amount of the bill. Before the bill matured D. paid the M. Bank the amount of the bill, & wrote to defts. releasing them from their liability as acceptors. Defts. never received any value on account of the bill. Both D. & the M. Bank became bkpt.:—*Held:* pltfs. having taken the bill under a restrictive indorsement could not recover against the acceptors.—WILLIAMS, DEACON & CO. *v.* SHADBOLT (1885), 1 Cab. & El. 529; 1 T. L. R. 417.

487. Mistake as to bill being honoured—Payment under mistake—Refusal of customer to repay—Liability of collecting bank.]—B. was the indorsee for value of a bill of exchange payable in Brussels. Defts. as agents for B. indorsed the bill to pltfs. for collection. Pltfs. indorsed the bill for that purpose to their agents at Antwerp. Afterwards pltfs. informed defts. that the bill had been collected, & they handed them a cheque for the amount, less their charges. Defts. informed B. that the bill had been collected & credited him with the amount. The bill had in fact been dishonoured. Pltfs. sued defts. for the return of the money, which B. refused to repay to them:—*Held:* defts. having accounted to B. before they were informed of the mistake, pltfs. were estopped from recovering.—DEUTSCHE BANK (LONDON AGENCY) *v.* BERIRO & CO. (1895), 73 L. T. 669; 12 T. L. R. 106; 1 Com. Cas. 255, C. A.

488. Unauthorised acceptance of conditional payment—Refusal of holders to agree—Liability of bank—Assignation of holders' rights.]—The agent of a bank offered to try to obtain payment of a bill which had been protested for non-payment, & the

Sect. 6.—Collection of bills of exchange and promissory notes: Sub-sects. 1 & 2.]

holders accepted the offer. The acceptors offered to pay the bill & the protest charges on the condition that they should not be called upon to pay interest & expenses. The bank's agent communicated this condition to the holders, &, without waiting for authority, took payment of the bill & protest charges, marked the bill paid, & delivered it to the acceptors, who deleted their names thereon. Thereafter the holders intimated their refusal to agree to the conditions on which payment had been made, refused to accept the sum tendered to them by the agent of the bank, & received back the bill cancelled. They sued the acceptors on the bill, but the latter became bkpt. The holders then sued the bank for the amount of the bill, with interest, & for the expenses of their action against the acceptors: —*Held:* the bank were liable, but were entitled to an assignation of the rights of the holders against the drawers of the bill.—BANK OF SCOTLAND *v.* DOMINION BANK (TORONTO), [1891] A. C. 592, H. L.

489. Drawn against goods—Free delivery allowed—Appropriation of payments to particular goods.]—A banker, who was employed by the consignor of goods to collect the proceeds of bills drawn against such goods, & for that purpose received the shipping documents, was instructed to allow a free delivery of goods to the consignee up to a fixed amount:—*Held:* the banker was under no obligation to ascertain that the payments made from time to time by the consignee represented the proceeds of any particular goods. — BAERLEIN & Co. *v.* CHARTERED MERCANTILE BANK OF INDIA, LONDON & CHINA (1896), 1 Com. Cas. 366.

See, further, Sect. 15, *post*.

490. Bank giving receipt for promissory note—Failure of maker—Whether receipt absolute acknowledgment of money received.]—A., a goldsmith, having £150 of B.'s money in his hands, gave him a note for it payable to him or order on demand. B. gave the note to pltf., to whom he was indebted in the like amount, without indorsement. Pltf. took the note & a bill for £80 on J. to his bankers, & they gave him a receipt for £230 on account, stating in the margin, "B. £150, J. £80." The bankers sent their dunner on several days to try to collect the note for £150, but before payment A. failed:—*Held:* the receipt was an absolute acknowledgment of so much money received on pltf.'s account, & bankers were liable.—TROWELL *v.* EVANS (1710), 1 Eq. Cas. Abr. 375; 21 E. R. 1113.

SUB-SECT. 2.—RIGHTS ON DISHONOUR.

491. Notice of dishonour—Bank acting for drawer & acceptor—Acceptor's instructions to stop payment—No notice to drawer.]—F. & Co. deposited a bill of exchange with defts., bankers, for the amount of which they were given credit in account. The bill was drawn by F. & Co. upon T., payable to the order of the drawers at S. & Co.'s in London, & was remitted by defts. to them. T. also kept a banking account with defts. Before the bill became due T. asked defts. to direct S. & Co. not to pay the bill. Defts. gave such directions, & the bill was returned to them the day after it became due. It was contended that defts. could not charge F. & Co. by reason of the default of the acceptor, when they themselves by their notice to S. & Co. were the cause of the non-payment of the bill, & that at all events defts. ought to have given notice of this circumstance to F. & Co., their customers:—*Held:* it was not the duty of defts. to give notice to F. & Co. of T.'s directions, as they acted confidentially & were not at liberty to communicate T.'s orders without betraying their trust, & as T. might have provided for the bill elsewhere.—CROSSE *v.* SMITH (1813), 1 M. & S. 545; 105 E. R. 204.

Annotations:—**Mentd.** Harris *v.* Richardson (1831), 4 C. & P. 522; Allen *v.* Edmonson (1848), 2 Car. & Kir. 547.

492. —— Reasonable time for giving.]—A country banker, with whom a bill of exchange, payable in London, is deposited, has an entire day after receiving notice of its dishonour to transmit same to his customer, so that notice by the next day's post, though it be not the next post, will be time enough.

The indorsee of a bill payable at a banker's in London deposited it with his bankers in the country, who caused it to be duly presented for payment on the 14th, when it was dishonoured & notice sent by the post to the country bankers on the 15th, which reached them on the morning of the 17th (being Sunday). On the next day they sent notice by the post to the indorsee, but not before twelve at noon, at which time the post set out for the place where the indorsee resided:—*Held:* this notice was within time.—BRAY *v.* HADWEN (1816), 5 M. & S. 68; 105 E. R. 976.

Annotations:—**Apprvd.** Hawkes *v.* Salter (1828), 4 Bing. 715. **Consd.** Fielding *v.* Corry, [1898] 1 Q. B. 268, C. A.

493. —— Presentment through branch banks—Rights as independent indorsees.]—A bill of exchange was indorsed to a branch bank at P., who indorsed to another branch of the same bank at B., who indorsed to the head bank in London:—*Held:* the branch banks were independent indorsees, & each entitled to the usual notice of dishonour, & it was reasonable the bill should be sent successively to the branch banks through which it had come to the principal bank before giving notice of dishonour to the holder.—CLODE *v.* BAYLEY (1843), 12 M. & W. 51; 13 L. J. Ex. 17; 2 L. T. O. S. 123; 7 Jur. 1092; 152 E. R. 1107.

Annotations:—**Consd.** Woodland *v.* Fear (1857), 7 E. & B. 519; Prince *v.* Oriental Bank Corpn. (1878), 3 App. Cas. 325, P. C. **Expld. & Apld.** Fielding *v.* Corry, [1898] 1 Q. B. 268, C. A. **Consd.** R. *v.* Lovitt, [1912] A. C. 212, P. C. **Refd.** Prideaux *v.* Criddle (1869), 10 B. & S. 515.

494. —— To wrong branch of country bank—Subsequent telegram to right branch.]—A branch of a country banking co. received from a customer a bill of exchange & forwarded it to a London bank for presentation. The bill was dishonoured, & the London bank on the following day sent notice of dishonour by post to a branch of the country banking co., but not to the branch from which they had received the bill. On the next day they discovered the mistake & telegraphed notice of dishonour to the branch from which they had received the bill. The notice given by that branch & all subsequent notices, including that to deft., who was an indorser of the bill, were sent in due time. In an action by the holder of the bill:—*Held:* sufficient notice of

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PART II. SECT. 6, SUB-SECT. 2.

494 i. *Notice of dishonour—To wrong branch—Failure of bank to correct mistake.*]—Pltf., a customer of defts.' branch bank at C., handed to the manager there for collection a note made by G. to, & indorsed by, T., both of whom lived at D., where the note was made & payable. The C. manager, without indorsing the note, sent it to their W. branch for collection without any instructions as to the place of residence of the indorser. Payment having been refused upon presentation, the agents of the W. branch handed it to a notary, who duly protested it but inclosed the notice for T., in the envelope containing the notice to the W. branch, addressed to the manager of that branch. The C. manager received the protest, & could have seen from it, in time to rectify the mistake, that the notice for T. had been addressed to the W. agent: —*Held:* on sending the note to their W. agent defts. should have given proper information as to the residence of the indorser for the guidance of the notary & the C. branch having notice from the protest, which they should have examined, that the notice for the indorser had been sent to W., they should at once have had a proper notice served in D.

dishonour had been sent by the London bank to comply with Bills of Exchange Act, 1882 (c. 61), s. 49 (12), (13).—FIELDING & CO. *v.* CORRY, [1898] 1 Q. B. 268; 67 L. J. Q. B. 7; 77 L. T. 453; 46 W. R. 97; 14 T. L. R. 35; 42 Sol. Jo. 45, C. A.

Branch banks, generally, *see* Sect. 1, sub-sect. 3, *ante*.

495. —— Casual customer—Notice not given—Usage of bankers.]—Pltf. handed defts. a bill for £272 for collection. He had no account with them, but they collected negotiable paper for him for a commission. The bill fell due on Nov. 24, & on Nov. 18 pltf. left it with defts.' cashier. On Nov. 30 pltf. called at the bank & was informed of the dishonour of the bill. The immediate & prior indorsers denied liability to pltf., on the ground of want of due notice of dishonour. In an action to recover the value of the bill, defts. set up a usage of bankers not to give notice of dishonour to casual customers, who were told to call on the day the bill would be returned, & a verdict was given for defts. on the ground that by the general usage of bankers, defts. were under no obligation to give pltf. notice of dishonour.—ASHWORTH *v.* MILLER (1865), cited Grant's Law of Banking, 6th ed., p. 53, n.

496. Customer credited on receipt of bill for collection—Indorsement as agent—Right to sue agent on dishonour.]—A solr., under the authority of an administrator & as his local agent, collected debts due to the estate of an intestate. He received, in the course of his agency, money which it was his duty to remit to the general agent of the administrator. In order the more conveniently to remit this money he procured a banker's bill, which had been accidentally drawn in his favour, & which he had to indorse. He indorsed it to the general agent & deposited it with a banker, to be presented for acceptance & payment by the drawee. The banker gave him credit for the amount, knowing the circumstances of the transaction & the relative situation of the parties:—*Held:* the Ct. of Equity would restrain an action on the indorsement, whether brought by the indorsee or by the banker against the solr.—KIDSON *v.* DILWORTH & WELCH (1818), 5 Price, 564; 146 E. R. 695.

Annotation:—**Apld.** Castrique *v.* Buttigieg (1855), 10 Moo. P. C. C. 94, P. C.

497. —— Payment by acceptor to customer after dishonour—Bank's rights against acceptor.]—Deft. accepted a bill of exchange drawn by C., who indorsed it to his bankers; they entered it on the credit side of C.'s account, but, the bill having been dishonoured, entered it afterwards on the debit side. A few days after the dishonour deft. paid to C. the amount of the bill, but omitted to take it out of the bankers' hands. C. subsequently paid in to the bankers on his general account more than enough to cover all the items of the account preceding the bill item, & that item also, & the bankers, for a space of three years, treated the bill as paid; they then sued deft. on his acceptance:—*Held:* he was not liable.—FIELD *v.* CARR (1828), 5 Bing. 13; 2 Moo. & P. 46; 6 L. J. O. S. C. P. 203; 130 E. R. 964.

Annotations:—**Expld. & Distd.** Jones *v.* Broadhurst (1850), 9 C. B. 173. **Mentd.** Tharsis Sulphur & Copper Co. *v.* Loftus (1872), 21 W. R. 109; The Mecca, [1897] C. A. 286, H. L.

498. Balance against customer at time of dishonour—Previous allowance of overdrafts by bank—Bank's right against acceptor.]—A. drew a bill on B., & indorsed it to a bank, at which he (A.) had an account. B. accepted the bill, but, not paying it, it was returned noted to the bank who entered it on the debit side of A.'s account, "B.'s return, £100 6*s*." The state of A.'s account at the time of the entry, & up to the commencement of the bank's action against B., was against A. to the amount of about £400. It was proved that the bank had, on former occasions, allowed A. to overdraw his account to the amount of £500 or £600, but there was not any agreement that they should do so:—*Held:* these facts did not prove a plea that the bank had received from A. £100 6*s*. in satisfaction of the bill.—RYDER *v.* WILLETT (1836), 7 C. & P. 608.

499. Payment by drawer after dishonour—Rights of bank against acceptor.]—On Apr. 3, 1889, S. drew a bill on C. & Co., by whom it was accepted. Pltfs., bankers, credited S. in his account with the full amount of the bill, & debited him with the discount. On Aug. 6 the bill was dishonoured. On Aug. 7, the amount of the bill was debited to S.'s account, &, on the same day, pltfs. issued a writ against S. & C. & Co. in an action to recover the amount of the bill. Many payments into his account were made by S. every day after Aug. 9, & it was contended by C. & Co. that the bill had been discharged by payment:—*Held:* it was no defence to an action by the holder against the acceptor of a bill that the holder had been paid by the drawer.—BROWN, JANSON & CO. *v.* CAMA & CO. & SALBERG (1890), 6 T. L. R. 250.

500. Collection of note by branch bank—Notice of dishonour to holder—Cancellation in error—Liability for money had & received.]—The holder of a promissory note presented it at the head office of the bankers of the maker for payment. They sent it to their branch at the place where the note was payable, where the clerk cancelled the signature, wrote "Paid" on the note, & transmitted a draft in respect of it to the head office. The note was in fact dishonoured. Notice of dishonour was given to the holder, making no reference to what had occurred between the branches of the bank:—*Held:* (1) the head office & branch being one & the same bank, the act of the clerk did not operate to charge the bank with money had & received to the use of the holder; (2) the mere fact of cancelling the signature & writing "Paid" on it, corrected before the note was sent back to pltfs. by a memorandum thereon "Cancelled in error," was not effectual to charge the bank with the receipt of the money.—PRINCE *v.* ORIENTAL BANK CORPN. (1878), 3 App. Cas. 325; 47 L. J. P. C. 42; 38 L. T. 41; 26 W. R. 543, P. C.

Annotations:—**Refd.** Bank of Africa *v.* Colonial Government (1888), 13 App. Cas. 215, P. C.; Fielding *v.* Corry, [1898] 1 Q. B. 268, C. A.; R. *v.* Lovitt, [1912] A. C. 212, P. C. **Mentd.** Sinclair *v.* Brougham, [1914] A. C. 398, H. L.

Branch banks, generally, *see* Sect. 1, sub-sect. 3, *ante*.

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which they could have done in time.—STEINHOFF *v.* MERCHANTS BANK (1881), 46 U. C. R. 25.—**CAN.**

e. —— Given by bank — Bank with no interest in note.]—Where a note, indorsed in blank, is left at a bank for collection, notice of dishonour may be given by the bank, though it has no interest in the note.—HOWARD *v.* GODARD (1860), 4 All. 452.—**CAN.**

f. Note dishonoured but not protested—Liability of indorsers to pay interest.]—A promissory note was dishonoured at maturity, but was not protested by the holders (a banking corpn.) because of a waiver by the indorsers of presentment & notice:—*Held:* the indorsers were not liable to pay interest thereon as a debt, nor could a contract to pay interest be deduced from a usage of banks to charge interest on overdue debts, & to collect it if possible.—*Re* MCDOUGALL (1885), 12 A. R. 265.—**CAN.**

g. Bank crediting payee after note retired—With money paid by maker.]—A payee of a promissory note discounted it at a bank where he was a customer &, the note having been dishonoured, paid it the day after maturity. Later, on the same day, the maker deposited the amount of the note in the bank & the money was placed to the credit of the payee:—*Held:* the bank had no authority to place the money to his credit after the note had been retired.—MCMENNAMIN *v.* EVANS (1912), 41 N. B. R. 481; 13 D. L. R. 197; 1 E. L. R. 269.—**CAN.**

Sect. 6.—Collection of bills of exchange and promissory notes: Sub-sect. 3.]

SUB-SECT. 3.—SHORT BILLS.

501. Given in exchange for acceptances by bank—Insolvency of bank—Liability of assignees to refund.]—Pltf. employed J. as his banker in London, & drew bills on him under an agreement to make remittances to answer same when due. In Nov., J. was liable for over £1,000 on bills accepted by him for pltf., & pltf. sent by post to J. two bills which became due in the following Jan. J. became a bkpt. in Nov., & defts., as his assignees, received payment of the bills remitted by pltf. These bills had been written short in J.'s books. J. did not meet his acceptances, but they were afterwards paid by pltf. Pltf., however, owed J., for commission & interest, a balance of £195 13*s.* 2*d.* :—*Held:* pltf. was entitled to the proceeds of the bills after discharging the balance of £195 13*s.* 2*d.*—ZINCK *v.* WALKER (1777), 2 Wm. Bl. 1154; 96 E. R. 681.

Annotations:—**Distd.** Bolton *v.* Puller (1796), 1 Bos. & P. 539. **Refd.** Parke *v.* Eliason (1801), 1 East, 544.

502. Remittance to London bank for collection—Insolvency of London bank—Right of country bank to recover—Agreement as to discount.]—Short bills were remitted by a country bank to London bankers, who did not act upon a particular agreement for discount, when overdrawn. The London bankers having become bkpt. :—*Held:* the assignees should within a week pay the sums of money admitted to have been received in respect of the bills, & should deliver up the bills outstanding.—*Ex p.* MADDISON (1796), cited in *Re* BOLDERO, *Ex p.* PEASE (1812), 19 Ves. 25; 34 E. R. 435.

503. —— —— —— Cash balance in favour of country bank.]—Short bills were remitted by a country bank to their banker in London, standing at the bkpcy. of the latter entered short, in the usual way, not being due. On petition :—*Held:* they should be delivered up by the assignees to the country bank, who, not being creditors when the petition was presented, the cash balance being against them, had since become so, turning it in their favour by taking up bkpt.'s acceptances on their account.—*Ex p.* ROWTON (1810), 17 Ves. 426; 1 Rose, 15; 34 E. R. 165.

Annotations:—**Refd.** *Ex p.* Cowan (1819), 3 B. & Ald. 123. **Mentd.** *Re* Boldero, *Ex p.* Pease (1812), 19 Ves. 25; *Re* Goren, *Ex p.* Cutts (1838), 3 Deac. 242.

504. —— —— —— Lien of London bank.]—Bills were remitted by a country bank to their banker in London, & remained at his bkpcy. in his hands undue, or unapplied according to the authority given, or afterwards came to the hands of the assignees, who received the proceeds. As & when the amount of a bill was received it formed for the first time an item in the cash account :—*Held:* (1) the bills were the property of the remitters, subject to any lien bkpt. might have; (2) the bills were not in the order & disposition of bkpt.—*Re* BOLDERO, *Ex p.* PEASE (1812), 19 Ves. 25; 1 Rose, 232; 34 E. R. 428.

Annotations:—**Apld.** *Re* Boldero, *Ex p.* Leeds Bank (1812), 1 Rose, 254. **Extd.** *Re* Boldero, *Ex p.* Wakefield Bank (1812), 1 Rose, 243. **Distd.** Hornblower *v.* Proud (1819), 2 B. & Ald. 327. **Apld.** Jombart *v.* Woollett, Jombart *v.* Legg (1837), Donnelly, 229; *Re* Wise, *Ex p.* Atkins (1842), 3 Mont. D. & De G. 103. **Consd.** Trimingham *v.* Maud (1868), L. R. 7 Eq. 201. **Refd.** Thompson *v.* Giles (1823), 3 Dow. & Ry. K. B. 733. **Mentd.** *Re* Brettell, *Ex p.* Goren (1838), 7 L. J. Ch. 187; *Re* Goren, *Ex p.* Cutts (1838), 3 Deac. 242.

505. —— Insolvency of country bank—Rights of bill-holders to proceeds.]—Bkpts. were bankers at Sheffield. P., who was not a customer of bkpts., inquired of them how he was to procure payment of a bill drawn upon F. & Co., London, at 30 days' sight & indorsed to the order of P. P. was informed that the bill must be sent up to London & remain there till paid, & he was told to indorse the bill & call again on Jan. 16 to receive the money. Bkpts. made no advance on the bill, but indorsed it specially to their London agents, in whose possession it was at the time of the bkpcy. The proceeds of the bill were subsequently received by the London agents & credited to bkpts. :—*Held:* subject to the lien of the London bankers, the proceeds of short bills so remitted ought to be deposited rateably among the bill-holders.—*Re* PARKER, *Ex p.* FROGGATT (1843), 3 Mont. D. & De G. 322; 7 Jur. 910.

506. Deposit of bills with bank to be received when due—Bills pledged for advances—Rights of pledgee on bank's insolvency.]—A. deposited bills indorsed in blank with B., his banker, to be received when due. The latter raised money upon them by pledging them with C., another banker, who took them in good faith. B. afterwards became bkpt. :—*Held:* A. could not maintain trover against C. for the bills, although B. was not justified in pledging them.—COLLINS *v.* MARTIN (1797), 1 Bos. & P. 648; 126 E. R. 1113.

Annotations:—**Expld.** *Re* Boldero, *Ex p.* Wakefield Bank (1812), 1 Rose, 243. **Consd.** *Re* Boldero, *Ex p.* Pease (1812), 19 Ves. 25. **Distd.** Treuttel *v.* Barandon (1817), 8 Taunt. 100. **Apld.** Wookey *v.* Pole (1820), 4 B. & Ald. 1. **Expld.** Goodwin *v.* Robarts (1875), L. R. 10 Exch. 337. **Refd.** Bank of Bengal *v.* Macleod (1849), 5 Moo. Ind. App. 1, P. C.; Bank of Bengal *v.* Fagan (1849), 5 Moo. Ind. App. 27, P. C.; Barber *v.* Richards (1851), 6 Exch. 63; Dawson *v.* Isle (1906), 75 L. J. Ch. 338. **Mentd.** Heath *v.* Sanson (1831), 2 B. & Ad. 291.

507. Property in as between banker & customer—Insolvency of bank—Cash balance in favour of customer—Liability of assignees to refund.]—D. & Co. were bankers at Birmingham, with whom pltfs. kept a banking account. In Nov. pltfs. indorsed & paid into the bank three bills of exchange, which became due in Dec. & Jan. following. Before these bills became due D. & Co. were made bkpts., & there was at that time a considerable balance due to pltfs. on their cash & bills (due) account. It was the practice of D. & Co. & other country bankers to enter approved undue bills, if they had not a long time to run, in a gross sum with cash to the credit of the customer, giving him either cash or liberty to draw on them to that amount. The bankers would, as convenience required, pay them away to other customers, or transmit them to their own agents in London. Interest was charged on both sides of the account on such transactions. London bankers did not carry undue bills to the credit of the customer, but entered them short. The assignees received the proceeds of the bills :—*Held:* the assignees were liable to refund these proceeds to pltfs.—GILES *v.* PERKINS (1807), 9 East, 12; 103 E. R. 477.

Annotations:—**Distd.** Carstairs *v.* Bates (1812), 3 Camp. 301. **Extd.** Thompson *v.* Giles (1824), 2 B. & C. 422. **Consd.** *Re* Dilworth, *Ex p.* Benson (1832), Mont. & B. 120. **Apld.** Gaden *v.* Newfoundland Savings Bank, [1899] A. C. 281, P. C.; Dawson *v.* Isle, [1906] 1 Ch. 633. **Refd.** *Re* Boldero, *Ex p.* Pease (1812), 1 Rose, 232.

508. —— —— —— ——.]—A customer was in the habit of indorsing & paying into his bankers' hands bills not due, which, if approved, were immediately entered (as bills) to his credit, to the full amount, & he was then at liberty to draw for that amount by cheques on the bank. The customer was charged with interest upon all cash payments to him from the time when made, & upon all payments by bills from the time when they were due & paid, & had credit for interest upon cash paid into the bank from the time of the payment, & upon bills paid in from the time when the amount of them was received. The bankers paid away such bills to their customers as they thought fit. The bankers became bkpts. :—*Held:* (1) the customer might maintain trover against their assignees for bills paid in by him, & remaining in specie in their hands, the

cash balance, independently of the bills, being in favour of the customer at the time of the bkpcy.; (2) the banker was only justified in negotiating the bills when that was rendered a reasonable course by the state of the customer's account.—THOMPSON *v.* GILES (1824), 2 B. & C. 422; 3 Dow. & Ry. K. B. 733; 2 L. J. O. S. K. B. 48; 107 E. R. 441.

Annotations:—**Apprvd.** *Re* Dilworth, *Ex p.* Armistead (1828), 2 Gl. & J. 371. **Distd.** *Re* Dilworth, *Ex p.* Thompson (1828), Mont. & M. 102. **Consd.** *Re* Dilworth, *Ex p.* Benson (1832), Mont. & B. 120. **Apld.** Jombart *v.* Woollett, Jombart *v.* Legg (1837), Donnelly, 229; *Re* Wise, *Ex p.* Atkins (1842), 3 Mont. D. & De G. 103. **Apprvd.** *Re* Harrison, *Ex p.* Barkworth (1858), 2 De G. & J. 194, L.JJ. **Distd.** *Re* Mills, Bawtree, *Ex p.* Stannard (1893), 10 Morr. 193. **Apld.** Gaden *v.* Newfoundland Savings Bank, [1899] A. C. 281, P. C. **Refd.** *Re* Maberly, *Ex p.* Cunningham (1833), 3 Deac. & Ch. 58; *Re* Trye & Lightfoot, *Ex p.* Pauli (1838), 2 Jur. 208; *Re* Forster, *Ex p.* Bond (1840), 1 Mont. D. & De G. 10; Harris *v.* Truman (1881), 7 Q. B. D. 340; *Re* A Debtor, *Ex p.* The Debtor, [1908] 1 K. B. 344, C. A.

509. —— —— —— ——.]—If a customer pay into the hands of his banker certain bills, as short bills, &, after the bkpcy. of the banker & choice of assignees, the assignees present them for payment, & receive the proceeds, & claim to hold the proceeds against the customer, they are liable in trover.—TENNANT *v.* STRACHAN (1829), 4 C. & P. 31; Mood. & M. 377.

510. —— —— —— ——.]—Where bills of exchange are paid by a customer into his account with a banker, & entered as cash, with a distinct interest account, & he has credit to the amount of the bills so entered, but, in fact, never overdraws his account, the bills not due at the date of the bkpcy. of the bankers, or the proceeds received by the assignees, belong to the customer.—*Re* DILWORTH, *Ex p.* BENSON (1832), 1 Deac. & Ch. 435; Mont. & B. 120.

511. —— —— —— ——.]—Petitioner deposited India bills drawn, or rather signed, by order of the Governor in Council of Bombay on the Ct. of Directors of the East India Co. with her bankers specially indorsed by her to receive the amount when they should become due. The balance of petitioner's banking account was then in her favour, & continued so up to the bkpcy. of the bankers. The bankers charged discount on the bills in their account with petitioner, who might have drawn upon them for the amount, it being the custom of the bankers to consider ordinary bills so deposited as cash. The bankers paid the bills away to a creditor, with whom the assignees afterwards settled an account, charging him with the amount of the bills, & receiving a balance due to the estate. This appropriation of the amount of the bills petitioner contended was unjustifiable, & claimed that the amount ought to be refunded to her by the assignees as the proceeds of the bills:—*Held:* petitioner was entitled to be reimbursed the whole amount of the bills from the assignees.—*Re* FORSTER, *Ex p.* BOND (1840), 1 Mont. D. & De G. 10; 9 L. J. Bcy. 18; 4 Jur. 224.

512. —— —— —— ——.]—A customer, having at the time a balance in his favour at his banker's, indorsed generally a bill of exchange for £50, which he deposited with them, together with a cheque for £7, being at the time credited by £57 in his account with the bank. He also sent to them a bank post bill for £48 9*s.* 10*d.* inclosed in a letter, directing them to place it to his account. Before the bill of exchange became due, a fiat issued against the bankers:—*Held:* the customer was entitled to be paid in full the amount of the bill of exchange which had been received by the assignees under the fiat, on the bill becoming due, & he was also entitled to the bank post bill, or to the amount thereof, if received.—*Re* WISE, *Ex p.* ATKINS (1842), 3 Mont. D. & De G. 103; 12 L. J. Bcy. 28; 7 Jur. 95.

513 —— —— —— ——.]—Undue bills of exchange were from time to time remitted to a banker by a customer & indorsed to the banker. The course of dealing was that the bills were not entered short, but though they were distinguished in the account as bills, the full amounts were entered in the cash column under the date on which the bills were paid into the bank, & the customer was at all times at liberty to draw cheques to the extent of the balance in his favour, as appearing on the account thus made out. Interest was allowed by the banker upon the bills only from the time when their amount was received:—*Held:* (1) in the absence of evidence of the customer's acquiescing in or authorising the banker treating the bills as his own from the time of their being paid in, they remained the property of the customer, subject to the lien of the banker for his cash balance, & the banker had no right to negotiate them unless the balance of the account was in his favour; (2) on the bkpcy. of the banker, such of them as remained in his hands in specie did not pass to his assignee, but, subject to such lien as above mentioned, belonged to the customer.—*Re* HARRISON, *Ex p.* BARKWORTH (1858), 2 De G. & J. 194; 27 L. J. Bcy. 5; 30 L. T. O. S. 313; 4 Jur. N. S. 547; 6 W. R. 273; 44 E. R. 962, L.JJ.

514. —— —— **Onus of proof as to whether bills considered as cash—Right of customer to proceeds.**]—Bkpt. was a banker at S., & at the time of his bkpcy. had a considerable balance in the hands of K. & Co., his London agents. Shortly before the bkpcy. B. paid two bills into the bank at S., which did not fall due until after the bkpcy. Bkpt. remitted the bills to K. & Co., who received the proceeds after the bkpcy. & paid them over to the assignees. B. had employed bkpt. for many years & had been in the habit of paying bills & cash indiscriminately into his bank, which were entered without distinction in a general running account. B. had occasionally, though rarely, overdrawn his general account:—*Held:* B. was entitled to the proceeds of the bills, unless on inquiry it should appear that with B.'s knowledge, or from the habits of dealing between the parties, the bills were to be considered as cash, & the *onus* of that proof lay on bkpt.—*Re* BURROUGH, *Ex p.* SARGEANT (1810), 1 Rose, 153.

Annotations:—**Apld.** *Re* Burrough, *Ex p.* Sollers (1811), 18 Ves. 229. **Consd.** Thompson *v.* Giles (1823), 3 Dow. & Ry. K. B. 733. **Apld.** *Re* Dilworth, *Ex p.* Thompson (1828) Mont. & M. 102. **Consd. & Dbtd.** *Re* Dilworth, *Ex p.* Benson (1832), Mont. & B. 120. **Consd.** *Re* Harrison, *Ex p.* Barkworth (1858), 2 De G. & J. 194.

515. *S. P. Re* BURROUGH, *Ex p.* SOLLERS (1811), 18 Ves. 229; 1 Rose, 155; 34 E. R. 304.

516. —— —— —— ——.]—A customer is not entitled to recover short bills in the hands of his bankers at the time of their bkpcy., where the habit of dealing between the parties was such as to warrant an inference that they mutually considered & treated such bills as cash.—*Re* DILWORTH, *Ex p.* THOMPSON (1828), Mont. & M. 102.

517. —— —— **Bills indorsed to bank for negotiation—Customer drawing against proceeds.**]—Short bills deposited with bankers, on opening an account with them, do not pass to their assignee, though the depositor indorsed the bills to the bankers, to enable them to receive the proceeds, when due, & drew on account of such proceeds.—*Re* WISE, *Ex p.* EDWARDS (1842), 2 Mont. D. & De G. 625; 11 L. J. Bcy. 36; 6 Jur. 877, Ct. of R.

518. —— —— **Indemnification of bankrupt estate—Customer's right to delivery.**]—The ct. made an order upon the provisional assignee to deliver up short bills in the hands of bankers at the time of their bkpcy., the estate being indemnified against their outstanding acceptances on account of petitioner.—*Re* KENSINGTON, *Ex p.* BUCHANAN (1812), 1 Rose, 280.

Sect. 6.—*Collection of bills of exchange and promissory notes: Sub-sect.* 3. *Sect.* 7: *Sub-sects.* 1 & 2. *Sect.* 8: *Sub-sect.* 1.]

519. —— —— —— ——.]—Short bills in the hands of bankers at the time of their bkpcy. were ordered to be delivered up, upon bkpt.'s estate being indemnified against its liability for petitioners. The right was considered so indisputable that the order was made by consent.—*Re* WHITEHEAD, *Ex p.* BURTON BANK (1814), 2 Rose, 162.

520. Receipt by bank as agent—Bankruptcy of bank—Customer's right to proceeds.]—A short bill in the hands of a bkpt. banker, as agent, & not by consent or the course of dealing, considered as cash, to be returned, or the proceeds, received after the bkpcy., though the bill was due previously, & retained so as to discharge the indorser.—*Re* BURROUGH, *Ex p.* SOLLERS (1811), 18 Ves. 229; 1 Rose, 155; 34 E. R. 304.

521. Right of bank to discount.]—*Re* BOLDERO, *Ex p.* WAKEFIELD BANK (1812), 1 Rose, 243.

522. —— **Reduction of cash balance.**]—*Re* BOLDERO, *Ex p.* LEEDS BANK (1812), 1 Rose, 254.

523. —— **Customer's right to bills.**]—By the terms of agreement between F. & Co., & their bankers S. & Co., the permission to discount bills of exchange was limited to the amount necessary to meet such acceptances of F. & Co., as were in course of immediate payment at the house of S. & Co. To cover certain acceptances becoming due, F. & Co. remitted to S. & Co. an indorsed bill of exchange. The acceptances were, however, dishonoured by S. & Co., who soon afterwards stopped payment. S. & Co. then procured the bill to be accepted, & made an entry in their books of having discounted it. A commission of bkpcy. having issued against S. & Co.:—*Held:* the permission to discount was, by the terms of the agreement, limited to the purpose for which the bill was remitted; & S. & Co. ought not to have received or discounted the bill without executing the trust reposed in them; & it must be delivered up to F. & Co.—*Re* SIKES & Co. *Ex p.* FRERE (1829), Mont. & M. 263.

Annotation:—**Refd.** Jombart *v.* Woollett (1837), 2 My. & Cr. 389.

524. Transfer by bank to London agent—Subsequent discount & sale—Customer's right to indemnity.]—A. kept a banking account with D. & Co. B. & Co. were the London bankers & correspondents of D. & Co., with whom they had deposited securities. A. indorsed two bills of exchange & handed them to D. & Co., & these were transmitted by them to B. & Co., who discounted one of them & received the proceeds of the other. When the bills were deposited by A., the account was in his favour, & it continued to be so until the bkpcy. of D. & Co. A. was credited with the bills when paid in & debited with interest on each payment by the bank to him in cash from the day of such cash payment, & credited with interest from the time when each bill paid in by him became due:—*Held:* D. & Co. had no right to transfer the property in the bills, & A. was entitled to be indemnified from the surplus security held by B. & Co.—*Re* DILWORTH, *Ex p.* ARMISTEAD (1828), 2 Gl. & J. 371.

Annotations:—**Distd.** *Re* Dilworth, *Ex p* Thompson (1828), Mont. & M. 102. **Refd.** *Re* Forster, *Ex p.* Bond (1840), 1 Mont. D. & De G. 10. **Mentd.** *Re* Dilworth, *Ex p.* Benson (1832), Mont. & B. 120.

525. Promissory note written short—Bankruptcy of customer—Lien of bank—Right to retain as against assignees.]—Defts. were bankers of N., a bkpt. N. paid in a note, the day before he committed the act of bkpcy., which was written short in his cash account. At that time there was a balance of £2 15*s.* in his favour. N. had also a discounting account with defts., & about a month before he became bkpt. they discounted fifteen bills for him, five of which were dishonoured. Defts. claimed to retain the note as against the assignees, to indemnify them for the loss they would sustain on the bad bills:—*Held:* they had a lien on the note.—JOURDAINE *v.* LEFEVRE (1793), 1 Esp. 66.

Annotations:—**Distd.** Bower *v.* Foreign & Colonial Gas Co. (1874), 22 W. R. 740. **Refd.** Barnett *v.* Brandao (1843), 6 Man. & G. 630.

See, further, BANKRUPTCY & INSOLVENCY.

SECT. 7.—COLLECTION OF OTHER DOCUMENTS.

SUB-SECT. 1.—DIVIDEND WARRANTS.

526. Receipt for trustees—Fraudulent sale of stock by partner of bank—Dividends entered in bank books as received & credited to customer—Right of trustees.]—Certain stock was vested in trustees, upon trust (*inter alia*) to pay the dividends to A. during his life, &, after his death, upon trusts for his widow & children. M. & Co. were the bankers of the trustees, & employed by them to receive the dividends. During the life of A., the amount of the dividends on the stock was regularly carried to the account of A., in the books of the firm, & drawn for & received by him. A. died on Jan. 23, 1824, &, on his death, a new account was opened with the trustees in the books of M. & Co., & in that account, credit was given to the trustees for dividends, amounting to £1,403 as received in Apr. & July, 1824, & the trustees were debited with several sums, amounting to £225, paid to cheques drawn upon the house on the presumption that the dividends had been actually received. In point of fact the above dividends had not been received by M. & Co., F., a partner in that house, having in the lifetime of A. sold & transferred the stock in question by means of forged powers of attorney. F. continued, after this transfer, to enter in the day-book of M. & Co. the amounts of the half-yearly dividends, on the days when they would have become due, as if he had duly received same at the Bank of England, which amounts were, in the ordinary course of business, regularly posted from such day-book to the credit of the trustees by the clerks of M. & Co. Commissions of bkpcy. issued against the members of the firm of M. & Co., in Sept. & Oct., 1824:—*Held:* at the date of those commissions, bkpts. were not indebted to the trustees for the balance of the dividends appearing by the books to have been received.—HUME *v.* BOLLAND (1832), 1 Cr. & M. 130; 2 Tyr. 575; 149 E. R. 343.

Annotation:—**Consd.** Coles *v.* Bank of England (1839) 10 Ad. & El. 437.

527. Transfer of dividends under power of attorney—Notification to bank of new power of attorney—Whether revocation of authority.]—T., a married woman, being entitled for her separate use to the dividends of certain govt. stock standing in the name of pltf. as her trustee, pltf. gave to defts., a banking co., a power of attorney to receive the dividends & at the same time directed them to pay the dividends to T. T. directed defts. to pay the dividends to S. & B., bankers at Brussels, to whom she had pledged them for advances made by S. & B. to her husband. Defts. for some time paid the dividends to S. & B., but at length T. wrote to defts. as follows:—"I think it right to inform you that in consequence of the death of one of my trustees, as well as my having left Brussels, I have been obliged to have a new power of attorney made to receive my own dividends, & I shall not have occasion to trouble you to do so." No new power

of attorney was made out & defts. received the ensuing half-yearly dividend & transmitted it to S. & B. Pltf. having sued defts. for that dividend: —*Held:* the letter of T. did not amount to a revocation of the authority she had given defts. to pay the money they received on her account to S. & B., & pltf. could not recover.—CLERK *v.* LAURIE (1857), 2 H. & N. 199; 5 W. R. 629; 157 E. R. 83; *sub nom.* CLARKE *v.* LAURIE, 26 L. J. Ex. 317; 29 L. T. O. S. 203; 3 Jur. N. S. 647, Ex. Ch.

Annotations:—**Apld.** Carmichael's Case, [1896] 2 Ch. 643, C. A. **Refd.** Frith *v.* Frith, [1906] A. C. 254, P. C. **Mentd.** Fitzmaurice *v.* Bayley (1857), 30 L. T. O. S. 230, Ex. Ch.

SUB-SECT. 2.—POST OFFICE MONEY ORDERS.

528. Defect in customer's title—Conversion—Conduct of true owner.]—Pltfs. banked with defts. It was the duty of pltfs.' secretary to pay all moneys received by him on behalf of pltfs. into defts.' bank to the credit of pltfs. The secretary, without the knowledge of pltfs., kept an account at defts.' bank. He paid into the bank to his own credit certain post office orders belonging to pltfs. which defts. subsequently cashed. The post office regulations with regard to post office orders provided that, when presented for payment by a banker, they should be payable without the signature by the payee of the receipt contained in the order, provided the name of the banker presenting the order was written or stamped upon it: —*Held:* (1) there had been a wrongful conversion of the post office orders by defts. & pltfs. were not estopped by their conduct from recovering; (2) the regulations of the post office with regard to the payment of post office orders presented through bankers did not give to those instruments in the hands of bankers the character of instruments transferable to bearer by delivery so as to give defts. a good title to the post office orders independently of the authority given to pltfs.' secretary.—FINE ART SOCIETY, LTD. *v.* UNION BANK OF LONDON, LTD. (1886), 17 Q. B. D. 705; 56 L. J. Q. B. 70; 55 L. T. 536; 51 J. P. 69; 35 W. R. 114; 2 T. L. R. 883, C. A.

Annotations:—**Consd.** McEntire *v.* Potter (1889), 22 Q. B. D. 438. **Folld.** Kleinwort *v.* Comptoir National D'Escompte de Paris, [1894] 2 Q. B. 157; Lacave *v.* Crédit Lyonnais, [1897] 1 Q. B. 148. **Consd.** Gordon *v.* London City & Midland Bank, Gordon *v.* Capital & Counties Bank, [1902] 1 K. B. 242, C. A. **Refd.** Bavins *v.* London & South Western Bank (1899), 81 L. T. 655, C. A.; Morison *v.* London, County & Westminster Bank, [1914] 3 K. B. 356, C. A.

See, now, Post Office Act, 1908 (c. 48), s. 25.

SECT. 8.—**PAYMENT OF CHEQUES.**

SUB-SECT. 1.—POST-DATED AND INSUFFICIENTLY STAMPED CHEQUES.

529. Post-dated & unstamped cheques—Given for advances—Liability of bank for payment.]—The N. Bank, having a branch establishment at F., sixteen miles from N., opened an account with B., a customer residing twenty miles from N., & gave him a credit with the branch bank for such advances as he might require. B. received various sums from time to time from the branch bank, which he did not draw for in the regular way, but applied for by letter to the agents at the branch bank when he wanted them, & every week gave the agent an unstamped cheque, post-dated, for the amount of the advances during the preceding week, which the agent transmitted to the bank at N., as a voucher for himself:—*Held:* this was not a draft or order issued for the payment of money to the bearer on demand, within Stamp Act, 1815 (c. 184), s. 13, & the bankers were not subject to the penalties imposed by that sect. for paying money on an unstamped cheque, post-dated, or issued beyond the prescribed distance.

A customer issues unstamped cheques more than fifteen miles from the bank on which they are drawn. The bankers are not liable to the penalties of the Act for paying such cheques, unless they know that the cheques were issued beyond the prescribed distance, or did not truly specify the place where they were issued. But striking balances in a running account between a banker & a customer, will not prevent the operation of the penal sect. of the Act.—*Re* BRERETON, *Ex p.* BIGNOLD (1836), 1 Deac. 712; 2 Mont. & A. 633; 6 L. J. Bcy. 17, Ct. of R.

530. Post-dated cheque—Order for payment of money.]—A post-dated cheque is an order for the payment of money within Forgery Act, 1830 (c. 66), although the banker might not be bound to pay it at once, if genuine.—R. *v.* TAYLOR (1843), 1 Car. & Kir. 213.

Annotation:—**Refd.** R. *v.* Hewitt (1848), 13 J. P. 23.

See, now, Forgery Act, 1913 (c. 27), s. 1 (3).

531. —— Marking cheque "post-dated"—Right to refuse payment on due date—Custom of London bankers.]—It was proved in the year 1868 that by the custom of London bankers, when a post-dated cheque was presented for payment, payment was refused & the cheque was marked "post-dated," & if at any subsequent time such cheque was again presented for payment bearing such mark upon it, payment was still refused. Pltf., who had an account with defts., London bankers, drew a cheque on Nov. 13, which he dated the 14th, & upon its

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PART II. SECT. 8, SUB-SECT. 1.

532 i. *Post-dated cheque—Validity.*]—A cheque in Upper Canada may be post-dated, though in England it is prohibited by the Stamp Acts.—WOOD *v.* STEPHENSON (1858), 16 U. C. R. 419.—**CAN.**

h. —— *Payment before due date.*]—A post-dated cheque is a bill of exchange payable at a future date, & a banker may render himself liable to an action by the customer for negligence, if he pay such cheque before the day it bears date.—HINCHCLIFFE *v.* BALLARAT BANKING CO. (1870), 1 V. R. L. 229.—**AUS.**

k. —— —— *Dishonour of subsequent cheques—Damages.*]—Pltf. issued to a creditor a post-dated cheque, which was put in circulation by the creditor & received in the ordinary course of banking exchange by defts., who paid it & debited it to pltf.'s account before the date appearing on the face of the cheque. In consequence of this debit two other cheques drawn by pltf. were dishonoured:—*Held:* (1) the true date of a post-dated cheque issued by the drawer was the date of its issue; (2) defts., who received the cheque in question from *bonâ fide* holders for value, were themselves holders for value, & the amount of the cheque was properly debited to pltf.'s account before the date appearing on its face.

It appeared from pltf.'s own evidence that, before drawing the second cheque, the dishonour of which was complained of, he had, on being informed of the dishonour of the first, obtained from defts. his pass-book, which showed that the post-dated cheque had been debited to his account, & that the balance to his credit was insufficient to meet the cheque which he then proceeded to draw, & that he knew that he would not be allowed to overdraw his account:—*Held:* an action could not be maintained for the dishonour of a cheque drawn in such circumstances.—MAGILL *v.* BANK OF NORTH QUEENSLAND (1895), 6 Q. L. J. 262.—**AUS.**

l. —— —— —— ——.]—A bank paid a post-dated cheque before its date, & then dishonoured another cheque of its customer (presented before the date of the post-dated one), on the ground that after payment of the post-dated cheque there were not sufficient funds to meet the other:—*Held:* the customer was entitled to recover damages for the dishonour.—POLLOCK *v.* BANK OF NEW ZEALAND (1901), 20 N. Z. L. R. 174.—**N.Z.**

m. —— *Notice of dishonour.*]—Where a post-dated cheque is payable on demand, no days of grace are allowed. Where, on the same day that the cheque was dishonoured, deft. paid £150 to the holder on account of it:—*Semble:* sufficient to excuse notice of non-payment, though he declared that he was then ignorant of such dishonour.—WOOD *v.* STEPHENSON (1858), 1 U. C. R. 419.—**CAN.**

Sect. 8.—Payment of cheques : Sub-sects. 1 & 2, A. & B.]

being presented for payment on the 13th, payment was refused, & the cheque was given back marked "post-dated." On the following day (the 14th) it was again presented for payment, when payment was again refused, upon the ground that it appeared to have been post-dated :—*Held :* the bankers were justified in refusing payment. *Semble :* a post-dated cheque is not an illegal instrument, & but for special circumstances a banker is not justified in refusing payment of it.—EMANUEL *v.* ROBARTS (1868), 9 B. & S. 121 ; 17 L. T. 646.

Annotations :—**Refd.** Bull *v.* O'Sullivan (1871), L. R. 6 Q. B. 209 ; Gatty *v.* Fry (1877), 46 L. J. Q. B. 605 ; Royal Bank of Scotland *v.* Tottenham (1894), 71 L. T. 168, C. A.

532. —— Validity—Stamp—Admissibility in evidence.]—There is nothing in any of the stats. to invalidate a post-dated cheque on a banker payable to order on demand, & in determining what is the requisite stamp to make such an instrument admissible in evidence, the instrument alone is to be looked at ; & a post-dated banker's cheque payable to order is available in the hands of a person who took it with knowledge that it was post-dated, & is admissible in evidence with only a penny stamp.—BULL *v.* O'SULLIVAN (1871), L. R. 6 Q. B. 209 ; 40 L. J. Q. B. 141 ; 24 L. T. 130.

Annotations :—**Refd.** Gattie *v.* Fry (1877), 41 J. P. 184 ; Royal Bank of Scotland *v.* Tottenham (1894), 71 L. T. 168, C. A.

533. —— —— —— ——.]—A cheque payable to bearer on demand, & having the stamp proper for such an instrument affixed to it, is admissible in evidence in an action by the holder upon it after it has become due, although it was post-dated to his knowledge at the time he received it.—GATTY *v.* FRY (1877), 2 Ex. D. 265 ; 46 L. J. Q. B. 605 ; 36 L. T. 182 ; 41 J. P. 184 ; 25 W. R. 305.

Annotations :—**Distd.** Clarke *v.* Roche (1877), 3 Q. B. D. 170. **Folld.** Hitchcock *v.* Edwards (1889), 60 L. T. 636. **Apprvd.** Royal Bank of Scotland *v.* Tottenham, [1894] 2 Q. B. 715, C. A.

534. —— —— —— Payment stopped by drawer — Immediate credit given to holder.] — Deft. drew a cheque for £250 dated Aug. 10, & payable to H. The cheque was in fact drawn on Aug. 3, & forwarded to H., who handed it to M. Pltfs. received the cheque from M. on Aug. 8 & gave her immediate credit for it in account. Deft. stopped payment of the cheque & in an action to recover the amount of it, it was objected that the cheque was not sufficiently stamped :—*Held :* a post-dated cheque, bearing a penny stamp, though taken by the holder before its date, was a valid cheque, & an action could be maintained upon it by the holder after its date.—ROYAL BANK OF SCOTLAND *v.* TOTTENHAM, [1894] 2 Q. B. 715 ; 64 L. J. Q. B. 99 ; 71 L. T. 168 ; 43 W. R. 22 ; 10 T. L. R. 569 ; 38 Sol. Jo. 615 ; 9 R. 569, C. A.

Annotations :—**Folld.** Gordon *v.* London City & Midland Bank, Gordon *v.* Capital & Counties Bank, [1902] 1 K. B. 242, C. A. **Refd.** Robinson *v.* Benkel (1913), 29 T. L. R. 475.

See, also, No. 547, *post.*

535. Unstamped cheque—Stamped by intermediate holder—Validity.]—Deft. bought a horse from B. & gave him an unstamped cheque on blank paper for the price. B. put an adhesive stamp on the cheque & transferred it to pltf., who took it in good faith & for value. B. stopped payment of the cheque, the stamp on which was cancelled by some one before it was presented for payment :—*Held :* pltf. could not recover on the cheque as it was not duly stamped, since by Stamp Act, 1870 (c. 97), s. 54, only the drawer or the banker on whom the cheque was drawn could affix & cancel an adhesive stamp.—HOBBS *v.* CATHIE (1890), 6 T. L. R. 292.

SUB-SECT. 2.—MODES OF PAYMENT, PAYMENT WITHOUT AUTHORITY, RECOVERY FROM PAYEE.

A. Modes of Payment.

536. Money placed on counter—Stolen from counter—Liability of bank.]—If A. go to a banker's to receive a draft of £100, & is desired to take £80 in part, which B. is come to pay, & A. counts out £50 from the £80 & puts it into a bag, & lays it on the counter, this is a good part payment of the draft, & if the bag be stolen from the counter, the banker shall be only answerable for the remaining £50.—CARTER *v.* SHEPHARD (1698), 5 Mod. Rep. 398 ; 12 Mod. Rep. 189 ; Comb. 475 ; 2 Salk. 507 ; 87 E. R. 728 ; *sub nom.* CANTER *v.* SHEPHEARD, 1 Ld. Raym. 330.

537. —— Forcible recovery by cashier—Liability of bank.]—Pltf. presented (on behalf of his employer) a cheque at defts.' banking-house. Defts.' cashier counted out the amount in notes, gold, & silver, & placed it on the counter. Pltf. took it & counted it, & was in the act of counting it a second time, when the cashier (having discovered that the drawer's account was overdrawn) demanded the money back, &, upon pltf.'s refusal, detained him & took it from him by force :—*Held :* the property in the notes & money had passed from the bankers to the bearer of the cheque, & the payment was complete & could not be revoked.—CHAMBERS *v.* MILLER (1862), 13 C. B. N. S. 125 ; 1 New Rep. 95 ; 32 L. J. C. P. 30 ; 7 L. T. 856 ; 9 Jur. N. S. 626 ; 11 W. R. 236 ; 143 E. R. 50.

Annotations :—**Distd.** R. *v.* Prince (1868), 19 L. T. 364, C. C. R. **Apld.** Deutsche Bank *v.* Beriro (1895), 73 L. T. 669, C. A. **Refd.** Pollard *v.* Bank of England (1871), L. R. 6 Q. B. 623.

538. Constructive payment.]—On Feb. 19, 1901, B., who was very ill & in expectation of death, drew a cheque for £300 in favour of E., to whom it was at once handed. E. indorsed the cheque, & on Feb. 23, it was presented for payment at B.'s bank, where his account was overdrawn. The bank manager refused payment, stating that the signature of the drawer was not like the ordinary signature of B., & that he required some confirmation of the signature. The manager was minded to "lend" the money to pay the cheque if he found that the signature was genuine. B. died on Feb. 25, 1901, without the cheque having been cashed :—*Held :* there was not a valid *donatio mortis causâ.*

If a cheque were given by a donor who was dangerously ill, & the drawee went to a branch of the bank in the country & asked for payment, & the manager said, "The cash is locked up for the night, come to-morrow & I will pay you," & the drawer died in the night, it might very well be that then there was an appropriation by the undertaking to answer the cheque & a good *donatio mortis causâ* (BUCKLEY, J.).—*Re* BEAUMONT, BEAUMONT *v.* EWBANK, [1902] 1 Ch. 889 ; 71 L. J. Ch. 478 ; 86 L. T. 410 ; 50 W. R. 389 ; 46 Sol. Jo. 317.

Annotation :—**Apld.** *Re* Leaper, Blythe *v.* Atkinson, [1916] 1 Ch. 579.

See, further, GIFTS.

II. SECT. 8, SUB-SECT. 2.—A.

n. *By packages of silver — Payment short—When bank liable.*]—In an action to recover $20, which the bank had paid short on a cheque :—*Held :* banking institutions were not liable for any deficit in packages of silver paid out by them, unless the silver was counted & the deficit made known before the packages were taken from the bank.—BROWN *v.* QUEBEC BANK (1866), 2 L. C. L. J. 253.—**CAN.**

o. *No discharge of obligation.*] — Case in which held the bank had, on the presentation of a cheque drawn upon it in favour of applts., failed to pay same in such manner as to be discharged of its obligation.—LALL CHAND *v.* AGRA BANK (1891), L. R. 18 Ind. App. 111.—**IND.**

539. "Banker's payment"—Bank as payee of cheque—Validity as payment.]—Pltfs., a bank, being holders for value of a bill of exchange accepted by one of defts., received from another of defts. who was an indorsee of the bill, a cheque drawn upon his account at the L. & C. Bank for the amount due upon the bill. Pltfs.' collector presented the cheque for payment at the L. & C. Bank, but, instead of being paid in cash, he received a document called a "banker's payment," as was customary when a bank, being payee of a cheque, presented it for payment. Immediately after receiving the "banker's payment," pltfs.' collector was induced by an unfounded representation of a clerk in the L. & C. Bank to return it to the clerk. Pltfs. did not afterwards obtain cash for the cheque, which was treated by pltfs. & the L. & C. Bank & the indorsee of the bill as a cheque which had not been paid:—*Held:* though the delivery of the "banker's payment" to pltfs.' collector was in law a payment of the cheque, yet as pltfs. had in fact never been paid the amount due upon the bill, the bill had not been discharged, & pltfs. as holders for value were entitled to recover the amount from the acceptor of the bill.—LONDON BANKING CORPN., LTD. *v.* HORSNAIL, HAYWARD & COOPER (1898), 14 T. L. R. 266; 3 Com. Cas. 105.

540. By crossed cheques—Exchange of cheques—Authority of cashier so to receive payment—Holding out.]—Applts.' cashier presented at resps.' bank cheques drawn on resps. in favour of applts. & crossed generally; in exchange he was handed cheques for the same amounts drawn by resps. upon other banks & crossed generally. Applts. had by their conduct held out their cashier as having authority to deal with the cheques in that way. The cashier fraudulently paid the cheques handed him by resps. to his own banking account & misappropriated the proceeds:—*Held:* the cheques drawn on resps. were paid by the cheques given in exchange within Bills of Exchange Act, 1882 (c. 61), s. 79 (2), but applts. were estopped from denying the authority of their cashier to receive payment in that manner & were not entitled to recover damages.—MEYER & CO., LTD. *v.* SZE HAI TONG BANKING & INSURANCE CO., LTD., [1913] A. C. 847; 83 L. J. P. C. 103; 109 L. T. 691; 57 Sol. Jo. 700, P. C.

B. Payment without Authority.

541. To wrong person before due date—Post-dated cheque lost by payee.]—A cheque was lost by the payee, & the banker paid to a stranger the day before it bore date:—*Held:* the banker was liable to repay the amount to the person who had lost it.—DA SILVA *v.* FULLER (1776), Bayley on Bills, 5th ed., p. 326; Chitty on Bills, 11th ed., p. 188.

542. —— Post-dated cheque payable to bearer.]—A banker, who pays a cheque payable to bearer to a wrong person before it is due, cannot protect himself by such payment from the right party (PARKE, B.).—MORLEY *v.* CULVERWELL (1840), 7 M. & W. 174; H. & W. 13; 151 E. R. 727.

Annotations:—**Mentd.** Steele *v.* Harmer (1845), 14 M. & W. 831; Attenborough *v.* Mackenzie (1856), 25 L. J. Ex. 244.

543. Cancelled cheque—Circumstances necessitating inquiry.]—If bankers pay a cancelled cheque drawn by a customer, in circumstances which ought

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PART II. SECT. 8, SUB-SECT. 2.—B.

p. *Bearer cheque — Indorsement.*]—*Qu.:* whether a bank is entitled to require the holder of a cheque payable to bearer to indorse it.—HALDANE (SPEIR'S FACTOR) *v.* SPEIRS (1872), 10 Macph. (Ct. of Sess.) 537.—**SCOT.**

q. *Cheque payable to order—Indorsed by B. for A.—Bank put on inquiry.*]—A cheque was payable to the order of "W. A.":—*Held:* the bank on which it was drawn was not justified in paying the amount on the indorsement "W. A. by A. B. A." unless the authority of the latter was proved.—ALMOUR *v.* BANQUE JACQUES CARTIER (1884), 8 L. N. 60; M. L. R. 1 S. C. 142.—**CAN.**

r. —— *Payment to third party on irregular indorsement—Rights of bearer.*]—A bank on which a cheque to order is drawn & which has accepted it, is bound to pay the amount of it to a legal bearer, & is not permitted to set off against him a previous payment which it has made to a third party on an irregular & insufficient indorsement. — CANADIAN PACIFIC *v.* BANK D'HOCHELAGA (1908), Q. R. 18 K. B. 237.—**CAN.**

s. *Cheque given to bank to meet acceptance—No appropriation by bank—Payment of altered cheque—Rights of drawer.*]—Pltf., a customer of defts.' bank, having a note payable there on Jan. 28, 1873, made a cheque payable to himself or bearer, & left it with defts. to meet the note. The cheque was not used for that purpose nor returned to pltf., but the note was paid by defts., & charged to pltf.'s account. The cheque was afterwards, on Jan. 31, 1874, presented to defts. by some one unknown, the year having been changed from 1873 to 1874, & it was paid by defts. without noticing the alteration, & charged to pltf.'s account. How it got out of defts.' bank was not ascertained:—*Semble:* the cheque must be considered to have been paid when the note for which it was given was handed over by defts. to pltf., & pltf. could not have been made liable upon it.—BELTZ *v.* MOLSONS BANK (1877), 40 U. C. R. 253.—**CAN.**

t. *On unauthorised indorsement — Of company manager—Authority only to indorse for deposit.*]—A local manager of an incorporated co., who was authorised only to indorse cheques for deposit with the B. C. Bank, indorsed & cashed at the M. Bank cheques payable to the co. drawn on that bank:—*Held:* the M. Bank liable to the co. for the amount of the cheques so cashed.—HINTON ELECTRIC CO. *v.* BANK OF MONTREAL (1903), 9 B. C. R. 545.—**CAN.**

u. —— *Of company secretary—Course of dealing.*]—A bank cashed a cheque payable to the order of a co., upon the indorsation of the secretary alone, who had on several previous occasions cashed other cheques in the same way, & acted as general agent of the co.:—*Held:* the bank was justified in cashing the cheque, although the bye-laws of the co. required that the cheque should be countersigned by the president.—THOROLD MANUFACTURING CO. *v.* IMPERIAL BANK (1887), 13 O. R. 330.—**CAN.**

w. —— *Of station-master.*]—Pltfs.' instructions to one of their agents was to receive cheques for freight, & forward same to the M. Bank, pltfs.' agents for collection. A son of the station agent having embezzled moneys belonging to pltfs. & collected for freight, the agent, in order to make up the losses, indorsed cheques made payable to the co., & received for freight, signing the co.'s name, *per* himself as agent, & received proceeds from defts. This he employed to make up his son's defalcations:—*Held:* defts. should have obtained an authority from pltfs. before accepting the agent's indorsations, & were liable to pay pltfs. the amount of the cheques.—CANADIAN PACIFIC *v.* BANK D'HOCHELAGA (1908), 5 E. L. R. 569.—**CAN.**

a. —— *Of club secretary.*]—Actions to recover amounts of various cheques sent to pltfs.' secretary by the members or received by him as club moneys, & cashed by or deposited with defts. by the secretary, in fraud of pltfs.:—*Held:* it was one thing to cash a cheque over the counter to an official, who had power to indorse & to receive the proceeds for his employer, & quite another to receive it & apply it, not for the employer's but for the official's use, & there might reasonably in the former case be a presumption that the official would deal honestly with the proceeds, but in the latter, where he in effect put the money into his own pocket, the presumption would be all the other way.—TORONTO CLUB *v.* DOMINION BANK, TORONTO CLUB *v.* IMPERIAL BANK, TORONTO CLUB *v.* IMPERIAL TRUSTS CO. (1911), 20 O. W. R. 781; 3 O. W. N. 460; 25 O. L. R. 330.—**CAN.**

b. —— *Of partner.*]—A loan to a partnership was paid by a cheque made payable to the order of all the partners by name. The active partner had authority by power of attorney to sign his partners' names to all deeds & conveyances necessary for carrying on the business, but had no express authority to indorse cheques:—*Held:* (1) having authority to effect the loan & receive the amount in cash, he could indorse his partners' names on the cheque, & the drawees had a right to assume that he did it for partnership purposes, & were justified in paying it on such indorsement; (2) if the payment by the drawees was not warranted the drawers had in the circumstances acquiesced in the payment.—MANITOBA MORTGAGE CO. *v.* BANK OF MONTREAL (1889), 17 S. C. R. 692.—**CAN.**

c. *Cheque of insolvent — Acceptance by bank—Rights of holder in due course.*]—A cheque representing a sum of money in his hands, drawn by the depository to the order of a public officer, & returned to the depositor, who turns it over to such public officer, ceases to form part of the drawer's estate from the moment of its acceptance by the bank. If the drawer becomes insolvent & makes an abandonment of his property, the curator has no right to the amount represented by such cheque, & a Judge of the Superior Ct. may permit him to vary the form of the cheque by making it payable to bearer. The latter thereupon becomes the holder in due course & has a right to recover the amount thereof from the bank.—BROSSARD *v.* STERLING BANK (1912), Q. R. 43 S. C. 133; 8 D. L. R. 889.—**CAN.**

Sect. 8.—Payment of cheques: Sub-sect. 2, B. & C. Sub-sect. 3, A.]

to have excited their suspicion & induced them to make inquiries before paying it, they cannot take credit for the amount.—SCHOLEY *v.* RAMSBOTTOM (1810), 2 Camp. 485, N. P.

Annotation:—**Consd.** Ingham *v.* Primrose (1859), 7 C. B. N. S. 82.

544. To directors of company—No authority of directors — Whether bank put on inquiry.] — Bankers who have funds of a co. formed under Cos. Act, 1862 (c. 89), in their hands may, acting *bonâ fide*, lawfully honour the cheques of the directors of the co., signed according to a form sent by them to the bank, without being bound previously to inquire whether the persons pretending to sign as directors have been duly appointed to office, in conformity with the memorandum & articles of assocn.

W., in concert with some friends & dependents of his, started a mining co. The memorandum & articles of assocn. were registered. Subscriptions were obtained from persons becoming shareholders, & these subscriptions were paid into a bank, described in the prospectuses of the co. as the bank for the co. The bankers received a formal notice, signed by the person who described himself as the secretary of the co., that they were to pay the cheques signed by "either two of the following three directors," & countersigned by himself, in accordance with a "resolution passed this day," & the names of the three persons described as directors, & their signatures, were inclosed with the "resolution." The bankers from time to time, while the business of the co. appeared to be going on, received cheques signed & countersigned as described, & duly honoured them. When the fund had been, almost entirely, drawn out, the co. was ordered to be wound up. It then appeared that there never had been a meeting of shareholders, nor any appointment of directors or of a secretary, but that the persons who had got up the co. had treated themselves as directors & secretary & appropriated the money obtained from the subscriptions:—*Held:* the official liquidator could not recover from the bankers the amount of the cheques which, in the above circumstances, they had thus *bonâ fide* paid.

Where those who draw & those who *bonâ fide* honour cheques intend them to operate on a certain account, no objection can afterwards be taken that that account is not specifically mentioned on the face of the cheques.—MAHONY *v.* EAST HOLYFORD MINING CO., LTD. (1875), L. R. 7 H. L. 869; 33 L. T. 383, H. L.

Annotations:—**Consd.** *Re* Staffordshire Gas & Coke Co., *Ex p.* Nicholson (1892), 66 L. T. 413. **Apld.** County of Gloucester Bank *v.* Rudry Merthyr Steam & House Coal Colliery Co., [1895] 1 Ch. 629, C. A.; Duck *v.* Tower Galvanizing Co., [1901] 2 K. B. 314. **Consd.** Whitechurch *v.* Cavanagh, [1902] A. C. 117, H. L. **Distd.** Ruben *v.* Great Fingall Consolidated, [1904] 2 K. B. 712, C. A. **Consd.** Pacific Coast Coal Mines *v.* Arbuthnot (1917), 117 L. T. 613, P. C. **Refd.** Sharpe *v.* Brighton & Dyke Ry. Co. (1884), 1 T. L. R. 28.

Powers of directors, *see* COMPANIES.

545. To agent—Notice of limitation of authority —Liability of principal.]—A line of steamers, the property of different sets of co-owners, was managed by T. & Co. T. & Co. assigned to pltfs. money alleged to be due to them from the owners of two of the steamers, & in consideration of the assignment pltfs. cashed cheques drawn by T. & Co. "*per pro.* the owners." At the date of the assignment nothing was in fact owing from the owners to T. & Co., & the cheques were dishonoured. In an action by pltfs. against the owners:—*Held:* pltfs. having taken the cheques with notice that the authority of T. & Co. was limited, the owners were not liable for the amounts of the cheques.—THE GONCHAR & THE IZGAR (1896), 1 Com. Cas. 318.

546. Mistake of authority—Customer's account debited.]—One of the essential terms of the contract between a banker & his customer is that the banker will not part with the customer's money without his authority. Circumstances in which it was held that defts. were not justified in debiting pltf.'s account with a payment made under a mistake as to the authority to make it.—BALE *v.* PARR'S BANK, LTD. (1909), 25 T. L. R. 549.

C. Recovery from Payee.

547. Cheque post-dated—Drawer insolvent—Knowledge of person presenting—Bonâ fide payment by bank.]—Defts. knowing a cheque to be post-dated, & that the drawers were insolvent, presented it for payment to pltfs., bankers, who, without knowledge of those facts, paid its amount, although they had no funds of the drawers in their hands at the time, but expected some in the course

PART II. SECT. 8, SUB-SECT. 2.—C.

d. *Payment in excess to agent — Liability of principal.*]—Action by a bank for the recovery of £25, alleged to have been paid in excess of a cheque drawn by the secretary of defts. & handed to their messenger:—*Held:* defts. not liable for an amount paid to their agent in mistake, unless it was shown that they authorised their messenger to receive such an amount or afterwards received & benefited by it.—CITY BANK *v.* MONTREAL HARBOR COMRS. (1857), 1 L. C. J. 288.—**CAN.**

e. *Customer overcredited — Payment out by bank—Repayment.*]—Pltfs. instructed one of their sub-agencies to credit deft. with $2,000. The sub-agency, by some misunderstanding, credited him with $3,000, which he drew out:—*Held:* deft. bound to repay the excess over the $2,000.—BANK OF TORONTO *v.* HAMILTON (1896), 28 O. R. 51.—**CAN.**

f. *Forged cheque indorsed by one bank to another—Receipt of payment by collecting bank—Right of paying bank to recover.*]—A., having stolen a genuine cheque on pltf. bank for $6, erased the name of the payee & the amount, substituted the fictitious name of B., & raised the amount to $1,000. He then indorsed the name B. & deposited the cheque to his credit in deft. bank. Defts. refused to advance more than $25 on the cheque until they should learn that pltfs. would pay it. They then stamped the name of their bank on the back of the cheque & put it through the clearing-house in the usual way, after which it was paid by the pltfs. Defts. then honoured the cheques of the forger for $800 more, shortly after which the forgery was discovered:—*Held:* the stamping of the name of deft. bank on the back of the cheque had the legal effect of an indorsement in blank by deft. bank, & defts. were liable to repay the amount of the cheque to pltfs.—UNION BANK *v.* DOMINION BANK (1907), 17 Man. L. R. 68; *affd.* 40 S. C. R. 366. —**CAN.**

g. *Cheque sent "for credit"—Payment, by head office—Dishonour by branch—Privity of contract.*]—Defts. forwarded to their agents, the C. Bank, in M., a cheque drawn by T. on pltfs.' branch bank at S. M. A letter accompanying the cheque stated that it was sent "for credit of this bank," as opposed to "for collection." The agents passed the cheque through the clearing-house to pltfs.' head office in M. Pltfs. forwarded it to their S. M. branch, on which it appeared that T. was not in funds. On action brought by pltfs. against defts. to recover the amount of the cheque:—*Held:* (1) as the cheque was sent by pltfs. to their agents by way of payment for a debt due & not for collection, there was no privity between pltfs. & defts., & pltfs. could not recover; (2) even if the cheque had been sent for collection, there would be no privity.—UNION BANK OF AUSTRALIA *v.* MERCANTILE BANK OF SYDNEY (1888), 9 N. S. W. L. R. 560.—**AUS.**

h. *Winding up—Acceptance of cheque against notes—Unjust preference.*]—The bank suspended payment on Sept. 15, 1883. Winding-up proceedings were commenced Nov. 23, & an order made Dec. 5. C. & S., depositors in the bank, drew a cheque for $4,000 on Nov. 1, on their deposit account, which was given to D., a debtor of the bank on notes maturing the following Dec. & Jan. D. gave mtge. security to C. & S. for the cheque on Oct. 31. The cheque was not presented to the bank until Nov. 23, when it was accepted as payment of the maturing notes. In an action by the liquidators of the bank against C. & S., to which D. was not a party, to recover the amount thus paid on the cheque as having been paid to defts. after the winding-up proceedings were commenced, & being an unjust preference, etc.:—*Held:* there was no payment by the bank to C. & S.—EXCHANGE BANK OF CANADA *v.* COUNSELL (1885), 8 O. R. 673.—**CAN.**

of the day :—*Held :* they were entitled to recover it back, in an action for money had & received.—MARTIN *v.* MORGAN (1819), 1 Brod. & Bing. 289 ; 3 Moore, C. P. 635 ; 129 E. R. 734.

Annotations :—**Distd.** Chambers *v.* Miller (1862), 13 C. B. N. S. 125. **Refd.** Sinclair *v.* Brougham, [1914] A. C. 398, H. L.

548. Cheque drawn on one branch—Payment at another—Dishonour on presentation.]—A banking co. had banking establishments or branches at G. & B. The co. was one, & had one public officer, but each establishment had a separate manager, kept separate accounts with separate customers, & delivered out distinct cheque books, with the name of the place at which it carried on business. H. kept an account with the establishment at G., & having to make a payment to deft., paid him on the 17th of the month by a cheque drawn on the G. establishment. Deft., being at the time of receiving it in the neighbourhood of B. presented it on the same day there ; he was known to the officers there, & they gave him cash for it. The cheque was sent by the first post to the G. establishment, where it was delivered in the course of the 18th. On the morning of that day H. had a balance there in his favour, which had been drawn out before the cheque arrived, & the cheque was refused payment :—*Held :* the co. might recover the amount of the cheque from deft. as money had & received, on the ground that H. had no authority to draw the cheque on the co. simply, or on the B. branch separately, & the B. branch paid the cheque on the credit of deft.—WOODLAND *v.* FEAR (1857), 7 E. & B. 519 ; 26 L. J. Q. B. 202 ; 29 L. T. O. S. 106 ; 3 Jur. N. S. 587 ; 5 W. R. 624 ; 119 E. R. 1339.

Annotations :—**Apld.** R. *v.* Lovitt, [1912] A. C. 212, P. C. **Refd.** Prince *v.* Oriental Bank Corpn. (1878), 3 App. Cas. 325, P. C. ; Fielding *v.* Corry (1897), 77 L. T. 453, C. A. **Mentd.** *Re* Brown *v.* L. & N. W. Ry. Co. (1863), 4 B. & S. 326.

Branch banks, generally, *see* Sect. 1, sub-sect. 3, *ante.*

SUB-SECT. 3.—DISHONOUR OF CHEQUES.

A. Funds available.

549. Bank bound to pay—Within reasonable time after receipt of sufficient funds—Customer's right of action—Actual damage unnecessary.]—A banker is bound by law to pay a cheque drawn by a customer, within a reasonable time after the banker has received sufficient funds belonging to the customer ; & the latter may maintain an action against the banker for refusing payment of a cheque in such circumstances, although he has not thereby sustained any actual damage.—MARZETTI *v.* WILLIAMS (1830), 1 B. & Ad. 415 ; 1 Tyr. 77, n. ; 9 L. J. O. S. K. B. 42 ; 109 E. R. 842.

Annotations :—**Consd.** *Re* Gibson & Sturt, *Re* St. Albans Bank (1850), 15 L. T. O. S. 95 ; Robarts *v.* Tucker (1851), 20 L. J. Q. B. 270, Ex. Ch. **Refd.** Boorman *v.* Brown (1842), 3 Q. B. 511, Ex. Ch. ; *Re* Wise, *Ex p.* Atkins (1842), 3 Mont. D. & De G. 103 ; Emanuel *v.* Robarts (1868), 9 B. & S. 121 ; Larios *v.* Bonany Y. Gurety (1873), L. R. 5 P. C. 346, P. C. **Mentd.** Godefroy *v.* Jay (1831), 7 Bing. 413 ; Bushell *v.* Beavan (1834), 1 Bing. N. C. 103 ; Gould *v.* Oliver (1840), 2 Man. & G. 208 ; Wylie *v.* Birch (1843), 4 Q. B. 566 ; Clifton *v.* Hooper (1844), 6 Q. B. 468 ; De Medina *v.* Grove (1847), 10 Q. B. 172, Ex. Ch. ; Westaway *v.* Frost (1848), 17 L. J. Q. B. 286 ; Beckham *v.* Drake (1849), 2 H. L. Cas. 579, H. L. ; Bell *v.* Carey (1849), 8 C. B. 887 ; Randall *v.* Moon (1852), 12 C. B. 261 ; Woods *v.* Finnis (1852), 16 Jur. 936 ; Rolin *v.* Steward (1854), 14 C. B. 595 ; Churchill *v.* Siggers (1854), 2 C. L. R. 1509 ; Bononi *v.* Backhouse (1859), 5 Jur. N. S. 1345, Ex. Ch. ; Fray *v.* Voules (1859), 1 E. & E. 839 ; Swinfen *v.* Chelmsford (1860), 2 L. T. 406 ; Dent *v.* Turpin (1861), 2 John. & H. 139 ; Hyde *v.* Bulmer (1868), 18 L. T. 293 ; Prehn *v.* Royal Bank of Liverpool (1870), L. R. 5 Exch. 92 ; *Re* General South American Co. (1877), 47 L. J. Ch. 67 ; Steljes *v.* Ingram (1903), 19 T. L. R. 534 ; Cole *v.* Christie, Manson & Woods (1910), 26 T. L. R. 469 ; Turpin *v.* Victoria Palace, [1918] 2 K. B. 539.

550. Refusal to treat credit as immediately available—No evidence of special damage—Measure of damages.]—Pltfs. were merchants & shipowners & deft. bank, having wrongfully refused to treat a credit of £900 as immediately available, dishonoured three cheques & an acceptance of pltfs. There was no evidence of special damage, & the jury awarded pltfs. £500 damages :—*Held :* pltfs. were entitled to recover substantial, but reasonable & temperate damages, without proof of any actual loss, & by agreement the damages were reduced to £200.—ROLIN *v.* STEWARD (1854), 14 C. B. 595 ; 23 L. J. C. P. 148 ; 18 Jur. 536 ; 2 C. L. R. 959 ; 139 E. R. 245 ; *sub nom.* ROLLIN *v.* STEWARD, 23 L. T. O. S. 114 ; 2 W. R. 467.

Annotations :—**Refd.** Prehn *v.* Royal Bank of Liverpool (1870), L. R. 5 Exch. 92 Larios *v.* Bonany Y. Gurety (1873), L. R. 5 P. C. 346, P. C. ; *Re* General South American Co. (1877), 47 L. J. Ch. 67. **Mentd.** Wallis Chlorine Syndicate *v.* American Alkali Co. (1901), 17 T. L. R. 656 ; Barnett *v.* Hart (1903) 48 Sol. Jo. 14, C. A.

551. Payment by bank after dishonour by mistake—Whether drawer can recover damages for loss of payee's custom.]—Pltfs. were furriers & drew a cheque for £256 7*s.* 6*d.* in favour of I., a bill discounter, with whom they were in the habit of dealing. I. represented the cheque personally, & it was dishonoured, the bank clerk having overlooked a large credit. Later in the day I. represented the cheque, when the mistake was satisfactorily explained & the amount paid. I. however refused to continue dealing with pltfs. :—*Held :* pltfs. could not recover damages for the loss of I.'s custom.—MORRIS *v.* LONDON & WESTMINSTER BANK (1885), Cab. & El. 498 ; *sub nom.* MEYER, MORRIS & CO. *v.* LONDON & WESTMINSTER BANKING CO., LTD., 1 T. L. R. 360.

552. Cheques of married woman trader—Right to sue—Married Women's Property Act, 1870 (c. 93), s. 11.]—A married woman, carrying on business separately from her husband as a sole trader, & having in that capacity a banking account, sued her bankers for damages for dishonouring her cheques, they having funds of hers at the time to meet them :—*Held :* she was entitled to maintain the action, it being a remedy for the protection & security of her wages, earnings, money, & property, within the above sect.—SUMMERS *v.* CITY BANK (1874), L. R. 9 C. P. 580 ; 43 L. J. C. P. 261 ; 31 L. T. 268 ; 38 J. P. 744.

Annotations :—**Refd.** Moore *v.* Robinson (1878), 48 L. J. Q. B. 156 ; R. *v.* London (Mayor) (1886), 16 Q. B. D. 772. **Mentd.** Ashworth *v.* Outram (1877), 5 Ch. D. 923, C. A.

553. Cheques of undischarged bankrupt — Dishonoured after discovery of bankruptcy.]—Pltf. opened an account with defts., concealing the fact that he was an undischarged bkpt. On discovering the fact, defts. declined to honour his cheques until they had obtained the consent of his trustee in bkpcy. At that time pltf. had a credit balance & had given four cheques amounting to a total of less than his credit balance. On his asking defts. to honour the four cheques, they declined to do so &

PART II. SECT. 8, SUB-SECT. 3.—A.

549 i. *Bank bound to pay — Cheque against funds partly collected.*]—A bank is bound to pay a cheque drawn for a part only of funds collected by it, & is liable in damages for refusal to do so. —PERREAULT *v.* MERCHANTS BANK (1905), Q. R. 27 S. C. 149.—**CAN.**

549 ii. —— *Incorrect bank ledger.*]—If a bank refuse to pay a cheque having sufficient funds of the drawer for the purpose, the holder can compel payment in equity. But the fact of there being sufficient at the drawer's credit in the bank ledger when the cheque was presented is immaterial, if the ledger did not show the true state of the account.—GORE BANK *v.* ROYAL CANADIAN BANK (1867), 13 Gr. 425.—**CAN.**

Sect. 8.—Payment of cheques: Sub-sect. 3, A.]

dishonoured them on presentation. In an action against defts. to recover the credit balance, the trustee in bkpcy. declined to intervene:—*Held:* pltf. was entitled to recover damages. *Semble:* the proper course for the bank would have been to honour the four cheques & ask pltf. to close his account.—SZEK *v.* LLOYDS BANK (1908), *Times*, Jan. 15.

See, now, Bankruptcy Act, 1914 (c. 59), s. 47 (2).

554. Closing customer's account—Usual course of business—Reasonable notice.]—Pltf. had banked with defts. for twenty years & defts. had lent him money on security, keeping the loan account & the drawing account separate. On Mar. 19 defts.' manager told pltf. that his account would be closed, & that they could not honour any cheques. On the next day two cheques & two bills of pltf. were dishonoured. The jury found that by the course of business pltf. was entitled to draw on his current account without reference to his loan account, that he was entitled to reasonable notice that that course of business would be discontinued & that no such notice was given:—*Held:* pltf. was entitled to recover damages.—BUCKINGHAM & CO. *v.* LONDON & MIDLAND BANK, LTD. (1895), 12 T. L. R. 70.

555. Uncleared cheques—Crediting customer in pass book.]—Pltf. was entitled to draw on defts. when his balance there exceeded £100. One Saturday it fell just below that amount, but he paid in on that morning an open cheque for £150 on another bank. Afterwards, the same day, he drew on defts.' bank a cheque, which was paid, & then, after banking hours, one for £17 10*s*. The latter cheque was presented on the Monday morning & payment refused, the clerk indorsing on it "effects not cleared." About the same time pltf. called at the bank & saw his pass-book, in which the £150 cheque was entered as cash paid in by him on the Saturday. Subsequently the manager told him that "the walk clerk," whose duty it was to go & get the £150 cheque cashed, went out at ten o'clock, & so had gone when the cheque was paid in on the Saturday, & had not yet returned:—*Held:* there was some evidence that the bank was in funds to pay the cheque on the Saturday, & pltf. was entitled to maintain an action against defts. for not paying the £17 10*s*. cheque:—BRANSBY *v.* EAST LONDON BANK (1866), 14 L. T. 403; 14 W. R. 652.

556. —— Immediate credit to customer—Customer's right of action.]—*Semble:* if a banker gives immediate credit for country cheques, & if during the time occupied by the collection of them, a cheque of the customer is dishonoured at a time when the banker has sufficient moneys in hand if the amount of the uncollected country cheques be included, the customer will have a right of action for the dishonour of his cheque.—*Re* MILLS, BAWTREE & CO., *Ex p.* STANNARD (1893), 10 Morr. 193.

557. —— —— Uncommunicated entries in bank ledger—Right to draw before clearance.]—*Semble:* entries in a bank's ledger, which are not communicated to the customer, giving immediate credit for cheques paid in for collection, confer no right on the customer to draw against such cheques before clearance.—AKROKERRI (ATLANTIC) MINES, LTD. *v.* ECONOMIC BANK, [1904] 2 K. B. 465; 73 L. J. K. B. 742; 91 L. T. 175; 52 W. R. 670; 20 T. L. R. 564; 48 Sol. Jo. 545; 9 Com. Cas. 281.

Annotation:—**Consd.** Bevan *v.* National Bank, Bevan *v.* Capital & Counties Bank (1906), 23 T. L. R. 65.

558. —— Practice to treat as cash — Refusal to treat any particular cheque as cash.]—For a period of twenty years defts. treated cheques paid in by pltf. as cash before clearance. This was not the invariable practice of the bank in all cases:—*Held:* as against pltf. defts. could not refuse to treat any particular cheque as cash, & dishonour pltf.'s bill for want of funds.—ARMFIELD *v.* LONDON & WESTMINSTER BANK (1883), Cab. & El. 170.

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556 i. *Uncleared cheques—Immediate credit to customer—Damages for breach of implied contract.*]—Deft. bank was in the habit of crediting a customer with the amount of the cheques as soon as they were paid in, &, if any cheque was subsequently dishonoured, of debiting the amount of such cheque to the customer. The customer frequently drew against such cheques immediately after they had been paid in, without any objection on the part of the bank. After a certain cheque had been paid in, but before it had been cleared, the bank dishonoured a cheque drawn against the amount so paid in:—*Held:* there was an implied contract that the customer should at once have credit for cheques paid in & be entitled to draw against them before clearance, & the customer was entitled to damages for breach of same occasioned by the dishonour.—FREEMAN *v.* STANDARD BANK OF SOUTH AFRICA, LTD. (1905), W. H. C. 26.—**S. AF.**

556 ii. —— —— *Death of customer.*]—A bank having refused payment of a cheque on the ground that it had received notice of the death of the drawer, the holder of the cheque, in an action against the bank, claimed payment of the amount on the ground that to that extent the cheque operated as an assignment of a sum standing at the drawer's credit on his account current in the hands of the bank. The bank books showed a balance due to the drawer on his account current more than sufficient to pay the cheque, but they also showed that, on his other accounts, the drawer was due to the bank for advances a larger sum than that standing to his credit on the account current. For these advances the bank held securities:—*Held:* (1) the cheque, as a cheque, having lapsed at the death of the drawer, pursuer could not avail himself of the rule by which a bank, which is in the habit of honouring a customer's cheques on a current account, is not entitled without notice to refuse payment because on a balance of all accounts the customer is a debtor to the bank; (2) the cheque did not operate as an assignment.—KIRKWOOD & SONS *v.* CLYDESDALE BANK, [1908] S. C. 20.—**SCOT.**

558 i. —— *No agreement to treat as cash—Remittances sent through post.*]—Pltf. sued for the dishonour by defts. of a cheque for £4. The first count was in the usual terms, & the second count alleged an agreement by defts. to treat known good cheques paid in by pltf. as cash. To the second count defts. pleaded *non-assumpsit.* The jury found a verdict for pltf. in the first count, & for defts. on all the other issues:—*Held:* as the only funds that could have been in the hands of the bank were cheques, & as the jury had found by the verdict on the second count that there was no agreement to treat cheques as cash, there must be a new trial: *Semble:* if, by the orders of a bank, the postmaster keeps letters till called for, delivery to the post office is delivery to the bank, & the bank cannot set up the defence of not sufficient funds, if a letter containing a remittance is lying at the post office when the cheque dishonoured is presented.—EDDY *v.* BANK OF NEW SOUTH WALES (1877), Knox, 299.—**AUS.**

558 ii. —— —— *No right to draw against.*]—A customer is not entitled to treat cheques paid in as cash & draw against them in the absence of a special agreement.

A cheque upon the A. Bank, S., was paid into a branch of the B. Bank at N. to the credit of a customer in the forenoon of Jan. 14. It was credited in the ledger on the same day as "cheque." According to the ordinary course of post, after the cheque was sent to the head office in S. to be cleared, notice of its being paid would not be received at the branch till the morning of the 16th. A cheque was presented on the 15th & dishonoured:—*Held:* the District Ct. Judge ought to have admitted evidence (1) as to the time it took to clear cheques from the suburban branches of the banks & between the banks in the city; & (2) to show the meaning of the entry in the ledger.—BOSLEY *v.* BANK OF AUSTRALASIA (1880), 1 N. S. W. L. R. 287.—**AUS.**

k. *Unaccepted cheque — Refusal of payment—Rights of holder.*]—R. gave pltf., in payment of a debt, a cheque drawn on deft. bank. Upon presentation payment of the cheque (which was not accepted) was refused, the clerk stating that, as it was for the balance of the sum to R.'s credit, his pass-book must be produced before payment. Within a few days R. became insolvent, & pltf. lost payment of his debt. The bank admitted that there were funds of R.'s to meet the cheque when presented, & it was not set up that production of the pass-book when the balance was withdrawn was a custom of the bank:—*Held:* pltf. had no right of action against defts. for damages incurred by reason of their refusing to pay the unaccepted cheque.—SILVERSTONE *v.* BANK D'HOCHELAGA, 21 C. L. T. Occ. N. 309.—**CAN.**

l. *Customer credited after discount—Retention of sum sufficient to meet bill.*]—A bill drawn by A. & accepted by B. was discounted by a banking co., & the proceeds placed to A.'s credit in account with the bank. A. thereafter drew out the whole amount standing at his credit, with the exception of a balance sufficient to meet the bill, & for that balance his order was presented before the bill arrived at maturity, but the bank

559. —— London or country—Delay in clearance —Custom of London banks.]—Pltf. before 3 p.m. on May 21 paid a cheque for £500 into his account, which was headed as follows:—"Norwich Union Life Insurance Society, No. 889. Norwich, May 20, 1901. Barclay & Co., Ltd., with which has been incorporated Gurneys, Birkbecks, Barclay & Buxton, Bank Plain, Norwich, or head office, 54, Lombard Street, London." Where cheques drawn on city banks were paid in before 3 p.m., the Bank of England allowed them to be drawn against on the next day. The bank presented the cheque through the country clearing-house & in consequence a cheque of pltf.'s which was presented on the following day, before the proceeds of the N. U. cheque had been credited to his account, was dishonoured. The jury found that the cheque was a cheque on a city bank & that there was a general & recognised custom among London bankers to treat such cheques as London cheques:—*Held:* pltf. was entitled to damages.—FORMAN *v.* BANK OF ENGLAND (1902), 18 T. L. R. 339.

560. Advance for definite period—Duty to honour — General drawing account.]—*Semble:* when a banker makes an advance to a customer for a particular period, he is bound to honour cheques upon the general drawing account of his customer to the last farthing of the amount standing to his credit.—THOMAS *v.* HOWELL (1874), L. R. 18 Eq. 198; 30 L. T. 244; 22 W. R. 676.

Annotations:—**Mentd.** Halse *v.* Rumford (1878), 47 L. J. Ch. 559; *Re* Corcoran, Corcoran *v.* Riddell (1892), 62 L. J. Ch. 267; Nickall *v.* Fawkes (1905), 50 Sol. Jo. 126.

561. Agreed overdraft — Cheques drawn & circulated before notice of withdrawal.] — *Semble:* where bankers have agreed to give an overdraft they cannot refuse to honour, within the limit of that overdraft, cheques which have been drawn & put into circulation before notice to the customer that the limit is to be withdrawn.—ROUSE *v.* BRADFORD BANKING CO., LTD., [1894] A. C. 586; 63 L. J. Ch. 890; 71 L. T. 522; 43 W. R. 78; 7 R. 127, H. L.

562. Secured overdraft — Dishonour of cheques within—Inconsistent agreement—Parol evidence.] —Pltf. recovered damages for the dishonour of his cheque, the jury having found that defts. had agreed to advance £2,000 for six months, that the contract was not terminable at the defts.' discretion at any time before the expiration of the six months, & that defts. had so agreed on the guarantee of pltf.'s mother & the deposit of her deeds as security. Defts. sought to rely on a written & printed application for overdraft dated Oct. 4, 1894, signed by pltf. after the above-mentioned agreement was come to, under which the loan was expressed to be repayable on "Apr. 4, 1895, or on demand at your discretion." Parol evidence was admitted to the effect that when this document was signed it was not intended to give defts. power to recall the overdraft at any time:—*Held:* the evidence was properly admitted to explain the circumstances in which pltf.'s name was appended to a document which was no part of the agreement but which was placed before him for signature by defts. after the agreement was concluded.—BANK OF AUSTRALASIA *v.* PALMER, [1897] A. C. 540; 66 L. J. P. C. 105, P. C.

563. —— Second charge on same property — Right to terminate overdraft.]—Pltf. deposited title deeds with defts. to secure any balance that might become due on his current account, & he was permitted to overdraw. In Oct., 1887, pltf. conveyed the same property by way of security to another person & notice of the charge was given to defts., whereupon they "ruled off" the account & calculated interest on it up to that date. Defts. repeatedly demanded payment of the overdraft. Fourteen months later pltf. paid moneys into his account & drew a cheque which defts. dishonoured, applying the moneys received in payment of the balance due to them. Pltf. sued for damages for the dishonour of his cheque:—*Held:* defts. were not liable, because the security was the foundation for the overdraft, & pltf. having destroyed its value as to further advances, defts. became entitled to close the account without notice.—PARKINSON *v.* WAKEFIELD & CO. (1889), 5 T. L. R. 646, C. A.

564. —— Security deposited by agent—Special damage—Evidence.]—Pltf.'s agent obtained from defts. a promise to pay certain cheques drawn by pltf., in consideration of his depositing with them a store warrant in lieu of the cash which pltf. had

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refused to honour the draft:—*Held:* the bank were not entitled for their own security to retain the amount, it not being alleged that at the time either the acceptor or the drawer of the bill was bkpt., or insolvent or *vergens ad inopiam.*—PAUL & THAIN *v.* ROYAL BANK OF SCOTLAND (1869), 7 Macph. (Ct. of Sess.) 361.—**SCOT.**

m. *Specific deposit to meet cheque—Applied to reduce overdraft—Damages.*]—Pltf., who had an overdrawn account with deft. bank, paid in a sum of money with instructions that it was to be applied to meet a certain cheque which would be presented, & the money was received by the teller on those conditions. The manager was informed of the conditions of the deposit, but, without notice to pltf., he applied the deposit in reduction of his overdraft, & the cheque was dishonoured:—*Held:* pltf. entitled to damages for the dishonour of the cheque.—HUENERBEIN *v.* FEDERAL BANK OF AUSTRALIA (1892), 13 N. S. W. L. R. 244.—**AUS.**

n. *Cheques presented through clearing-house—Misrepresentation as to funds of customer—Right of collecting bank to recover—Costs.*]—BANK OF BRITISH NORTH AMERICA *v.* STANDARD BANK (1915), 9 O. W. N. 216, 34 O. L. R. 648. —**CAN.**

o. *Presentment at wrong wicket — Mistake of clerk—Evidence.*]—A clerk from one bank presented at another bank a cheque of a customer of such last-mentioned bank, but at the wrong ledger-keeper's wicket, & was directed to present it at another wicket. There was no evidence that this was done, & a telegram was sent out by the first-mentioned bank that the drawer of the cheque had no account:—*Held:* the trial judge was right in taking the case from the jury & dismissing the action for want of sufficient evidence.—REAR *v.* THE IMPERIAL BANK OF CANADA (1908), 13 B. C. R. 345; 42 S. C. R. 222. —**CAN.**

p. *Cheques drawn under cash credit—Termination of credit—Notice.*]—When a bank grants a cash credit to a customer to a certain specified amount, upon receiving satisfactory security, & promises to honour drafts to the extent of the credit, it incurs a liability & undertakes an obligation to honour the drafts of the customer up to the specified amount. It undertakes such obligation by the very nature of the transaction, & cannot get rid of it capriciously, without cause & without notice, without being guilty of a breach of contract.

Defts.' manager wrote to pltf., to whom a cash credit had been allowed:—"I have again to state that your account does not suit the bank; & I have to request that you will take immediate steps to pay off the overdraft"; & three days later he wrote: "I must ask you to relieve me of it (the overdraft) at your earliest convenience." The jury found that the two letters put an end to the right of pltf. to draw cheques on the account:—*Held:* the sufficiency of the notice was for the jury, & their verdict was warranted by the evidence.—DAWSON *v.* BANK OF NEW ZEALAND (1884), 5 N. S. W. L. R. 154, 386.—**AUS.**

q. *Attachment of all moneys due by bank—Reasonable time for inquiries—Damages.*]—T. & A. carried on business in partnership & had an account with defts. On a Friday the bank was served with an order attaching all money due by the bank to T. & P. On Saturday two of T.'s cheques, aggregating $401, were presented & refused, the bank not having by that time determined what position it should assume. In an action for damages for such refusal the trial judge told the jury that, if they were of opinion that the bank had exceeded a reasonable time for making all necessary inquiries for their protection, the damages should be substantial but temperate. The jury found a verdict for pltf. for $1,000:—*Held:* (1) there was no misdirection; (2) the bank had acted with proper, reasonable despatch; (3) the damages were unreasonable & unjust.—TODD *v.* UNION BANK OF CANADA (1887), 4 Man. L. R. 204.—**CAN.**

r. *Cheque drawn on estate account—Insolvency of estate—Claim of bank.*]—A bank, which held on account current £413 belonging to an executory estate, refused to cash a cheque for £100 drawn on the account, on the ground that the estate was insolvent, & that the bank, which had a claim for £130, intended to apply for sequestration of it:—*Held:* the bank were not entitled to withhold payment of the cheque.—IRELAND *v.* NORTH OF SCOTLAND BANKING CO. (1880), 8 R. (Ct. of Sess.) 215.—**SCOT.**

Sect. 8. — *Payment of cheques: Sub-sect.* 3, *A. & B.*]

instructed him to pay to the credit of pltf.'s account. The store warrant belonged to pltf., was under pledge to the agent, & was accepted by defts. with full knowledge of the circumstances. In an action for dishonouring the cheques:—*Held:* (1) the agent in substituting the deposit for cash did not exceed his authority, but even if he had, the contract was complete, for there was consideration for defts.' promise, & in the circumstances they could not be heard to say that that consideration did not move from pltf.; (2) evidence of special damage—that is, of pltf.'s loss of custom & credit from particular individuals—was wrongly admitted, special damage not having been alleged.—FLEMING *v.* BANK OF NEW ZEALAND, [1900] A. C. 577; 69 L. J. P. C. 120; 83 L. T. 1; 16 T. L. R. 469, P. C.

Annotation:—**Mentd.** *Re* Gloucester Municipal Election Petition, 1900, Ford *v.* Newth [1901] 1 K. B. 683.

565. Cheque marked "reason assigned not stated"—Meaning—No presentment by mistake.]—Pltf. drew a cheque upon his bank in favour of a customer, who paid it into deft. bank, where he kept an account, for collection. Defts. by some mistake did not present it for payment to the bank upon which it was drawn, & later on it was found at deft. bank in the box in which returned cheques from pltf.'s bank were usually left. Pltf. had ample assets at his bank to meet the cheque. A clerk of defts., thinking that the cheque had been returned unpaid & not knowing for what reason, attached a slip to it on which the words "Reason assigned" were printed, & against those words he wrote "Not stated." The cheque with the slip attached was sent to the person in whose favour it was drawn, who communicated with pltf., & the cheque was paid. Pltf. brought an action of libel, alleging that the words meant that the cheque had been dishonoured through want of assets: *Held:* (1) the words on the slip, coupled with the return of the cheque, were not in their natural meaning libellous, & it lay upon pltf. to prove facts & circumstances leading to the conclusion that they would naturally be understood by reasonable persons as conveying the libellous imputation alleged; (2) pltf. not having proved this, there was no case to go to the jury.—FROST *v.* LONDON JOINT STOCK BANK, LTD. (1906), 22 T. L. R. 760, C. A.

566. Cheque marked "refer to drawer"—Meaning—Question for jury whether libellous.]—Defts. wrongfully dishonoured pltf.'s cheques & marked them "refer to drawer":—*Held:* the words "refer to drawer" meant the cheque had been dishonoured & it was a question for the jury whether they constituted in fact a libel on pltf.—SZEK *v.* LLOYDS BANK (1908), *Times*, Jan. 15.

567. —— —— Effect of moratorium proclamation.]—Pltf. had an account with defts. & on Aug. 5, 1914, she drew a cheque for £4 5*s.* in favour of a co., from whom she was in the habit of buying newspapers. On Aug. 5, a moratorium proclamation was issued, providing that all payments of not less than £5 due & payable before Aug. 6, or on any day before Sept. 4, in respect of any cheque drawn before Aug. 4, "or in respect of any contract made before that time," should be deemed due & payable one month after the original due date or on Sept. 4. The cheque was presented on Aug. 10, & returned with the words "Refer to drawer" upon it. On Aug. 10, pltf. had £6 16*s.* 5*d.* to her credit on the pre-moratorium account & £3 9*s.* 3*d.* on the post-moratorium account. In an action by pltf. against defts. for breach of contract & libel:—*Held:* (1) defts. were protected by the moratorium, as the case was one of a payment in respect of a contract made before Aug. 4; (2) in the circumstances the words "Refer to drawer" were not capable of a libellous meaning; (3) pltf. was not entitled to recover. *Semble:* the words "Refer to drawer" ordinarily mean that the bank are not going to pay, & that the payee must go back to the drawer & ask him to pay; they do not mean that there is no money to pay the cheque (SCRUTTON, J.).—FLACH *v.* LONDON & SOUTH-WESTERN BANK, LTD. (1915), 31 T. L. R. 334.

568. Retention of funds for contingent liabilities.]—Bankers retained the balance of a customer to answer a future liability, which might arise in respect of bills which they had discounted for him to a much larger amount than the balance, & the cus-

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565 i. *Cheque marked "refused payment"—Cheque never presented—Irregular indorsement.*]—A. deposited pltf.'s cheque, drawn on a bank at S., in deft. bank at M. for collection. The same day defts. returned the cheque to A., with a printed form "that it had been refused payment at the place where payable." The cheque had not left M., owing to the discovery of an irregularity in the indorsement, & had not been presented. There was no evidence of malice. In an action for libel:—*Held:* there was no privilege, for, as there had been no presentation, there had been no dishonour & no duty to communicate to A.—BROWNE *v.* BANK OF AUSTRALASIA (1881), 2 N. S. W. L. R. 325.—**AUS.**

s. *Cheque marked "indorsement irregular"—Notification of dishonour to customer—Liability for libel.*]—H. gave a cheque on the U. Bank to W. & Sons, payable to J. & J. W., the words "or bearer" being erased. W. & Sons indorsed the cheque "W. & Sons" & paid it into the N. Bank for collection. The U. Bank returned the cheque to the N. Bank with the words "indorsement irregular" on the back. The N. Bank gave notice to W. & Sons that the cheque had been dishonoured. H. then brought a libel action against the N. Bank:—*Held:* the cheque was, in fact, dishonoured, & the communication by the bank to their customers was privileged.—HALL *v.* BANK OF NEW SOUTH WALES (1889), 10 N. S. W. L. R. 292.—**AUS.**

566 i. *Cheque marked "Effects retained; refer to drawer"—Retention of funds to meet other liabilities.*]—Defenders returned a cheque drawn by pursuer marked "Effects to be retained; refer to drawer." There was at the time a balance on account current sufficient to meet the cheque, but defenders had intimated to pursuer that, pending a settlement of a claim in respect of a bill for a larger amount, they would retain the money at his credit on account current. The cheque in question had left pursuer's hands before receipt of the above intimation from defenders. An action for payment of the bill was compromised for a payment of £20:—*Held:* defenders had funds of their customer in their hands sufficient to meet the cheque, & their duty was to pay it, seeing that it had been granted before receipt of a notice closing the account, & the customer was entitled to £100 damages.—KING *v.* BRITISH LINEN CO. (1899), 7 S. L. T. 58.—**SCOT.**

t. *Measure of damages.*]—Pltfs. were in business as general merchants & insurance agents, & since defts had wrongfully dishonoured cheques, which pltfs. had drawn for the benefit of their creditors, they had been obliged to pay cash for goods & their credit had been seriously injured:—*Held:* £750 damages not excessive.—ROBY *v.* ORIENTAL BANK CORPN. (1879), 2 N. S. W. S. C. R. N. S. 56.—**AUS.**

u. —— *Mercantile character.*] — In an action for the dishonour of a cheque, the loss by pltf. of a partnership, the contract for which the other refused to fulfil in consequence of such dishonour, may be considered by the jury as evidence of damage to pltf.'s mercantile character; but they are not to estimate it as special damage. Evidence of the probable value of such partnership is not admissible. If such evidence has been admitted, although without objection, it is the duty of the judge to warn the jury not to take the amount of the loss of the contract as the measure of damages; if he do not, deft. is entitled to a new trial.—DYSON *v.* UNION BANK OF AUSTRALIA, LTD. (1882), 8 V. L. R. 106.—**AUS.**

w. —— ——.]—A farmer is not a trader, & is not entitled to more than nominal damages for the dishonour of his cheque, unless he prove special damage or that he has a mercantile character to be injured.—BANK OF NEW SOUTH WALES *v.* MILVAIN (1884), 10 V. L. R. 3.—**AUS.**

y. —— *Special damage.*] — In an action by a trader for dishonouring cheques & for libel, contained in the memorandum written on a cheque in explanation of the dishonour, in which pltf. claims only general damages for injury to his credit & reputation, evidence that he lost a particular agency business, upon which the rest of his business depended, by reason of the dishonours or libel complained of, is not admissible. Such damage is special damage, & must be pleaded & proved.—MILES *v.* COMMERCIAL BANKING CO. OF SYDNEY (1904), 1 C. L. R. 470.—**AUS.**

tomer brought an action against the bankers for damages for having dishonoured his cheques, & for the amount of his balance. After the action was commenced several of the above bills, to a larger amount than the balance, were dishonoured. Upon a bill filed by the bankers against the customer for an account & for an injunction to restrain the action at law, the ct. (considering there was a substantial question to be tried in equity), granted an injunction restraining the action.—AGRA & MASTERMAN'S BANK, LTD. *v.* HOFFMANN (1864), 5 New Rep. 214; 34 L. J. Ch. 285; 11 L. T. 701; 11 Jur. N. S. 335; 13 W. R. 226.

569. Attachment of all debts in bank's hands — Balance available after attachment—Cheques drawn against balance.]—Deft. acted as banker to pltf. & held a sum of money to his credit. A judgment was obtained against pltf., & all debts in the hands of deft. were attached to answer such judgment. The amount in the hands of deft. exceeded the amount of the judgment. Pltf. drew cheques against the balance which were presented & dishonoured:—*Held:* deft. was not bound to honour the cheque so drawn, & his refusal to do so gave pltf. no cause of action.—ROGERS *v.* WHITELEY, [1892] A. C. 118; 61 L. J. Q. B. 512; 66 L. T. 303; 8 T. L. R. 418, H. L.

Annotations:—**Consd.** Geisse *v.* Taylor, [1905] 2 K. B. 658; Galbraith *v.* Grimshaw & Baxter, [1910] 1 K. B. 339, C. A. **Refd.** Yates *v.* Terry, [1901] 1 K. B. 102; Edmunds *v.* Edmunds, [1904] P. 362. **Mentd.** *Re* Greenwood, Sutcliffe *v.* Gledhill, [1901] 1 Ch. 887.

570. Cheque marked by drawer "to be retained"—Unconditional order to pay as regards bank—Rights of drawee.]—Deft. gave pltfs. a cheque, written on a blank sheet of paper, on the face of which he wrote "to be retained" & promised to send a cheque on one of his banker's printed forms in substitution for it. This he did not do, & the cheque was dishonoured on presentment. In an action on the cheque:—*Held:* the addition of the words "to be retained" merely imported a condition between drawer & drawee, & did not prevent the instrument being an unconditional order to pay with regard to the bankers, & it was a cheque within Bills of Exchange Act, 1882 (c. 61), upon which pltfs. were entitled to sue.—ROBERTS & Co. *v.* MARSH, [1915] 1 K. B. 42; 84 L. J. K. B. 388; 111 L. T. 1060, C. A.

B. Funds insufficient.

571. To meet all cheques — Duty of bank to honour first cheque presented.]—Pltfs., foreign bankers, sued defts. for wrongfully dishonouring cheques. When the cheques were presented defts. marked them "effects not cleared; please present again," & contended that they were justified in refusing payment because they had been advised of a number of cheques to be presented, &, as they had not sufficient funds to meet them all, they were entitled to meet none of them but could ask the holders to present them again. On the day when the cheques were presented defts. held assets sufficient to pay one or more of them, but not sufficient to meet all the cheques presented on that day:—*Held:* defts. were liable in damages, it being their duty to honour the first cheque presented which was within the amount of the assets in their hands.—SEDNAONI ZARIFFA NAKES & Co. *v.* ANGLO-AUSTRIAN BANK (1909), Journal of Institute of Bankers, Vol. XXX., p. 413; *Times*, Apr. 26.

572. To meet all demands — Payment into court — Rights of payee.]—Pltfs. were deft.'s bankers & also agents for his regiment. On May 7 deft. retired from the Army, having sold his commission, & on the following day it became the duty of pltfs., as agents for the regiment, to issue to deft. the sum of £365 18*s.* 6*d.*, the price of his commission. On May 23 C. presented a cheque drawn by deft. for £50, which was dishonoured, his credit balance being £38 4*s.* 8*d.*, although with the price of the commission there would have been sufficient moneys to meet the cheque. Various claims having been made to the proceeds of the

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PART II. SECT. 8, SUB-SECT. 3.—B.

571 i. *To meet all cheques—Duty of bank to honour first cheque presented.*]—CALDWELL *v.* MERCHANTS BANK OF CANADA (1876), 26 C. P. 294.—**CAN.**

571 ii. *To meet whole cheque—Assignment of funds standing to customer's credit.*]—A cheque granted for value, when presented at the bank on which it is drawn, constitutes an intimated assignation of the drawer's funds to the amount of the value of the cheque; & if the cheque be for a larger amount than is at the drawer's credit with the bank, it nevertheless operates as an assignation of such funds as are at his credit.—BRITISH LINEN CO. BANK *v.* CARRUTHERS & FERGUSSON (1883), 20 Sc. L. R. 619.—**SCOT.**

571 iii. —— *When interest on overdrafts added.*]—A cheque of pltfs. was dishonoured on Nov. 4. The balance then standing to their credit in the pass-book exceeded the amount of the cheque, &, before drawing the cheque, pltfs. were so informed by the clerk of the bank. Between June 30 & Nov. 4 pltfs. had several times overdrawn their account, & the interest due to defts. upon such overdrafts, with the amount of the cheque, exceeded the credit balance, but the dishonour of the cheque was not put on that ground at that time. It was the practice of the bank not to charge interest to the customers until the end of the half-year, unless the account was closed or the customer became insolvent. Pltfs., some days before the dishonour, were offering to their creditors a composition of 8*s.* in the pound:—*Held:* defts. could not avail themselves of the interest due to them under the plea that there were not sufficient funds in their hands available for the payment of the cheque.—ROBY *v.* ORIENTAL BANK CORPN. (1879), 2 N. S. W. S. C. R. N. S. 56.—**AUS.**

a. *Cheque drawn in excess of credit—Temporary overdraft.*]—In the absence of special agreement, express or implied, a banker is under no obligation to allow a customer to overdraw his account, & cannot be held liable for damages for dishonouring a cheque which the customer has insufficient funds to meet.

The usual pledge form of a bank, by which pltf. pledged to the bank certain shares as security for an overdraft, provided that the overdraft should be temporary & at the manager's discretion:—*Held:* pltf. could not succeed in an action for damages for dishonour of a cheque, drawn after the manager's refusal to allow further overdrawing, for a sum in excess of the amount to pltf.'s credit.—MCINTYRE *v.* ROBINSON SOUTH AFRICAN BANKING CO., 17 E. D. C. 111.—**S. AF.**

b. —— *Promise by manager to payee to honour—Liability of bank to payee for dishonouring.*]—Pltf. sold goods to C., who gave pltf. cheque on deft. bank. When pltf. presented the cheque C.'s account was considerably overdrawn, but the manager promised pltf. that the bank would pay the cheque later, which they refused to do:—*Held:* the promise given pltf. was made on behalf & for the benefit of the bank, & the benefit derived from the transaction, which was carried out on the faith of the promise, accrued to deft. bank, & they were liable.—ADAMS *v.* CRAIG & ONTARIO BANK (1911), 20 O. W. R. 7; 3 O. W. N. 41.—**CAN.**

573 i. *Exhaustion of funds — "No funds" Onus of proof.*]—Where a bank supports an answer of "no funds" with a cheque, by which it claims that the amount claimed was withdrawn, the *onus* is on it to prove the cheque genuine.—CLARK *v.* EXCHANGE BANK (1880), 3 L. N. 45.—**CAN.**

c. *Cheque payable at named bank at par—No guarantee of funds—Right to charge back on dishonour.*]—Pltfs. were holders for value of a cheque drawn by the A. Bank on the M. Bank at London, on the face of which appeared the words "payable at M. Bank, Toronto, at par." The above words were habitually used by the A. Bank on their cheques with the assent of the M. Bank:—*Held:* the effect of the words was that the M. Bank at Toronto would make no charge for cashing the cheque, & they did not assume the risk of there being funds to meet it, & they did not lose the right to charge it back on ascertaining there were no funds.—ROSE-BELFORD PRINTING CO. *v.* MONTREAL BANK (1886), 12 O. R. 544.—**CAN.**

d. *Funds assigned to third party—Notice by assignee to bank.*]—In an action against a banker for not paying cheques defts. pleaded, on equitable grounds, that, before pltf. drew any of the cheques, he had assigned by deed to F. & Co. all moneys, etc., in the hands of the bank, & that, before the presentation of any of the cheques, F. & Co. gave the bank notice of the deed & of its execution by pltf., & demanded of the bank all the moneys, etc., of pltf. in his hands of the bank, & afterwards, & before the action, the bank, by the authority & order of pltf., paid over to F. & Co. all of pltf.'s money, etc., in their hands:—*Held:* a good plea.—NEWMAN *v.* BANK OF NEW SOUTH WALES (1873), 12 N. S. W. S. C. R. 289.—**AUS.**

Sect. 8.—Payment of cheques: Sub-sect. 3, B., C. & D.]

sale of the commission the bankers paid into ct. the sums of £365 18*s.* 6*d.* & £38 4*s.* 8*d.*:—*Held:* C. had no rights against the bankers or the money in ct.—HOPKINSON *v.* FORSTER (1874), L. R. 19 Eq. 74; 23 W. R. 301.

Annotations:—**Refd.** *Re* Beaumont, Beaumont *v.* Ewbank, [1902] 1 Ch. 889. **Mentd.** Schroeder *v.* Central Bank of London (1876), 34 L. T. 735.

573. Exhaustion of funds—Payment of customer's bill.]—Defts., bankers, holding in their hands £20 on account of pltf., paid a bill of exchange, accepted by pltf., payable at their banking-house, for £42, when it became due & was presented to them by the holder. No orders to pay the acceptance had been given by pltf., nor had he countermanded the authority contained in the acceptance. Defts., after payment of the bill, endeavoured to get back the money, & treated the payment as made by mistake, & subsequently honoured a cheque drawn by pltf. for £13 13*s.* In an action against defts. for not honouring a further cheque for £7 11*s.*, pltf. alleging that they had funds in their hands:—*Held:* defts. had authority from pltf. to apply his money towards the payment of the acceptance, & so had properly applied & exhausted his funds, & what happened afterwards was immaterial.—KYMER *v.* LAURIE (1849), 18 L. J. Q. B. 218; *sub nom.* KEYMER *v.* LAURIE, 13 Jur. 426.

574. Accounts at two branches—Right of bank to combine accounts.]—Pltf. having an account at the L. branch of defts.' bank, which showed a balance to his credit exceeding £23, drew cheques to that amount on that branch. At the same time he was indebted to the bank at their B. branch in an amount which, having regard to his whole account, reduced his assets in the bank's hands to a few shillings only. The bank, without any notice to him, transferred the B. debt to the L. branch, & refused to pay the cheques on presentment. There was no special contract or course of dealing between the parties that each account should be kept separate:—*Held:* the bank were entitled at any time to combine the accounts, & to charge the L. account with the B. debt.—GARNETT *v.* MCKEWAN (1872), L. R. 8 Exch. 10; 42 L. J. Ex. 1; 27 L. T. 560; 21 W. R. 57.

Annotation:—**Consd.** Prince *v.* Oriental Bank Corpn. (1878), 3 App. Cas. 325, P. C.

Branch banks, generally, *see* Sect. 1, sub-sect. 3, *ante.*

575. Allegation of payment in—Denial by bank—Evidence.]—In an action for damages for dishonouring a cheque pltf. alleged that he had previously paid in a cheque which was more than sufficient to meet the amount of the dishonoured cheque, & called his son to prove that he had handed an envelope containing the cheque across the counter; the bank proved by their officials that the cheque was never seen by them & that no trace of its receipt was to be found in the bank books:—*Held:* the bank were entitled to judgment.—BELL *v.* CAPITAL & COUNTIES BANK (1887), 3 T. L. R. 540.

576. Customer overcredited in pass-book by mistake—Cheque drawn bonâ fide—Liability of bank—Customer's right to damages.]—Pltf., a customer of defts., finding on examining his pass-book that it showed a balance of £70 17*s.* 9*d.* in his favour, drew a cheque for £67 11*s.* in favour of a firm to whom he owed that amount. On the cheque being presented by that firm it was dishonoured by defts. At the time pltf. drew the cheque for £67 11*s.* he had a balance at the bank of £60 5*s.* 9*d.* only, but in his pass-book one of the bank clerks had, in error, entered to pltf.'s credit a sum of £10 12*s.* twice, with the result that from the pass-book pltf. appeared to be in credit to the amount of £70 17*s.* 9*d.*:—*Held:* although defts. were entitled to have the wrong entry ultimately corrected, pltf. (who had not been guilty of any negligence or fraud in connection with the matter) was entitled, until that correction had been made, to act upon defts.' statements in the pass-book, &, having acted upon those statements & suffered damage thereby, he was entitled to recover against defts. the amount of such damage.—HOLLAND *v.* MANCHESTER & LIVERPOOL DISTRICT BANKING CO., LTD. (1909), 25 T. L. R. 386; 14 Com. Cas. 241.

Pass-book, generally, *see* Sect. 13, *post.*

C. Cheques drawn in Breach of Trust.

Trust accounts, generally, *see* Sect. 2, sub-sect. 2, *ante.*

577. Money of principal paid into private account — After revocation of agency — Cheques dishonoured on instructions from principal.]—A., the farming bailiff of D. (after his employment as such had ceased), received a cheque for £180, in payment for wheat belonging to D., which he had sold on his account while acting as bailiff, & paid it in to his own account with B. & Co., his bankers, who received the cash for it, & gave A. credit for the amount; B. & Co. afterwards, under an indemnity from D., refused to honour his drafts:—*Held:* even assuming that the cheque had been improperly obtained by A., still, as between him & his bankers, the amount was recoverable by A., as money had & received by them to his use, or money paid.—TASSELL *v.* COOPER (1850) 9 C. B. 509; 14 L. T. O. S. 466; 137 E. R. 990.

Annotations:—**Consd.** R. *v.* Hassall (1861), 9 W. R. 708, C. C. R. **Distd.** Société Coloniale Anversoise *v.* London & Brazilian Bank, [1911] 2 K. B. 1024. **Refd.** Hardy *v.* Veasey (1868), L. R. 3 Exch. 107.

578. Notice to bank by third party—Application for injunction—Right to refuse payment.]—*Semble:* where a banker dishonours a trustee's cheques in consequence of notice from a third party that the trustee intends to misapply the trust moneys & that an injunction is about to be applied for, no action will lie against the banker, if an injunction is subsequently granted.—HUNT *v.* MANIERE (1864), 34 Beav. 157; 5 New Rep. 181; 34 L. J. Ch. 142; 11 L. T. 469; 11 Jur. N. S. 28; 13 W. R. 212; 55 E. R. 594; *subsequent proceedings* (1865), 5 New Rep. 295, L.JJ.

579. Bank cognisant of breach—Right to refuse payment.]—In order to hold a banker justified in refusing to pay a demand of his customer, the customer being an exor. & drawing a cheque as exor., there must be a misapplication of the money intended by the exor., so as to constitute a breach of trust, & the banker must be cognisant of that intention.—GRAY *v.* JOHNSTON (1868), L. R. 3 H. L. 1; 16 W. R. 842, H. L.

Annotations:—**Consd.** *Re* Gross, *Ex p.* Adair (1871), 24 L. T. 198; *Re* Wall, Jackson *v.* Bristol & West of England Bank (1885), 1 T. L. R. 522; Coleman *v.* Bucks & Oxon Union Bank, [1897] 2 Ch. 243; Bath *v.* Standard Land Co., [1911] 1 Ch. 618, C. A. **Refd.** Foxton *v.* Manchester & Liverpool District Banking Co. (1881), 44 L. T. 406; Marten *v.* Rocke, Eyton (1885), 53 L. T. 946; Bank of New South Wales *v.* Goulburn Valley Butter Co. Proprietary, [1902] A. C. 543, P. C. **Mentd.** *Re* Blundell; Blundell *v.* Blundell (1888), 40 Ch. D. 370.

580. Restraining bank from honouring cheques—Defect in customer's title—Injunction.]—Pltf. sued defts. for an injunction to restrain them from honouring cheques drawn by his wife, alleging that the moneys deposited by her with defts. had been stolen from him. The wife was not a party to the action:—*Held:* there was no power to grant an injunction against defts. in the absence of the

customer. *Semble:* if the customer were before the ct., it would restrain her from drawing cheques, but would not restrain defts. from honouring cheques already drawn.—FONTAINE-BESSON *v.* PARR'S BANKING CO. & ALLIANCE BANK, LTD. (1895), 12 T. L. R. 121, C. A.

D. Other Cases.

581. Retention after dishonour—Usage of London bankers.]—By the usage of trade in London, a cheque may be retained by the banker on whom it is drawn till five in the afternoon of the day on which it is presented for payment, & then returned, although it has previously been cancelled by mistake.—FERNANDEY *v.* GLYNN (1808), 1 Camp. 426, n., N. P.

Annotations:—**Consd.** Cox *v.* Troy (1822), 5 B. & Ald. 474; Wilkinson *v.* Johnson (1824), 3 B. & C. 428.

582. Position of holder—No right of action against bank.]—The payee of a cheque has no right of action for its dishonour against the banker on whom it is drawn.—SCHROEDER *v.* CENTRAL BANK OF LONDON, LTD. (1876), 34 L. T. 735; 24 W. R. 710; 2 Char. Pr. Cas. 77.

Annotation:—**Mentd.** Read *v.* Brown (1888), 22 Q. B. D. 128, C. A.

583. Dishonour by country bank—Failure to return cheque by return of post—Clearing-house rules.]—A country bank, upon whom a cheque was drawn:—*Held:* liable for the loss sustained by another country bank, by whose agent the cheque was presented at the clearing-house, in consequence of the first mentioned bank, who dishonoured the cheque, failing to return it to the second bank by return of post.—PARR'S BANK, LTD. *v.* ASHBY (THOMAS) & CO. (1898), 14 T. L. R. 563.

584. Notice of dishonour—Rights of drawer.]—In an action by the holder against the drawer of a dishonoured cheque, notice of dishonour is excused by want of effects at the time when the drawer would reasonably expect the cheque to be presented for payment, provided the drawer had no reasonable expectation that it would be paid. The want of effects which will excuse notice of dishonour need not be a want of any effects; it is sufficient if there are no effects sufficient for the payment of the cheque.

If there were funds in the hands of the bank sufficient to meet the cheque, the drawer would be entitled to notice, though he knew that the bank would not honour the cheque, for he would be entitled to say they were bound to honour it, even though they had told him they would not (BRAMWELL, B.).—CAREW *v.* DUCKWORTH (1869), L. R. 4 Exch. 313; 38 L. J. Ex. 149; 20 L. T. 882; 17 W. R. 927.

See, further, BILLS OF EXCHANGE, PROMISSORY NOTES, & NEGOTIABLE INSTRUMENTS.

PART II. SECT. 8, SUB-SECT. 3.—D.

e. *Relationship of banker & holder of cheque—Privity of contract.*]—There is a privity of contract created by the usage of trade between banks & the holders of cheques drawn on them.—MARLER *v.* MOLSONS BANK (1879), 2 L. N. 166.—**CAN.**

f. *What amounts to dishonour.*]—Any refusal on the part of a banker to pay a customer's cheque on presentation, in whatever language couched & with whatever intimation as to the probable state of the customer's account at a future date, such as "effects not cleared," is a dishonour.—FREEMAN *v.* STANDARD BANK OF SOUTH AFRICA, LTD. (1905), W. H. C. 26.—**S. AF.**

584 i. *Notice of dishonour—Rights of drawer.*]—The drawer of a cheque is entitled to due notice of dishonour.—CLARKE *v.* MCLEAN (1867), 4 W. W. & A'B. 275.—**AUS.**

584 ii. —— *Reasonable time.*]—In the case of a cheque the same strictness as to presentment & notice of dishonour as in the case of a bill of exchange is not required. Notice of dishonour of a cheque is sufficient, if given within any reasonable time, provided none of the parties have become insolvent.—HUTTON *v.* GLASS (1868), 5 W. W. & A'B. 163.—**AUS.**

g. *Incomplete cheque—Refusal to pay justified.*]—Until the statement at length in the body of a cheque is filled in the instrument is incomplete, & a banker is not liable to an action at the suit of a customer for refusing to honour on presentment a cheque thus imperfect.—COMMERCIAL BANK OF AUSTRALIA, LTD. *v.* HULLS (1884), 10 V. L. R. 110.—**AUS.**

h. *Refusal to pay after acceptance—Credit obtained by fraud—Rights of indorsee.*]—Pltf., as indorsee of a cheque drawn by B. upon deft. bank in favour of P., & accepted by the bank, sued for the amount of the cheque, payment of which had been refused after the acceptance, on the ground that B.'s credit with the bank was obtained upon the faith of a forged indorsement. The bank set up that pltf. was aware of the fraud, & gave no consideration for the cheque sued on:—*Held:* (1) the cheque was accepted by the bank either at the request of pltf. or of pltf. & B., & consideration was given by pltf. for the cheque; (2) at the time it was given to P., neither P. nor pltf. was aware of any fraud, & P. entitled to recover from the bank the amount of the cheque for the use of pltf.—BAKER *v.* MERCHANTS BANK (1911), 19 W. L. R. 641.—**CAN.**

j. *Funds of customer obtained by fraud—Repayment by bank to rightful owner—No liability for dishonour of customer's cheques.*]—Pltf., by fraud, obtained money from the Govt., which he paid to an account in his name in deft. bank. Pltf. having been afterwards prosecuted for the fraud & convicted, the Govt. demanded from defts. the money standing to the credit of pltf., & defts. paid the money to the Govt. & dishonoured pltf.'s cheque:—*Held:* pltf. not entitled to proceed in an action for the dishonour of his cheque.—ZEEB *v.* BANK OF NEW SOUTH WALES (1901), 1 S. R. N. S. W. 167.—**AUS.**

k. *Customer credited on discount of bills—Dishonour of bills—Right to dishonour cheques of customer.*]—Pltf. opened an account with defts. by getting them to discount for him two acceptances for $500 each, payable to & indorsed by him, & to place the proceeds to his credit. He afterwards paid in a further sum, & drew out by cheques all except $403, when the two bills were returned dishonoured:—*Held:* defts. were entitled to apply the balance in hand in part payment of the acceptances, &, having done so, they were not liable for refusing to honour pltf.'s cheque.—JONES *v.* BANK OF MONTREAL (1869), 29 U. C. R. 448.—**CAN.**

l. *Cheque countersigned by representative of bank—Agreement with bank as to advances—Statute of Frauds.*]—A firm of fruit dealers, whose account was overdrawn at their bank, applied for further advances, which the bank refused to make unless D. was employed to look after the business, act as bookkeeper, receive all produce, & countersign cheques given for the same. D. was so employed, & represented to producers that it was safe for them to bring their produce to the factory, & that cheques given therefor countersigned by him would be paid by the bank. Pltf., relying on those representations, delivered peaches, for which he received the firm's cheque, countersigned by D. On the cheque being presented, the bank refused payment:—*Held:* the bank had such an interest in the goods delivered by pltf. as prevented the application of Stat. Frauds, s. 4, & were bound by D.'s promise of representation that they would pay the cheque, though not made in writing.—SIMPSON *v.* DOLAN (1908), 16 O. L. R. 459; 11 O. W. R. 590.—**CAN.**

m. —— —— ——.]—A canning co. was extended credit by deft. bank on condition that D. should be employed by the co. as bookkeeper, etc. The co.'s cheques were paid by the bank when countersigned by D. Pltfs. sold the canning co. a quantity of fruit & were given a cheque countersigned by D., which the bank refused to pay:—*Held:* the bank was not liable under Stat. Frauds, s. 4.—MCWILLIAM & EVERIST *v.* SOVEREIGN BANK (1909), 14 O. W. R. 561.—**CAN.**

n. *Cheque drawn against telegraphic remittance—Plaintiff's name mis-spelt—Indemnity refused—Damages.*]—Pltf.'s agent in London paid a sum of money to defts. in London to be remitted by telegraph to the credit of pltf. at defts.' Dunedin branch, less cost of telegram & exchange. The telegram mis-spelt pltf.'s name, & defts. refused to pay over the money until a satisfactory indemnity was given. An indemnity offered was not accepted, & the money remained in defts.' hands for nearly two months, until they received advice by letter. Pltf. drew a cheque upon defts., which was returned marked "declined to pay." Pltf. brought an action alleging that pltf. was kept out of the money from Mar. 13 to May 4, & the jury awarded damages as follows: Telegram, £10; exchange, £33 7*s.*; interest, £13 2*s.* 11*d.*; general damages, £300. On a rule to reduce the damages:—*Held:* (1) a contract to transmit money by telegraphic advice differed in no respect from a contract to transmit by letter of advice, & in no essential respect from the contract entered into in granting a letter of credit or bank draft; (2) the contract created the relation of debtor & creditor, &, on breach, the ordinary measure of damages must be applied; (3) the cost of telegram & exchange was recoverable only as an alternative to interest, both charges representing the difference between a present payment & a payment deferred.—SMYTHIES *v.* BANK OF NEW ZEALAND, 3 J. R. N. S. 23. **N.Z.**

Sect. 8.—*Payment of cheques: Sub-sects.* 4 & 5. *Sect.* 9: *Sub-sect.* 1.]

SUB-SECT. 4.—STOPPING CHEQUES.

585. Received by bank in reduction of debt—Bank's right to recover.]—L., then in good credit in the city, sold to M. four bills of exchange, drawn by himself upon P. at Cadiz. They were sold on Feb. 11, & by the custom of bill brokers were to be paid on the first foreign post-day following the day of the sale. That first day was Feb. 14. L. was much in debt to his banker, & being pressed to reduce the balance, gave to the banker a draft or order on M. for the amount of the four bills. This draft or order was dated on the 14th, though it was, in fact, written on the 13th, & then delivered to the banker. On the morning of the 14th the manager of M.'s business gave a cheque for the amount of the order, which was then given up to him. L. failed, & on the afternoon of the 14th the manager, learning that fact, stopped payment of the cheque: —*Held:* the banker was entitled to recover its amount from M.—MISA *v.* CURRIE (1876), 1 App. Cas. 554; 45 L. J. Q. B. 852; 35 L. T. 414; 24 W. R. 1049, H. L.

Annotations:—**Consd.** M'Lean *v.* Clydesdale Banking Co. (1883), 9 App. Cas. 95, H. L.; Fleming *v.* Bank of New Zealand, [1900] A. C. 577, P. C. **Refd.** Hogarth *v.* Latham (1878), 47 L. J. Q. B. 339, C. A.; Elwell *v.* Jackson (1885), 1 T. L. R. 454, C. A. **Mentd.** Stott *v.* Fairlamb (1883), 32 W. R. 354, C. A.; *Re* Matthew, *Ex p.* Matthew (1884), 12 Q. B. D. 506, C. A.; *Re* Romer, *Ex p.* Snell (1893), 62 L. J. Q. B. 610, C. A.; Nash *v.* De Freville (1900), 69 L. J. Q. B. 484, C. A.; Banbury *v.* Bank of Montreal, [1918] A. C. 626, H. L.

586. —— ——.]—On a Saturday A. granted a cheque on his account with the Bank of S., for (*inter alia*) £250 crossed blank in favour of B. On the same day B. indorsed the cheque & paid it into the Bank of C., of which he was a customer. The Bank of C. immediately on receipt of the cheque carried the amount to B.'s credit, & thus reduced a debit balance standing against him. On the Monday following A. stopped payment of the cheque at the Bank of S., & when the Bank of C. presented it, payment was refused. The Bank of C. sued A. for the amount. The ct. found that the cheque was granted to B. to reduce the balance at his debit with the Bank of C., that A. agreed the cheque should be so used, & that in pursuance of that agreement the cheque was indorsed to the Bank of C., & given to them as cash, & the contents being put to B.'s credit the balance at his debit was thereby reduced:—*Held:* the Bank of C. were onerous holders of the cheque & the Bank of S., not having paid the cheque on demand, A. was liable.—M'LEAN *v.* CLYDESDALE BANKING CO. (1883), 9 App. Cas. 95; 50 L. T. 457, H. L.

Annotations:—**Expld.** National Bank *v.* Silke, [1891] 1 Q. B. 435, C. A.; Gordon *v.* London, City & Midland Bank, Gordon *v.* Capital & Counties Bank, [1902] 1 K. B. 242, C. A. **Refd.** Capital & Counties Bank *v.* Gordon, London, City & Midland Bank *v.* Gordon, [1903] A. C. 240, H. L. **Mentd.** *Re* Boyse, Crofton *v.* Crofton (1886), 33 Ch. D. 612; *Re* Bethell, Bethell *v.* Bethell (1887), 34 Ch. D. 561.

587. Given in satisfaction of debt—Revival of debt.]—Where a cheque has been given in satisfaction of a debt, but payment of the draft has been stopped before it has been cashed, the debt & the position of the parties are just the same as though such cheque had never been given, & the debt revives & is capable of being attached under a garnishee order.—COHEN *v.* HALE (1878), 3 Q. B. D. 371; 47 L. J. Q. B. 496; 39 L. T. 35; 26 W. R. 680.

Annotations:—**Consd.** Elwell *v.* Jackson (1884) Cab. & El. 362; Mears *v.* Western Canada Pulp & Paper Co., [1905] 2 Ch. 353, C. A. **Refd.** Elliott *v.* Crutchley, [1903] 2 K. B. 476.

588. Failure to stop post-dated cheque—Bankruptcy of payee—Liability to trustee.]—Purchasers paid part of the purchase-money by a post-dated cheque. Before the date of payment they had notice that the vendor was adjudicated a bkpt., but they did not stop the cheque, which was honoured in due course:—*Held:* the drawer of a post-dated cheque given for value was under no obligation to stop its payment before its date for the benefit of a third party & the transaction was protected by Bkpcy. Act, 1869 (c. 71), s. 94.—*Re* PALMER, *Ex p.* RICHDALE (1882), 19 Ch. D. 409; 51 L. J. Ch. 462; 46 L. T. 116; 30 W. R. 262, C. A.

Annotations:—**Refd.** Bence *v.* Shearman, [1898] 2 Ch. 582, C. A. **Mentd.** Royal Bank of Scotland *v.* Tottenham, [1894] 2 Q. B. 715, C. A.; Gordon *v.* London, City & Midland Bank, Gordon *v.* Capital & Counties Bank, [1902] 1 K. B. 242, C. A.

589. By telegram—Payment before notice of countermand—Negligence.]—Though a telegram countermanding a cheque may reasonably be acted upon by a banker, at least to the extent of postponing the honouring of the cheque until further inquiry can be made, yet a banker is not bound to accept an unauthenticated telegram as sufficient authority for the serious step of refusing payment.

On Oct. 31, 1906, pltf. drew a cheque for £63 on his bankers, defts. On the same day after business hours, he telegraphed to countermand payment of this cheque. The telegram was delivered on the evening of the same day by the post office, &, it being after office hours, was placed in the letter-box of the bank. By an oversight on the part of defts.' servants this telegram was not brought to the notice of their manager until Nov. 2. On Nov. 1 the cheque was presented & paid. In an action for money had & received:—*Held:* payment of the cheque was not in fact countermanded within Bills of Exchange Act, 1882 (c. 61), s. 75, although it might well be that it was owing to the negligence of the bank officials that notice of the customer's desire to stop the cheque was not received in time.—CURTICE *v.* LONDON CITY & MIDLAND BANK, LTD., [1908] 1 K. B. 293; 77 L. J. K. B. 341; 98 L. T. 190; 24 T. L. R. 176; 52 Sol. Jo. 130, C. A.

Annotation:—**Refd.** Lloyds Bank *v.* Swiss Bankverein, Union of London & Smiths Bank *v.* Swiss Bankverein (1913), 108 L. T. 143, C. A.

PART II. SECT. 8, SUB-SECT. 4.

o. *Right to refuse payment—Right of customer to countermand—Liability to holder.*]—In an action against a bank by the holder of a cheque payable to bearer, but which had been recalled by the drawer & which the bank had refused to pay:—*Held:* the bank were entitled to refuse payment, a cheque being an order by a customer, which might be countermanded before payment.—WATERSTON *v.* CITY OF GLASGOW BANK (1874), 11 Sc. L. R. 236.—**SCOT.**

p. *Indemnity for inadvertent cashing—Cheque cashed through clearing house—Bank not liable.*]—A bank protected itself by an indemnity against responsibility for the "inadvertent" cashing of a stopped cheque. More than five weeks after being stopped, the cheque came to the bank on clearance through another bank, which had cashed it on the strength of what appeared to be good indorsements, though such indorsements were actually forgeries. The cheque was included in the clearance account, cashed, & debited to the customer who had stopped it:—*Held:* this was an "inadvertent" payment in terms of the indemnity, for which the bank was not liable in damages.—GROCOTT & SHERRY *v.* AFRICAN BANKING CORPN., 18 E. D. C. 267.—**S. AF.**

q. *Notice to bank of lost cheque—Holder countermanding payment—Cheque cashed after notice—Liability of bank.*]—H., holder of a cheque dated Apr. 20, 1862, lost it on that day. The 21st & 22nd were holidays, & the bank closed. On the 23rd, before the bank opened, H. gave notice of his loss, & required the bank not to pay. On the 24th a customer of the bank brought in the cheque to be carried to his account. The bank disregarded H.'s notice & credited their customer with the amount of the cheque. In an action by H. against the bank for honouring the cheque after notice of his loss:—*Held:* the bank was not liable.—COLONIAL BANK OF AUSTRALASIA *v.* HUNTER (1862), I. W. & W. 236.—**AUS.**

SUB-SECT. 5.—MARKING AND CERTIFYING CHEQUES.

590. Marking cheque presented after banking hours—Acceptance—Usage of London bankers.]—By the practice of the London bankers, if one banker, who holds a cheque drawn on another banker, presents it after four o'clock, it is not then paid, but a mark is put on it, to show that the drawer has assets, & that it will be paid; & cheques so marked have a priority, & are exchanged or paid next day at noon at the clearing-house; & a cheque presented after four, & so marked, & carried to the clearing-house next day, but not paid, no clerk from the drawee's house attending, need not be presented for payment at the banking house of the drawee. Such marking under this practice amounts to an acceptance, payable next day at the clearing-house.—ROBSON *v.* BENNETT (1810), 2 Taunt. 388; 127 E. R. 1128.

Annotations:—**Consd.** Boddington *v.* Schlenker (1833), 2 L. J. K. B. 138. **Mentd.** Moule *v.* Browne (1838), 5 Scott, 694.

591. Certified cheque—Crediting customer on receipt of—Position of collecting bank.]—The only effect of a bank upon whom a cheque is drawn certifying it is to show that the drawer has funds to meet it. A bank by receiving a cheque so certified by another bank & crediting their customer with the amount, in the absence of express agreement, merely receive it for collection, & not as purchasers of it.—GADEN *v.* NEWFOUNDLAND SAVINGS BANK, [1899] A. C. 281; 68 L. J. P. C. 57; 80 L. T. 329; 15 T. L. R. 228, P. C.

Annotation:—**Refd.** Imperial Bank of Canada *v.* Bank of Hamilton, [1903] A. C. 49, P. C.

SECT. 9.—PAYMENT OF OTHER DOCUMENTS.

SUB-SECT. 1.—BILLS OF EXCHANGE ACCEPTED PAYABLE AT A BANKER'S.

592. Presentment after banking hours.]—A bill accepted, payable at a banker's, must be presented for payment within the usual banking hours; & proof of presentment afterwards by a notary, when a boy came to the door, & could give no answer as to payment, the clerks being gone:—*Held:* not proof of the dishonour of a bill so as to charge the drawer.—PARKER *v.* GORDON (1806), 7 East, 385; 6 Esp. 41; 3 Smith, K. B. 358; 103 E. R. 149.

Annotations:—**Follld.** Elford *v.* Teed (1813), 1 M. & S. 28. **Refd.** Callaghan *v.* Aylett (1810), 2 Camp. 549, N. P.;

PART II. SECT. 8, SUB-SECT. 5.

r. *Private notification out of hours certifying payment—Custom.*]—A custom that a notification by one banker to another after office hours that a customer's note is good & will be paid the next day on presentment is equivalent to payment, is bad.—TOBIN *v.* CITY BANK (1878), 1 N. S. W. S. C. R. N. S. 267.—**AUS.**

s. *Certification of post-dated cheques by president & manager—Cheques discounted by drawer—Certifying bank liable to discounting bank for acceptance by president & manager.*]—EXCHANGE BANK OF CANADA *v.* PEOPLE'S BANK, 23 C. L. J. 391.—**CAN.**

t. *Certification before suspension—Discharge of drawer.*]—The payees of a cheque took it to the bank on which it was drawn on the afternoon of the day on which they received it from the drawer & got it marked "good," the amount being charged to the drawer's account. They then took it away without demanding payment. The bank on the evening of the same day suspended payment, & on the following day, on presentation of the cheque, payment was refused:—*Held:* the drawer of the cheque was discharged from all liability thereon.—BOYD *v.* NASMITH (1888), 17 O. R. 40.—**CAN.**

u. *S. P.* BRUNELLE *v.* OSTIGNY (1911), Q. R. 21 K. B. 302.—**CAN.**

w. —— *Cheque deposited with another bank—Liability of receiving bank.*]—Pltf. had an account with the F. Bank which he withdrew by giving defts. a cheque, which they marked instead of demanding the cash. Then defts. gave pltf. a pass-book crediting him with amount of the cheque. Defts. drew a settlement on the F. Bank for the cheque & some other small accounts, which was refused, as the F. Bank had suspended. Defts. then secured a release from pltf. of his claim against them & at the same time took an assignment of pltf.'s claim against the F. Bank. Pltf. brought an action to set aside the release, which he alleged was obtained by false pretences, whereupon defts. withdrew the release from the case, but contended that, as they had received no value, they should not be made to suffer the loss:—*Held:* defts. accepted the F. Bank as their debtor for amount of the cheque, & judgment for pltf.—JOHNS *v.* STANDARD BANK (1911), 18 O. W. R. 650; 2 O. W. N. 910.—**CAN.**

a. *Acceptance of cheques — Blank spaces—Duty of bank.*]—A bank, which accepts a cheque drawn upon it, is not bound to fill in the blanks or to stamp the cheque in such a way as to obviate its being raised. Neglect so to do does not render the bank liable for an excess amount paid as a consequence of an alteration effected after the acceptance of the cheque.—DUQUET *v.* BANQUE NATIONALE (1914), Q. R. 46 S. C. 131.—**CAN.**

b. —— *Insolvency of bank — Debiting customer & crediting collecting bank—Set-off.*]—On Nov. 15, 1887, the day before the suspension of the C. Bank, B., having sufficient funds to his credit, drew a cheque upon it payable to A., who deposited same in the D. Bank, & obtained an advance upon it. The D. Bank presented it for payment on Nov. 17, when the C. Bank had suspended payment. On Nov. 23, 1887, the C. Bank marked the cheque good, debiting B.'s account & crediting the D. Bank with the amount thereof. Afterwards, the liquidators claiming the right to set off certain subsequently accruing liabilities of B. against the cheque, the D. Bank withdrew their claim upon it. Subsequently, & after the first dividend had been paid, A. heard of this, & filed a claim on the cheque, on Sept. 13, 1888. The master allowed the claim, only subject to the set-off:—*Held:* there was no right to set-off as claimed, & that the allowance of the claim was *ex debito justitiæ*, & not discretionary; & the fact of the C. Bank having accepted the cheque, & credited the amount to the D. Bank, & charged the amount to B., showed conclusively that at that time the C. Bank was not a creditor of B.—*Re* CENTRAL BANK OF CANADA, CAYLEY'S CASE (1889), 17 O. R. 122.—**CAN.**

c. —— *Subsequent dishonour — Rights of holder.*]—The M. Bank, by its manager, accepted cheques drawn on it by the C. Bank, & the latter deposited them in the N. Bank for value received. The cheques, on presentation, were refused & protested, & the N. Bank brought action therefor:—*Held:* the M. Bank could not refuse its acceptance thus made, & was bound to protect & guarantee the C. Bank from all loss thereunder.—BANQUE NATIONALE *v.* CITY BANK & BANK OF MONTREAL (1873), 17 L. C. J. 197.—**CAN.**

d. *Unauthorised marking — Payment refused—Custom of bankers.*]—H., a customer of two banks, presented two cheques, drawn by himself, & asked for the cash from the B. Bank, promising to deposit a marked cheque for $10,000 on M. Bank. Later in the day H. presented his cheque for $10,000 on M. Bank, with "D" placed upon it by D., the manager of M. Bank, but the M. Bank refused to pay the cheque when presented:—*Held:* (1) the placing of "D" on the cheque was only authority of the manager to the ledger keeper to certify the cheque, & this not having been done, the M. Bank was not liable; (2) pltf. should have a new trial on the point that the initialling of the cheque by D. was with the object of enabling H. to present same to the D. Bank as one which would be accepted by the M. Bank & so obtaining money which was to be deposited to his credit in that bank.—SCOTT *v.* MERCHANTS BANK (1911), 17 O. W. R. 849; 2 O. W. N. 514.—**CAN.**

e. —— *Cheque cashed by another bank—Payment stopped by drawer—Liability of drawer.*]—Y. drew a cheque, dated June 9, 1906, in favour of J. on deft. bank. On June 15 Y. stopped payment of the cheque. On Oct. 30 following, R., a clerk in deft. bank, by misrepresentations, got possession of the cheque, & without authority of deft. bank marked it accepted with the acceptance stamp of deft. bank, & on same day got pltfs. to cash the cheque. On the following day he ceased to be an employee of deft. bank:—*Held:* pltfs. could not succeed.—NORTHERN *v.* YUEN (1909), 11 W. L. R. 698.—**CAN.**

f. *Interest after certification.*]—Two cheques were presented on Aug. 7 & 8 & certified good by the bank, but not paid until Oct. 8 following. Pltf. contended that he was entitled to interest until payment:—*Held:* pltf. had no right to interest after certification of the cheque.—WILSON *v.* BANQUE VILLE MARIE (1880), 3 L. N. 71.—**CAN.**

g. *Holders of certified cheques — Right to interest.*]—Holders of cheques drawn on the bank by customers, accepted or certified by the ledger keepers in the ordinary way & charged to the customers' accounts, will not be entitled to interest, unless they have served the demand & notice under 3 & 4 Will. 4, as in the case of other ordinary creditors.—*Re* COMMERCIAL BANK OF MANITOBA, *Re* CLAIMS FOR INTEREST ON DEBTS PROVED (1894), 10 Man. L. R. 187.—**CAN.**

Sect. 9. Payment of other documents: Sub-sect. 1.]

Gammon *v.* Schmoll (1814), 5 Taunt. 344; Garnett *v.* Woodcock (1816), 1 Stark. 475; Rowe *v.* Young (1820), 2 Bli. 391, H. L.; Triggs *v.* Newnham (1825), 10 Moore, C. P. 249.

593. ——.]—A presentment of a bill of exchange at a banker's after banking hours, when the house is shut, is not a sufficient presentment to charge the drawer; & no inference is to be drawn, from the circumstance of the bill being presented by a notary, that it had been before duly presented within banking hours.—ELFORD *v.* TEED (1813), 1 M. & S. 28; 105 E. R. 11.

Annotations:—**Refd.** Rowe *v.* Young (1820), 2 Bli. 391, H. L.; Triggs *v.* Newnham (1825), 10 Moore, C. P. 249.

594. —— Person appointed by bank to answer.]—A bill payable at a banker's was presented between seven & eight in the evening, after banking hours, but a person appointed by the banker for that purpose returned for answer "No orders":—*Held:* a sufficient presentment.—GARNETT *v.* WOODCOCK (1817), 6 M. & S. 44; 1 Stark. 475; 105 E. R. 1159.

Annotations:—**Consd.** Whitaker *v.* Bank of England (1835), 1 Cr. M. & R. 744. **Refd.** Crook *v.* Jadis (1833), 6 C. & P. 191.

595. —— Continuing presentment—Dishonour.]—Pltf. sued defts. for wrongfully dishonouring his bill accepted payable at the Bank of England, it being the course of dealing for the Bank to honour such bills out of pltf.'s assets. The bill was presented at nine-fifteen a.m. & handed back dishonoured at eleven a.m., at which hour defts. had not sufficient assets of pltf. to take up the bill. Another presentment was made in the afternoon, by a notary, but after banking hours. A clerk of defts. then answered that there were not sufficient assets, although they had then in fact received sufficient moneys of pltf. to pay the bill:—*Held:* (1) the bill was to be considered as continuing in course of presentment until eleven a.m., & if defts. had had funds available before that hour, they would have been liable for its dishonour; (2) defts. were not bound to pay the bill after banking hours. *Semble:* it was the duty of defts. to have informed the notary that they had received assets, & that the bill would be paid the following day.—WHITAKER *v.* BANK OF ENGLAND (1835), 1 Cr. M. & R. 744; 1 Gale, 54; 5 Tyr. 268; 4 L. J. Ex. 57; 149 E. R. 1280.

Annotation:—**Refd.** Robarts *v.* Tucker (1851), 16 Q. B. 560, Ex. Ch.

596. Presentment to banker's clerks at clearing-house.]—If a bill of exchange is accepted payable at A. B. & Co.'s who are bankers in the City of London, a presentment of the bill for payment to their clerks at the clearing house is sufficient.—REYNOLDS *v.* CHETTLE (1811), 2 Camp. 596, N. P.

Annotation:—**Mentd.** Mills *v.* Barber (1836), 1 M. & W. 425.

597. *S. P.* HARRIS *v.* PACKER (1833), 3 Tyr. 370, n.

598. Presentment at acceptor's private residence—Subsequent presentment at bank after due date—Refusal of payment.]—A bill drawn by G. on H. was addressed to him at his private residence. H. accepted the bill payable at the C. Bank. Deft. indorsed the bill, & pltf. discounted it. Pltf. did not present the bill to the bankers within business hours on the day when it became due, but presented it at the private residence of the acceptor as given on the face of the bill, but the house was shut up. On the day after the bill became due pltf. presented it at the bankers', but it was refused payment on the ground that the acceptor had no effects there, & for this reason the bill would not have been paid if it had been presented on the due date:—*Held:* the bill had not been duly presented for payment as against an indorser.—SAUL *v.* JONES (1858), 1 E. & E. 59; 28 L. J. Q. B. 37; 32 L. T. O. S. 90; 5 Jur. N. S. 220; 7 W. R. 47; 120 E. R. 829.

Annotation:—**Refd.** Wirth *v.* Austin (1875), L. R. 10 C. P. 689.

599. Presentment at banker's sufficient.]—In order to charge the drawer, the holder of a bill accepted & made payable at a banker's is only bound to present it there; he need not seek the acceptor elsewhere.—DE BERGARECHE *v.* PILLIN (1826), 3 Bing. 476; 11 Moore, C. P. 350; 4 L. J. O. S. C. P. 146; 130 E. R. 597.

600. ——.]—Deft. accepted a bill payable at the banking house of W. D. & Co. It was presented there & dishonoured:—*Held:* although since 1 & 2 Geo. 4, c. 78, such acceptance was general, it might be declared upon as payable at the bank & presented there for payment.—BLAKE *v.* BEAUMONT (1842), 1 Dowl. N. S. 697; 4 Man. & G. 7; 4 Scott, N. R. 617; 11 L. J. C. P. 222; 134 E. R. 3.

601. No assets of acceptor at bank—Whether presentment to acceptor necessary.]—A bill of exchange drawn by W. upon J. was accepted by the latter, payable at pltfs.' bank. The bill was subsequently indorsed by W. to pltfs., & on the day when it became due there were no assets of J.'s in the bank. Pltfs. brought an action as indorsees of the bill against the indorser:—*Held:* it was not necessary to show a presentment of the bill to the acceptor.—BAILEY *v.* PORTER (1845), 14 M. & W. 44; 14 L. J. Ex. 244; 153 E. R. 382.

Annotations:—**Mentd.** Allen *v.* Edmundson (1848), 2 Exch. 719; Armstrong *v.* Christiani (1848), 5 C. B. 687; Everard *v.* Watson (1853), 22 L. J. Q. B. 222; Paul *v.* Joel (1859), 4 H. & N. 355, Ex. Ch.; Maxwell *v.* Brain (1864), 10 L. T. 301; Bain *v.* Gregory (1866), 14 W. R. 845.

602. Acceptance general—Action by indorsee against acceptor—Whether presentment at bank necessary.]—A declaration by the indorsee against the acceptor of a bill alleged that he accepted it "payable at C. & Co's., bankers," but did not aver any presentment there:—*Held:* since 1 & 2 Geo. 4, c. 78, the words did not, according to their legal effect, imply that the bill was payable at the bankers' only, & the acceptance was general, & it was unnecessary to allege presentment at the house of those bankers.—HALSTEAD *v.* SKELTON (1843), 5 Q. B. 86; 1 Dav. & Mer. 664; 13 L. J. Ex. 177; 2 L. T. O. S. 228; 7 Jur. 680; 114 E. R. 1180, Ex. Ch.

603. Acceptance qualified—Presentment according to qualification—Duties of holder.]—A bill was accepted "payable at Sir John P. & Co.'s, bankers, London":—*Held:* the acceptance was qualified, & the holder was bound to allege & prove presentment at the banking house of Sir John P. & Co. in order to charge the acceptor.—ROWE *v.* YOUNG (1820), 2 Bli. 391; 2 Brod. & Bing. 165; 4 E. R. 372, H. L.

Annotations:—**Distd.** Rhodes *v.* Gent (1821), 5 B. & Ald. 244. **Refd.** Cowie *v.* Halsall (1821), 4 B. & Ald. 197; Treacher *v.* Hinton (1821), 4 B. & Ald. 413; Gibb *v.* Mather (1832), 8 Bing. 214; Skelton *v.* Halstead (1842), 11 L. J. Q. B. 331; Saul *v.* Jones (1858), 1 E. & E. 59; Smith *v.* Vertue (1860), 9 C. B. N. S. 214. **Mentd.** Smith *v.* Jersey (1821), 3 Bli. 290, H. L.; *Re* Dilworth, *Ex p.* Lancaster Canal Co. (1831), Mont. 27; *Re* Mayor, *Ex p.* Whitworth (1841), 2 Mont. D. & De G. 158; Haldane *v.* Johnson (1853), 8 Exch. 689.

See, now, Bills of Exchange Act, 1882 (c. 61), s. 19 (2), re-enacting 1 & 2 Geo. 4, c. 78.

604. Presentment after due date—Indorsees entitled to payment.]—Defts. accepted a bill of exchange "payable on giving up bill of lading for seventy-six bags of clover per *Amazon* at the L. & W. Bank." The bill became due on Mar. 14, but was not presented for payment. No inquiry was made by defts. until Mar. 15, when one of defts. called on pltfs., who were indorsees of the bill, & asked why it had not been presented. The bill being then presented to him with the bill of lading annexed, he re-

fused payment, saying he had entered into a contract to ship the seed to Scotland on that day, & it was then too late. The bill, with the bill of lading annexed, was presented on the same day at the L. & W. Bank & refused payment :—*Held :* pltfs. were entitled to payment on tender of the bill of lading & were not bound to present the bill on the precise date on which it became due.—SMITH *v.* VERTUE (1860), 9 C. B. N. S. 214 ; 30 L. J. C. P. 56 ; 3 L. T. 583 ; 7 Jur. N. S. 395 ; 9 W. R. 146 ; 142 E. R. 84.

Annotations :—**Refd.** Ebsworth *v.* Alliance Marine Insce. (1873), L. R. 8 C. P. 596 ; Decroix *v.* Meyer (1890), 25 Q. B. D. 343, C. A.

605. Delay in presentment—Failure of bank—Discharge of acceptor.]—Deft. accepted a bill thus :—"Messrs. C. & M., pay this bill when due for T. C." The bill fell due Jan. 2, 1741, & C. & M., bankers, paid until Jan. 19, when they failed. On Jan. 21 the money was demanded of deft. :—*Held :* the acceptor was discharged.—BISHOP *v.* CHITTY (1743), 2 Stra. 1195 ; 93 E. R. 1123.

Annotations :—**Expld.** Fenton *v.* Goundry (1811), 13 East, 459. **Consd.** Rowe *v.* Young (1820), 2 Bli. 391, H. L. **Refd.** Sebag *v.* Abitbol (1816), 4 M. & S. 462.

606. —— Liability of acceptor.]—Deft. accepted a bill as follows : "Accepted, payable when due at Messrs. P. & H.'s, bankers, London." It was not presented there for payment when due, nor until some days after. No inconvenience resulted to the acceptor from the delay to present the bill :—*Held :* the acceptor remained liable.—RHODES *v.* GENT (1821), 5 B. & Ald. 244 ; 106 E. R. 1182.

607. No presentment—Failure of bank—Liability of acceptor.]—The holder of bills of exchange, accepted payable at a banker's, neglected to present them there when due, & the banker, in whose hands the acceptor had funds, afterwards failed :—*Held :* the acceptor was still liable, the acceptance being in law a general acceptance.—TURNER *v.* HAYDEN (1825), 4 B. & C. 1 ; 6 Dow. & Ry. K. B. 5 ; 107 E. R. 959.

608. —— Bill alleged to be lost—Afterwards found—Liability of acceptor.]—A. drew a bill accepted by B. payable at his bankers'. W. & Co.. & becoming due in Feb., 1813. The bill was never presented for payment, nor was payment demanded of B., but in answer to a letter written by B. in May or June, 1814, requesting the return of the bill, A. informed B. that it had been mislaid. The bill was afterwards found. In Nov., 1814, W. & Co. became bkpt., & B. had at the time the bill became due & up to the time of the bkpcy. a balance in their hands more than sufficient to pay the bill :—*Held :* the acceptor was not discharged.—SEBAG *v.* ABITBOL (1816), 4 M. & S. 462 ; 105 E. R. 905.

Annotations :—**Consd.** Rowe *v.* Young (1820), 2 Bli. 391, H. L. **Foild.** Turner *v.* Hayden (1825), 6 Man. & Ry. K. B. 5.

609. Cancellation of acceptor's signature — "By mistake"—Liability of indorsee.]—Deft. indorsed to pltf. bills which had been drawn & indorsed to deft. by parties in France, but accepted in England payable at a banker's. On presentment for payment the banker's clerk inadvertently cancelled the acceptances, but immediately wrote opposite to them "Cancelled by mistake," & the bills were returned unpaid, the acceptor having no assets. The referee in case of need refused to pay in consequence of the cancelling. Pltf. returned the bills protested to deft., whom prior indorsers refused to pay. Deft. cited pltf., drawer & indorsers before the French Ct., which adjudged him discharged from liability, on the ground that the cancelling of the acceptance operated as a suspension of legal remedies against the acceptor :—*Held :* the French Cts. had mistaken the English law, & deft. was still liable for the debt in respect of which the bills had been given.—NOVELLI *v.* ROSSI (1831), 2 B. & Ad. 757 ; 9 L. J. O. S. K. B. 307 ; 109 E. R. 1326.

Annotations :—**Apld.** Reimers *v.* Druce (1857), 23 Beav. 145. **Expld. & Distd.** Castrique *v.* Imrie (1870), L. R. 4 H. L. 414, H. L. **Refd.** Warwick *v.* Rogers (1843), 5 Man. & G. 340 ; Baines *v.* Woodfall (1859), 6 Jur. N. S. 19 ; Simpson *v.* Fogo (1863), 1 Hem. & M. 195. **Mentd.** Godard *v.* Gray (1870), L. R. 6 Q. B. 139.

610. —— —— "Orders not to pay"—Insolvency of acceptor—Liability of bank.]—A. was the holder of a foreign bill drawn upon B. in England, & accepted by B. payable at the banking house of C. On the morning when the bill became due D., as A.'s banker, delivered the bill to C. C. (acting throughout according to the practice of London bankers) intending to pay the bill, & having funds of B.'s in his hands at the time, cancelled the acceptance by drawing lines across B.'s name, without rendering the acceptance illegible. In the course of the day B., finding himself to be insolvent, ordered C. not to pay the bill, & C. wrote thereon "Cancelled by mistake—orders not to pay," & the bill was returned in this state to D. at the clearing-house before the settling hour :—*Held :* (1) in these circumstances C. was not liable ; (2) the duty cast upon C. was no more than to take due care of the bill, &, if he did not choose to pay it, to return it uncancelled unless it had been cancelled by mistake, & in that case to indicate same by writing on the bill ; (3) C. did use due care to prevent the acceptance from being defaced. *Semble :* a banker who omits to return, or defaces, a bill is not in all cases under an obligation to pay the amount ; but if he do so wrongfully he becomes liable to an action on the case, if the holder has sustained damage by his breach of duty.—WARWICK *v.* ROGERS (1843), 5 Man. & G. 340 ; 6 Scott, N. R. 1 ; 12 L. J. C. P. 113 ; 134 E. R. 595.

Annotations :—**Apprvd.** Prince *v.* Oriental Bank Corpn. (1878), 3 App. Cas. 325, P. C. **Mentd.** Pollard *v.* Bank of England (1871), L. R. 6 Q. B. 623.

611. Action by bank against acceptor—Proof of genuineness of payee's indorsement.]—In an action by bankers to recover the amount of a bill of exchange accepted by deft. payable at their house, & paid by them after it was indorsed, they are bound to prove the indorsement by the payee.—FORSTER *v.* CLEMENTS (1809), 2 Camp. 17, N. P.

Annotation :—**Refd.** Tucker *v.* Roberts (1849), 18 L. J. Q. B. 169.

612. Payment by bank though funds insufficient—Applying assets in part payment.]—Defts., bankers, holding in their hands £21 4*s.* on account of pltf., paid a bill of exchange, accepted by pltf., payable at their banking house, for £42 when it became due & was presented to them by the holder. No orders to pay the acceptance had been given by pltf., nor had he countermanded the authority contained in the acceptance. Subsequently defts. honoured a cheque for £13 13*s.*, but refused to pay another cheque for £7 11*s.* for the residue of the money applied in payment of the bill. Pltf. sued for damages for the dishonour of his cheque :—*Held :* defts. had authority to apply the funds of pltf. in their hands in payment of the acceptance. *Qu. :* whether defts. could recover from pltf. the difference between the amount of the bill & the moneys in their hands.—KYMER *v.* LAURIE (1849), 18 L. J. Q. B. 218 ; *sub nom.* KEYMER *v.* LAURIE, 13 Jur. 426.

613. —— —— Insolvency of customer.]—H. accepted a bill payable at his bankers' to a larger amount than the effects in their hands. The bill was paid. Afterwards, having committed an act of bkpcy., of which the bankers had no notice, H. paid the bankers £250 for the purpose of reimbursing them. H. became bkpt., & his assignees sued to recover the £250 :—*Held :* the bankers

Sect. 9.—Payment of other documents: Sub-sects. 1 & 2.]

were not protected by 19 Geo. 2, c. 52, s. 1. *Semble:* they were merely creditors for money lent or for money paid at the request of H.—HOLROYD *v.* WHITEHEAD (1814), 5 Taunt. 444; 1 Marsh. 128; 128 E. R. 762.

Annotations:—**Mentd.** Lazarus *v.* Cowie (1842), 3 Q. B. 459; Jewell *v.* Parr (1853), 13 C. B. 909.

614. Inquiries as to genuineness of indorsements—Whether bank entitled to reasonable time.]—*Semble:* bankers have a right to take a reasonable time to make inquiries as to the genuineness of indorsements on bills accepted payable at their house.—ROBARTS *v.* TUCKER (1851), 16 Q. B. 560; 20 L. J. Q. B. 270; 15 Jur. 987; 117 E. R. 994, Ex. Ch.

Annotations:—**Dbtd.** Bank of England *v.* Vagliano, [1891] A. C. 107, H. L. **Mentd.** *Re* North British Australasian Co. & Joint Stock Companies Acts, 1857, *Ex p.* Swan (1859), 7 C. B. N. S. 400; Woods *v.* Thiedemann (1862), 1 H. & C. 478; Halifax Grdns. *v.* Wheelwright (1875), L. R. 10 Exch. 183; Arnold *v.* Cheque Bank, Arnold *v.* City Bank (1876), 1 C. P. D. 578; Scholfield *v.* Londesborough, [1896] A. C. 514, H. L.; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L.

615. —— ——.]—*Semble:* bankers, who undertake the duty of paying their customers' acceptances, cannot do otherwise than pay off hand, & as a matter of course, bills presented for payment which are duly accepted & regular & complete upon the face of them. They cannot defer payment until satisfied by inquiry & investigation that all the indorsements on the bill are genuine.—BANK OF ENGLAND *v.* VAGLIANO BROTHERS, [1891] A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 7 T. L. R. 333; *sub nom.* VAGLIANO *v.* BANK OF ENGLAND, 55 J. P. 676, H. L.

Annotations:—**Mentd.** Robinson *v.* Canadian Pacific Ry. Co., [1892] A. C. 481, P. C.; *Re* English Bank of the River Plate, *Ex p.* Bank of Brazil, [1893] 2 Ch. 438; *Re* Budgett, Cooper *v.* Adams, [1894] 2 Ch. 557; Scholfield *v.* Londesborough, [1896] A. C. 514, H. L.; Clutton *v.* Attenborough, [1897] A. C. 90, H. L.; River Thames Conservators *v.* Smeed, Dean, [1897] 2 Q. B. 334, C. A.; Priest *v.* Last (1903), 89 L. T. 33, C. A.; Vinden *v.* Hughes, [1905] 1 K. B. 795; Lewes Sanitary Steam Laundry Co. *v.* Barclay & Co. (1906), 22 T. L. R. 737; Macbeth *v.* North & South Wales Bank, [1908] 1 K. B. 13, C. A.; North & South Wales Bank *v.* Macbeth, North & South Wales Bank *v.* Irvine, [1908] A. C. 137, H. L.; Holland *v.* Manchester & Liverpool District Banking Co. (1909), 14 Com. Cas. 241; Kepitigalla Rubber Estates *v.* National Bank of India, [1909] 2 K. B. 1010; Hall *v.* Hayman, [1912] 2 K. B. 5; Wimble *v.* Rosenberg, [1913] 3 K. B. 743, C. A.; Maclaren *v.* A.-G. for the Province of Quebec, [1914] A. C. 258, P. C.; Sanday *v.* British & Foreign Marine Insce., [1915] 2 K. B. 781, C. A.; MacConnell *v.* Prill, [1916] 2 Ch. 57; R. *v.* Kennaway (1916), 86 L. J. K. B. 300, C. C. A.; MacMillan *v.* London Joint Stock Bank, [1917] 2 K. B. 439, C. A.; London Joint Stock Bank *v.* MacMillan & Arthur, [1918] A. C. 777, H. L.

616. Dishonour by bank—No notice of dishonour to acceptor—Liability of acceptor.]—Deft. at Plymouth accepted a bill payable at a bank in London. The bill was presented at the bank & dishonoured, but no notice of dishonour was given to the acceptor:—*Held:* the acceptor was liable.—TREACHER *v.* HINTON (1821), 4 B. & Ald. 413; 106 E. R. 988.

Annotation:—**Mentd.** Edwards *v.* Dick (1821), 4 B. & Ald. 212.

617. —— **Measure of damages.**]—Substantial damages may be recovered against a banker for dishonouring an acceptance of a customer, there being sufficient assets in his hands at the time to meet it.—ROLIN *v.* STEWARD (1854), 14 C. B. 595; 23 L. J. C. P. 148; 18 Jur. 536; 2 C. L. R. 959; 139 E. R. 245; *sub nom.* ROLLIN *v.* STEWARD, 23 L. T. O. S. 114; 2 W. R. 467.

Annotations:—**Consd.** Prehn *v.* Royal Bank of Liverpool (1870), L. R. 5 Exch. 92; *Re* General South American Co. (1877), 47 L. J. Ch. 67. **Refd.** Larios *v.* Bonany y Gurety (1873), L. R. 5 P. C. 346, P. C.; Wallis Chlorine Syndicate *v.* American Alkali Co. (1901), 17 T. L. R. 656. **Mentd.** Barnett *v.* Hart (1903), 48 Sol. Jo. 14, C. A.

618. Payable generally at bank—Dishonoured at head office—Paid by branch—Rights of bank.]—H., having an account at the head office of a bank, accepted a bill payable generally at that bank. H. subsequently, & before the bill became due, opened an account at a branch bank belonging to the same co., but gave no notice to the bank to dishonour the bill. The bill, on becoming due, was presented at the head office, & was refused payment for want of funds. The holder then presented it at the office of the branch, where it was paid:—*Held:* the co. were authorised in paying the bill at the branch office, though bills made payable at the branch bank by H. were always specially accepted payable at the branch office.—HUNT *v.* CHAPMAN (1852), 20 L. T. O. S. 181.

Branch banks, generally, *see* Sect. 1, sub-sect. 3, *ante.*

619. Death of customer—Notice.]—A.'s bankers, for nine or ten years previous to his death, had been in the habit of accommodating him with a loan of £1,000 upon the security of his promissory note, which was renewed every three months, the bankers upon those occasions discounting the note by placing the amount of it to the credit of A., as cash paid in by him, & debiting him on the other side with the discount. A. also, about two months before his death, accepted, payable at his bankers', a bill drawn by B. on A. for £467. This bill having been paid away by B., was discounted by the bankers for a holder who did not indorse it, & the bankers were the holders when the bill became due. On the morning the bill became due, before the arrival of the post, the bankers, who had then in their hands £142 of A.'s money, wrote off the bill to the debit of A.'s account; the same day's post informing them of A.'s death two days before, they called upon B. to pay, & B. paid them £40 on account of the bill, on a representation from them that £40 would be wanting to make A.'s account right. At this time the last promissory note for £1,000, given by A. to the bankers, had 53 days to run, but the bankers immediately entered that note, as well as the bill of exchange, to the debit of A.'s account, allowing on the other side a rebate of discount for the time the note had to run. The exors. of A., having, before the 53 days expired, sued the bankers for the balance in their hands at the time of A.'s death:—*Held:* the bankers might set off against the demand of the exors. the £467 written off on the bill of exchange, but not the £1,000 on the promissory note.—ROGERSON *v.* LADBROKE (1822), 1 Bing. 93; 7 Moore, C. P. 412; 130 E. R. 39; *sub nom.* ROBINSON *v.* LADBROKE, 1 L. J. O. S. C. P. 6.

620. Bill discounted with & indorsed by bank—Payment by bank to holder as indorsers—Acceptor's account overdrawn.]—In an action by the customer of a bank against the bankers, to try their right to debit him with a bill, it appeared that pltf. was drawer of the bill, which was accepted payable at the bank. Pltf. discounted the bill with the bank & indorsed it to them; they rediscounted the bill & indorsed it to the rediscounter. On the maturity of the bill, it was presented by the holder at the bank along with several other bills payable there, all of which bore the bank's indorsement. The bank paid the amount of the whole without any indication of whether they paid as indorsers or as agents for the acceptor. The account of the acceptor of the bill was at this time overdrawn; he stopped payment on that day; &, on the next, notice of dishonour was given by the bank to pltf., & he was debited with the amount. It was left to the jury to say whether

the bank paid the bill on their own account as indorsers, or as agents of the acceptor. The jury found that they paid as indorsers, & the bank had a verdict:—*Held:* (1) the question was properly left, it being a question of fact whether they intended to do so; (2) the bank had a right to pay the bill as indorsers, reserving to themselves time to inquire whether they would honour the bill or not; (3) there was no obligation on them to inform the holder in what capacity they paid.—POLLARD *v.* OGDEN (1853), 2 E. & B. 459; 22 L. J. Q. B. 439; 21 L. T. O. S. 152; 18 Jur. 39; 1 W. R. 387; 118 E. R. 839.

621. Payment of bill—Subsequent discovery of insolvency of acceptor—Payment not provisional.]—The branch bank of defts. at N. discounted a bill of exchange drawn by pltfs., customers of the branch bank, upon H. & Co. & accepted by them, payable at the bank of L. & Co., also bankers at N. According to the practice prevailing among bankers at N., the branch bank, on the morning when the bill became due, took it to L. & Co., who marked it for payment, & gave a credit note, indicating that it, with other moneys, was in order for payment & would be paid. About two p.m. on the same day a clerk of the branch bank, in accordance with the practice, took all the cheques which had been received, drawn on L. & Co., together with the credit note, to the bank of L. & Co. The credit note was admitted into the total amount, & a cheque upon the branch bank was, in accordance with the practice, handed by L. & Co. to the clerk, for the amount of the balance due to defts. At three p.m. the banks at N. closed to the public, but it was the practice for the bankers who kept accounts with the branch bank to attend at such bank, before it finally closed for the day at four p.m., for the purpose of having the day's accounts investigated, & of rectifying any mistakes or errors which might have arisen in the course of the day, & finding & striking the final balances between them. When the bank of L. & Co. closed at three o'clock it was ascertained that H. & Co. had stopped payment, & that their balance was not sufficient to meet the bill. Notice was at once & before four p.m. given to the branch bank that the bill had been paid in error, & they were requested to take it back. Before such notice was received, the account of L. & Co. had been debited with the amount in the accounts of the branch bank:—*Held:* it not being shown that the giving the cheque was provisional only, & subject to rectification upon going over the accounts later in the day, such giving the cheque by L. & Co. amounted to payment of the bill to defts., & pltfs. were entitled to have credit with them for the amount of the bill.—POLLARD *v.* BANK OF ENGLAND (1871), L. R. 6 Q. B. 623; 40 L. J. Q. B. 233; 25 L. T. 415; 19 W. R. 1168.

Annotations:—**Consd.** Deutsche Bank *v.* Beriro (1895), 73 L. T. 669, C. A. **Mentd.** Kitts *v.* Atlantic Transport Co. (1902), 18 T. L. R. 739; Taylor *v.* Met. Ry. Co., [1906] 2 K. B. 55.

SUB-SECT. 2.—PROMISSORY NOTES, ETC.

622. Note indorsed to banker for value — Dishonour for want of assets—Claim by bank against indorsee—Whether presentment to maker necessary.]—A. made a promissory note payable to B. or order, with a memorandum that he would pay it at the house of pltfs., his bankers. The note was indorsed to pltfs. for value, who, finding that they had no assets of A. in their hands, treated the note as dishonoured & sued the indorser:—*Held:* it was not necessary to prove an actual demand on A.—SAUNDERSON *v.* JUDGE (1795), 2 Hy. Bl. 509; 126 E. R. 675.

Annotations:—**Distd.** Callaghan *v.* Aylett (1810), 2 Camp. 549, N. P.; Fenton *v.* Goundry (1811), 13 East, 459. **Consd.** Rowe *v.* Young (1820), 2 Bli. 391, H. L. **Apprvd.** Bailey *v.* Porter (1845), 14 M. & W. 44. **Refd.** Parker *v.* Gordon (1806), 7 East, 385.

623. Note payable at town — Presentment to bankers.]—Deft. made a promissory note payable at G. It was presented at two banking houses at G., but there was no evidence to connect the maker with either bank:—*Held:* a sufficient presentment to deft.—HARDY *v.* WOODROOFE (1818), 2 Stark. 31.

Annotation:—**Refd.** Hine *v.* Allely (1833), 4 B. & Ad. 624.

624. Note payable at particular bank—Presentment at maker's residence—Whether presentment at bank necessary.]—The maker of a promissory note wrote & signed the words "payable at the L. & P. Bank" across the face of it. The maker also signed the note in the usual place. The note was not presented at the bank for payment, but at the maker's house:—*Held:* the note was not made payable at a particular place in the body of it within Bills of Exchange Act, 1882 (c. 61), s. 87 (1), & presentment at the bank was unnecessary to charge an indorser.—STEVENSON *v.* BROWN (1902), 18 T. L. R. 268.

PART II. SECT. 9, SUB-SECT. 2.

624 i. *Note payable at bank—Maker & payee customers of same bank—Bank crediting payee & debiting maker—Payment irrevocable.*]—Defts. were the bankers of both pltf. & E. E. having given a note payable to pltf. at defts.' bank, pltf., about two weeks before its maturity, left it with defts. for collection, & to be protested if not paid. On the day of its maturity, the ledger keeper debited E.'s account & credited pltf.'s with the amount of the note, & on pltf. calling at the bank next morning, he received his pass-book with an entry crediting him with the amount of the note. Subsequently the manager refused to pay pltf. the amount of it. E. stated that he always gave authority to pay each particular note, which he had not done in the present case; & the manager stated that without such authority it was not the custom of the bank to pay any note:—*Held:* pltf. was entitled to recover the amount of the note from the bank, as the act of the ledger keeper in charging the note to E.'s account & crediting it to pltf. in his account & pass-book amounted to a payment of the note, & was irrevocable.—NIGHTINGALE *v.* CITY BANK OF MONTREAL (1876), 26 C. P. 74.—**CAN.**

h. *Note credited as cash in bank books—Imputation of payment.*]—*Held:* (1) resp. did not, by the mere act of crediting as cash in its books the amount of applt.'s promissory note, when such note was received, subject itself to have such credit entry imputed as a payment, seeing applts.' default to pay their note at maturity, the entry of such credit & re-charge at maturity being a mere book-keeping operation; (2) in view of the legal imputation which had to be made of the sum paid in discharge of the customer's note & of the other sums credited in the account, the debt sued for must be held to have been paid.—CRAIK *v.* MACFARLANE & CO. (1911), 18 R. de J. 88.—**CAN.**

k. *Dishonour of note — Practice to treat uncleared cheques as cash—Entries in pass-book.*]—In an action to recover damages for the dishonour of a promissory note, it was proved that on the day on which the note was dishonoured pltf. had paid in to his credit a cheque drawn on a country bank, at the same time paying the charge for exchange, that he afterwards asked the teller of the bank the amount standing to his credit, & that a credit-slip was then handed to him showing a credit balance sufficient to cover the promissory note, & including the amount of the cheque. The usual course of dealing with country cheques paid in by customers was either to treat them as bills for collection, & to credit the customer with the amount only when the bank was advised that they had been paid on presentation, or to treat them as cash when paid in, & to credit the customer's account with the amount; in the latter case the charge for exchange was always paid by the customer when paying in. The cheques paid in by pltf. had on all previous occasions been treated as cash by defts., & the entries in pltf.'s pass-book showed that the cheque in question had been so treated. The pass-book contained a printed notice as follows: "Cheques upon other banks paid in by customers to their credit will not be treated as cash, nor will they be treated as credit until they are cleared":—*Held:* there was sufficient evidence to justify the jury in finding that the bank had treated the cheque as cash, & the transaction was in effect in the nature of a discount of the cheque.—BURKE *v.* COLONIAL BANK, O. B. & F. 146.—**N.Z.**

l. —— *Presentment at wrong bank—Alteration by maker.*]—Pltf gave a promissory note to B., making it payable at deft. bank, where he had an account. He subsequently altered the note by writing the word "Royal"

Sect. 9.—Payment of other documents: Sub-sect. 2. Sect. 10.]

625. Cancelling maker's signature—Note returned dishonoured—"Cancelled in error."]—The mere fact of cancelling the signature of the makers of a dishonoured promissory note & writing "paid" on the note, corrected before the note is sent back to pltfs. by a memorandum thereon "cancelled in error," cannot be effectual to charge a bank with the receipt of the money.

A promissory note was returned dishonoured to pltfs., the amount thereof having been transmitted by transfer drafts & entries in the bank's books, from the branch where same was made payable to the branch where pltfs. paid same in, such transfer & entries not being communicated to pltfs.:—*Held:* the bank could not be charged with the receipt of the money.—PRINCE *v.* ORIENTAL BANK CORPN. (1878), 3 App. Cas. 325; 47 L. J. P. C. 42; 38 L. T. 41; 26 W. R. 543, P. C.

Annotations:—**Distd.** Bank of Africa *v.* Colonial Government (1888), 13 App. Cas. 215, P. C. **Refd.** Fielding *v.* Corry, [1898] 1 Q. B. 268, C. A.; Sinclair *v.* Brougham, [1914] A. C. 398, H. L. **Mend.** R. *v.* Lovitt, [1912] A. C. 212, P. C.

626. Order to bank for payment to third party—Countermand before appropriation—Payment after countermand.]—Pltf. directed defts., his bankers, to hold a sum of money from his private account at the disposal of S., & the bankers accepted the order; pltf. countermanded it before any actual appropriation or payment made:—*Held:* such order was revocable, & defts. having paid the money to S. after such countermand were liable to pltf. in an action for money had & received.—GIBSON *v.* MINET (1824), 2 Bing. 7; 9 Moore, C. P. 31; 2 L. J. O. S. C. P. 99; 130 E. R. 206.

Annotation:—**Refd.** Rodick *v.* Gandell (1852), 1 De G. M. & G. 763, L.C.

627. Post-dated unstamped drafts—Payable to bearer—Stamp Act, 1815 (c. 184), s. 13.]—M. & others bound themselves by bond, jointly & severally, to pay to the Bank of Scotland such sums as should be drawn out by M., or be due from him, on a cash credit opened by the bank, in his name, & the certificate of the bank accountant was to be held sufficient to ascertain the balance due, & to warrant execution of law for such balance, not exceeding £5,000, against the obligors. M. drew on the bank by orders, written on unstamped paper, payable to bearer, & though the drafts purported to be issued in the town where the bank was situated, they were in fact drawn & issued at a place more than ten miles distant, & were also post-dated, & the bank agent knew that they were wrongly dated in point of place & time. M., having become insolvent, was found to owe to the bank on the cash credit account upwards of £4,000, as certified by the bank accountant, & for that debt the bank put the bond in suit against his co-obligors:—*Held:* no obligation arose on the bond to pay any balance alleged to be due on drafts so drawn & issued, contrary to the above sect.—SWAN *v.* BLAIR (1835), 3 Cl. & Fin. 610; *sub nom.* SWAN *v.* BANK OF SCOTLAND, 10 Bli. N. S. 627; 2 Mont. & A. 656; 6 E. R. 1566, H. L.

SECT. 10.—FORGED OR ALTERED CHEQUES.

628. Precautions against forgery—Duties of customer.]—It is the duty of a customer of a bank in issuing mandates to the bank to take reasonable care so as not to mislead the bank; but, beyond the care which must be taken in or immediately connected with the transaction itself, there is no duty on the part of the customer to take precautions in the general course of carrying on his business to prevent forgeries on the part of his servants.—KEPITIGALLA RUBBER ESTATES, LTD. *v.* NATIONAL BANK OF INDIA, LTD., [1909] 2 K. B. 1010; 78 L. J. K. B. 964; 100 L. T. 516; 25 T. L. R. 402; 53 Sol. Jo. 377; 14 Com. Cas. 116; 16 Mans. 234.

Annotations:—**Consd.** Walker *v.* Manchester & Liverpool District Banking Co. (1913), 108 L. T. 728. **Refd.** MacMillan *v.* London Joint Stock Bank, [1917] 1 K. B. 363; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L. **Mentd.** Morison *v.* London County & Westminster Bank (1913), 18 Com. Cas. 137.

629. —— ——.]—A customer of a bank owes a duty to the bank in drawing a cheque to take reasonable & ordinary precautions against forgery, & if as the natural & direct result of the neglect of those precautions, the amount of the cheque is increased by forgery, the customer must bear the loss as between himself & the banker.—LONDON JOINT STOCK BANK *v.* MACMILLAN & ARTHUR, [1918] A. C. 777; 119 L. T. 387; 34 T. L. R. 509; 62 Sol. Jo. 650, H. L.

630. Wha amounts to forgery—Erasure of crossing.]—The crossing, though made by the drawer himself, forms no part of the cheque itself, & its erasure does not amount to a forgery.—SIMMONS *v.* TAYLOR (1858), 4 C. B. N. S. 463; 27 L. J. C. P. 248; 4 Jur. N. S. 412; 6 W. R. 548; 140 E. R. 1165, Ex. Ch.

Annotations:—**Expld.** Suffell *v.* Bank of England (1882), 9 Q. B. D. 555, C. A. **Refd.** Smith *v.* Union Bank of London (1875), 1 Q. B. D. 31, C. A.

631. —— Signature "per pro."—Signature outside & in fraud of authority.]—A cheque signed "*per pro.*" by a person having authority so to sign cheques for specified purposes is not a forgery within Forgery Act, 1861 (c. 98), s. 24, because it is drawn for purposes outside & in fraud of the authority.—MORISON *v.* LONDON COUNTY & WESTMINSTER BANK, LTD., [1914] 3 K. B. 356; 83 L. J. K. B. 1202; 111 L. T. 114; 30 T. L. R. 481; 58 Sol. Jo. 453; 19 Com. Cas. 273, C. A.

Annotations:—**Mentd.** Crumplin *v.* London Joint Stock Bank (1913), 109 L. T. 856; John *v.* Dodwell, [1918] A. C. 563, P. C.

632. Payment on forged cheques—Loss sustained by bank—Right to rank as creditors.]—A. forged the name of S. to a cheque for £550, & obtained the money from the bankers. He was subsequently apprehended for another felony, & indictments for

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before the words "Bank of A.," thus making it payable at the Royal Bank of A. The alteration was not noticed by the person into whose hands it came, & the note was presented at deft. bank. Deft. bank did not notice the alteration, & as pltf.'s account was much less than the amount of the note, the words "N. P. F." were written on the back of the note. Pltf. sued defts. for libel:—*Held:* the statement was made *bonâ fide* & in the ordinary course of business & was privileged.—HUSSEY *v.* BANK OF AUSTRALASIA (1889), 15 V. L. R. 9.—**AUS.**

m. *Payment on draft—Assignment & notices thereof.*]—S. was entitled to a legacy under the will of a person deceased, who at the time of his death was domiciled in India. In consideration of certain advances he assigned the legacy to W. & appointed W. his attorney to indorse any bank draft which might be forwarded in payment of the legacy. Notice of the assignment was given to defts., but they declined to record or notice the intimation given by W. Defts. some time afterwards received notice from S. cautioning them against paying any draft which might come to their hands for his use to any person but himself. Defts. subsequently received from India a bank draft for S., but it was accompanied by instructions that it was to be paid over only upon his receipt, & on his signing certain vouchers & acknowledgments which were inclosed. Defts. agreed to honour the draft, & they placed the proceeds to the credit of S. upon his signing the vouchers & documents which had been forwarded from India. After the draft had been passed to the credit of S., & he had operated upon it, defts. received notice that W. had assigned his claims to pltf. Defts. had never recognised, nor had they at any time agreed to recognise, either W. or pltf. as the owner of the draft. Upon these facts in action for the wrongful conversion of the draft:—*Held:* defts. not liable.—COHEN *v.* BANK OF NEW ZEALAND, Mac. 620.—**N.Z.**

both felonies were preferred against him at the next assizes. To the first (not pltfs.') he pleaded "guilty," to pltfs.' indictment, "not guilty." He was sentenced on the first to four years' penal servitude. The second was not tried, but ordered to stand over, the ends of justice, in the words of the judge, having been satisfied. Previously to the sentence A. had executed an assignment of all his real & personal estate for the benefit of his creditors to S., whose name he had so forged. The bankers claimed to rank under this deed of assignment as creditors for the money of which they had been so defrauded :—*Held :* the money so obtained was a debt due to the bankers, who were entitled to come in under the deed of assignment & rank as creditors. —DUDLEY & WEST BROMWICH BANKING CO. *v.* SPITTLE (1860), 1 John. & H. 14 ; 2 L. T. 47 ; 8 W. R. 351 ; 70 E. R. 642.

Annotations :—**Mentd.** Chowne *v.* Baylis (1862), 31 Beav. 351 ; *Re* Shepherd, *Ex p.* Ball (1879), 10 Ch. D. 667, C. A.

633. —— Liability of bank.]—C. Co. received a loan proposal forwarded & recommended by H., their country agent, purporting to come from K., a farmer. H. forged all the usual documents & signatures, & filled up the forms, & requested the money to be sent by letter to him for K. C. Co. then paid the loan, being £437, into the B. Bank, for which they got an order or letter of credit, on the B. branch bank, "to honour the drafts of K.," & sent same to H. to hand to K. H. kept the order, & forged K.'s indorsement ; & being known as the co.'s agent, got the money on a representation that K. was a client who sent him for the money. H. then absconded :—*Held :* the bank were liable to repay the money to C. Co., though the fraud was that of H., their own agent, for it was the ordinary case of a banker paying on a forged cheque of a customer, the letter of credit being merely the machinery for the cheque.—BRITISH LINEN CO. *v.* CALEDONIAN INSURANCE CO. (1861), 4 Macq. 107 ; 4 L. T. 162 ; 7 Jur. N. S. 587 ; 9 W. R. 581, H. L.

Annotations :—**Refd.** Conflans Quarry Co. *v.* Parker (1867), L. R. 3 C. P. 1 ; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L.

634. —— —— Customer silent at bank's request.] —Certain entries were debited by a bank to their customer in respect of cheques forged by one of the bank's servants. The customer was first informed thereof by the accredited agent of the bank who requested his silence, & the customer in complying with that request acted honestly & with a view to what he believed to be the bank's interest :—*Held :* the silence of the customer was not a legal wrong to the bank, & he was not estopped from relying on the forgery.—OGILVIE *v.* WEST AUSTRALIAN MORTGAGE & AGENCY CORPN., LTD., [1896] A. C. 257 ; 65 L. J. P. C. 46 ; 74 L. T. 201 ; 12 T. L. R. 281, P. C.

635. —— —— Negligence of customer.]—The directors of a limited co. (three in number) appointed the son of the chairman as secretary of the co. Four years previously the son had, to his father's knowledge, committed a forgery, but since that time the son had apparently lived a blameless life. Neither of the other two directors knew of the forgery committed four years previously. The secretary had the custody of the co.'s cheque-book & bank passbook, & the directors, who reposed confidence in him, did not require the production of the cheque-book for inspection at their meetings. The secretary forged the signature of one of the directors on a number of cheques purporting to be drawn on behalf of the co., & obtained payment thereof from the co.'s bankers. In an action by the co. against the bank to recover the amounts paid on such forged cheques :—*Held :* there had been no such negligence on the part of the co. as to estop them from recovering.—LEWES SANITARY STEAM LAUNDRY CO., LTD. *v.* BARCLAY & CO., LTD. (1906), 95 L. T. 444 ; 22 T. L. R. 737 ; 11 Com. Cas. 255.

Annotations :—**Consd.** London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L. **Refd.** Kepiti

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PART II. SECT. 10.

633 i. *Payment on forged cheques—Liability of bank.*]—Payment on a forged cheque is not legal payment ; if the banker pays a forged cheque, the loss will be his own.—ORR & BARBER *v.* UNION BANK OF SCOTLAND (1854), 17 Dunl (Ct. of Sess.) 24.—**SCOT.**

633 ii. ——.]—Pltf.'s money was drawn out by means of forged cheques by some person or persons unknown, the signatures being so perfect that the difference could hardly be discovered :—*Held :* the bank must pay.—WENHAM *v.* BANQUE DU PEUPLE (1865), 1 L. C. L. J. 30.—**CAN.**

635 i. —— —— *Negligence of customer.*]—When a banker makes a payment on a forged cheque, he cannot make the customer liable, except on the ground of negligence imputable to the customer. — BHAGWAN DAS *v.* CREET (1904), I. L. R. 31 Calc. 249.—**IND.**

635 ii. —— —— ——.]—If a party having an account at a banker's is not in the habit of locking up his cheque-book, with the result that a person in his establishment abstracts from it a blank cheque, forges his name to it, & thereby obtains money from the banker, the omission to lock up the cheque-book cannot be relied upon as a defence to an action for recovery of the amount obtained by the forgery.—BANK OF IRELAND *v.* EVANS' CHARITIES TRUSTEES (1852), 3 I. C. L. R. 280, 316.—**IR.**

635 iii. —— —— *Negligence of customer's agent.*]—Pltfs.' valuator, H., filled in the blanks in an application for a loan on statements of S., who forged the names of J. B. & I. B. as appcts., & although H. had never seen the property or appcts., he certified a valuation to pltfs., who accepted the loan, & signed his name as a witness of the signatures of appcts. Cheques in payment thereof to the order of the supposed borrowers were obtained by S., who forged the names of the payees, indorsed his own name, & received payment of the cheques, which were drawn upon defts. through other banks, who presented them to defts. & received payment in good faith. The fraud was not discovered for some time, during which the cheques were returned to pltfs. at the end of the month as paid, & the usual acknowledgment of the correctness of the account was duly signed :—*Held :* pltfs. not estopped from recovering the amount paid on the forged indorsements from defts. by their agent's negligence, as it did not occur in the transaction itself, & was not the proximate cause of their loss.—AGRICULTURAL SAVINGS & LOAN ASSOCN. *v.* FEDERAL BANK (1881), 6 A. R. 192.—**CAN.**

635 iv. —— —— *Acknowledgment of correctness of accounts—Estoppel.*]—A clerk in a Govt. department, whose duty was to examine & check its accounts with the M. Bank, forged departmental cheques & deposited them to his credit in other banks. The forgeries were not discovered until some months after the cheques had been paid by the drawee to the several other banks, on presentation, & charged against the Receiver-General. None of the cheques were marked with the drawee's acceptance before payment. In the meantime the accountant of the department, being deceived by false returns of checking by the clerk, acknowledged the correctness of the statements of the account as furnished by the bank where it was kept. In an action by the Crown to recover the amount so paid upon the forged cheques & charged against the Receiver-General :—*Held :* the bank was liable, & the Crown was not estopped from setting up the forgery.

Deft. bank made claims against the other banks, as third parties, as indorsers or as having received money paid by mistake, for the reimbursement of the several amounts so paid to them, respectively :—*Held :* the drawee could not recover.—BANK OF MONTREAL *v.* R. (1907), 38 S. C. R. 258.—**CAN.**

635 v. —— —— —— ——.] — A cheque, purporting to be drawn by pltf. upon defts., was paid & charged to pltf.'s account. Pltf. asserted that the signature of the cheque was a forgery, & sued for the amount of it. Before complaining to defts. about the cheque, pltf. signed defts.' voucher book, confirming the statement of his account with the cheque charged against it, but he did so before examining the cheque : —*Held :* the *onus* was on defts. to prove the signature to the cheque or to prove their defences of estoppel & stated account, &, not having discharged that *onus*, pltf. entitled to recover.—WOOSNAM *v.* MERCHANTS BANK (1911), 17 W. L. R. 40.—**CAN.**

635 vi. —— —— —— ——.]—AGRICULTURAL SAVINGS & LOAN ASSOCN. *v.* FEDERAL BANK (1881), 6 A. R. 192.—**CAN.**

p. *Collection of forged cheque — Bonâ fide receipt of payment—Collecting bank not liable.*]—A clerk of P., a customer of the R. Bank, presented there a crossed cheque drawn in P.'s favour by D. on the C. Bank & indorsed by P. D. was not a customer of the R. Bank. The R. Bank cashed the cheque, & thereafter presented it to the C. Bank, who paid the money. Ten days after, the C. Bank discovered D.'s signature

Sect. 10.—*Forged or altered cheques.*]

galla Rubber Estates *v.* National Bank of India, [1909] 2 K. B. 1010; Macmillan *v.* London Joint Stock Bank, [1917] 1 K. B. 363.

636. —— —— ——.]—The secretary of a limited co. had the custody of the co.'s cheques & pass-books. It was the practice of the co. when cheques were drawn to have them signed by two directors & the secretary, & at the same time to enter the amount of the cheque in a book called the "finance book," which was initialled by each signing director. The secretary drew several cheques, which were actually signed, duly entered in the finance book & initialled by one director, but the signature by the other director was forged by means of an india-rubber stamp kept by the cashier, & his initials in the finance book were also forged. The drawing of the cheques was confirmed at a directors' meeting, & a certificate of the credit balance at the bank was produced by the secretary, but the paid cheques & pass-book were not produced:—*Held:* there was no such negligence proved as would estop the co. from recovering the amounts paid on such forged cheques.—KEPITIGALLA RUBBER ESTATES, LTD. *v.* NATIONAL BANK OF INDIA, LTD., [1909] 2 K. B. 1010; 78 L. J. K. B. 964; 100 L. T. 516; 25 T. L. R. 402; 53 Sol. Jo. 377; 14 Com. Cas. 116; 16 Mans. 234.

Annotations:—**Folld.** Walker *v.* Manchester & Liverpool District Banking Co. (1913), 108 L. T. 728. **Refd.** Morison *v.* London County & Westminster Bank (1913), 18 Com. Cas. 137; Macmillan *v.* London Joint Stock Bank, [1917] 1 K. B. 363; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L.

637. —— —— **Debited in pass-book—Book returned unexamined.**]—The fact that the customer of a bank does not examine his pass-book, when it is periodically returned to him, does not preclude him from recovering from the bank amounts paid in respect of cheques, the signatures to which were forged, although such cheques were debited to his account in the pass-book.—WALKER *v.* MANCHESTER & LIVERPOOL DISTRICT BANKING CO., LTD. (1913), 108 L. T. 728; 29 T. L. R. 492; 57 Sol. Jo. 478.

638. Payment to holder in due course—Right of bank to recover.]—*Semble:* a banker paying a forged cheque to an innocent holder for value cannot recover back its amount.—SIMM *v.* ANGLO-AMERICAN TELEGRAPH CO., ANGLO-AMERICAN TELEGRAPH CO. *v.* SPURLING (1879), 5 Q. B. D. 188; *revsd.* without reference to this point, 5 Q. B. D. 196, C. A.

Annotations:—**Mentd.** Smith *v.* Reynolds (1891), 8 T. L. R. 137; Tomkinson *v.* Balkis Consolidated Co., [1891] 2 Q. B. 614, C. A.; Kingston-upon-Hull Corpn. *v.* Harding, [1892] 2 Q. B. 494, C. A.; Balkis Consolidated Co. *v.* Tomkinson, [1893] A. C. 396, H. L.; Foster *v.* Tyne Pontoon & Dry Docks Co. (1893), 63 L. J. Q. B. 50; Dixon *v.* Kennaway, [1900] 1 Ch. 833; Sheffield Corpn. *v.* Barclay, [1903] 1 K. B. 1; Ruben *v.* Great Fingall Consolidated, [1904] 1 K. B. 650; Bank of England *v.* Cutler, [1908] 2 K. B. 208, C. A.; Platt *v.* Rowe & Mitchell (C. M.) (1909), 26 T. L. R. 49.

639. —— ——.]—*Semble:* as against a holder in due course a banker paying a forged cheque cannot afterwards recover back the money.—HART *v.* FRONTINO & BOLIVIA SOUTH AMERICAN GOLD MINING CO., LTD. (1870), L. R. 5 Exch. 111; 39 L. J. Ex. 93; 22 L. T. 30.

Annotations:—**Mentd.** R. *v.* Shropshire Union Ry. & Canal Co. (1873), L. R. 8 Q. B. 420, Ex. Ch.; Simm *v.* Anglo-American Telegraph Co., Anglo-American Telegraph Co. *v.* Spurling (1879), 5 Q. B. D. 188, C. A.; Waterhouse *v.* L. & S. W. Ry. Co. (1879), 41 L. T. 553; R. *v.* Charnwood Forest Ry. Co. (1884), 1 T. L. R. 161; Low *v.* Bouverie, [1891] 3 Ch. 82, C. A.; Balkis Consolidated Co. *v.* Tomkinson, [1893] A. C. 396, H. L.; Sheffield Corpn. *v.* Barclay, [1903] 1 K. B. 1.

640. Alteration of amount—Payment of increased sum by bank—Cheque negligently drawn—Rights of bank.]—A customer of a banker delivered to his wife certain printed cheques signed by himself, but with blanks for the sums, requesting his wife to fill the blanks up according to the exigency of his business. She caused one to be filled up with the words "fifty pounds two shillings," the "fifty" being commenced with a small letter, & placed in the middle of a line, & the figures £50 2*s.* were placed at a considerable distance from the printed £. In this state she delivered the cheque to her husband's clerk to receive the amount, whereupon he inserted at the beginning of the line in which the word "fifty" was written the words "three hundred &," & the figure 3 between the £ & the 50. The bankers having paid the £350 2*s.*:—*Held:* the loss must fall on the customer, as pltf. was guilty of negligence, & the bankers, who could have no means of detecting the fraud, were not liable to repay to pltf. the sum so fraudulently obtained.—YOUNG *v.* GROTE (1827), 4 Bing. 253; 12 Moore, C. P. 484; 5 L. J. O. S. C. P. 165; 130 E. R. 764.

Annotations:—**Consd.** Robarts *v.* Tucker (1851), 16 Q. B. 560, Ex. Ch.; Barker *v.* Sterne (1854), 9 Exch. 684. **Expld.** Orr *v.* Union Bank of Scotland (1854), 1 Macq. 513, H. L. **Distd.** Bank of Ireland *v.* Evans' Trustees (1855), 5 H. L. Cas. 389, H. L. **Consd.** Staple of England *v.* Bank of England (1855), 21 Q. B. D. 160, C. A.; *Re* North British Australasian Co., *Ex p.* Swan (1859), 7 C. B. N. S. 400; Tayler *v.* Gt. Indian Peninsular Ry. Co. (1859), 28 L. J. Ch. 285. **Apprvd. but N.F.** Foster *v.* Green (1862), 7 H. & N. 881. **Consd.** Swan *v.* North British Australasian Co. (1863), 2 H. & C. 175, Ex. Ch.; Foster *v.* Mackinnon (1869), 38 L. J. C. P. 310. **Distd.** Société Générale *v.* Metropolitan Bank (1873), 27 L. T. 849. **Consd.** Halifax Grdns. *v.* Wheelwright (1875), L. R. 10 Exch. 183. **Distd.** Johnson *v.* Credit Lyonnais Co. (1877), 3 C. P. D. 32, C. A.; Baxendale *v.* Bennett (1878), 3 Q. B. D. 525, C. A. **Apprvd.** Staple of England *v.* Bank of England (1887), 56 L. T. 665. **Consd.** Bank of England *v.* Vagliano, [1891] A. C. 107, H. L. *Young* v. *Grote* must

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& P.'s indorsation to be forgeries:—*Held:* the R. Bank had acted merely as agent for getting the money for P., & were not liable, not being *lucratus* & no *mala fides* being alleged.—CLYDESDALE BANKING CO. *v.* ROYAL BANK OF SCOTLAND (1876), 13 Sc. L. R. 367.—**SCOT.**

q. *Property in forged cheque.*]—A cheque, payable to pltf., or order, was mailed to pltf.'s address, but he did not receive it. A few days afterwards a young man, whom pltf. had previously dismissed from his employ, brought the cheque, with pltf.'s name indorsed on it, without authority, to the bank, & drew the money. Pltf.'s attorney wrote to defts. demanding the money, but not the cheque, & defts.' attorney replied that if pltf. would write a letter to the bank declaring the indorsement a forgery, & stating that he would be prepared to give evidence if required, the amount would be paid. Pltf.'s attorney then wrote to defts.' attorney, asking that defts. would pay or restore the cheque. The cheque was handed by the bank to pltf. on condition that he would return it, which he did, but it was not delivered to him as his own property:—*Held:* the demand to pay or return the cheque was a sufficient demand of the cheque, but pltf. had no such property in the cheque & no such possession of it as would entitle him to maintain an action for conversion, &, even if he had, defts.' refusal was not such an absolute refusal as to constitute a conversion.—ANNAND *v.* MERCHANTS BANK (1878), 3 R. & C. 329.—**CAN.**

r. ——.]—SMITH *v.* TRADERS' BANK OF CANADA (1906), 7 O. W. R. 791.—**CAN.**

640 i. *Alteration of amount, date, & name of payee—Receipt of payment by collecting bank—Liability to refund.*]—A cheque for $6, drawn on pltfs., was fraudulently altered by changing the date & the name of the payee, & by raising the amount to $1,000. Pltfs. refused payment for want of identification of the person who presented it. Defts., without requiring identification, advanced $25 in cash to the forger on the forged cheque, placed the balance, $975, to his credit in a deposit account, endorsed it, & received the full amount of $1,000 from pltfs. After receipt of such amount, defts. paid the further sum of $800 to the forger out of the amount so placed to the credit of his deposit account. The fraud was discovered a few days later &, on refusal to refund the money received, an action was brought to recover it back from defts. as indorsers or as having received money paid under mistake of fact:—*Held:* pltfs., although obliged to know the signature of their customer, were not under a similar obligation in regard to the writing in the body of the cheque, & entitled to recover back the money notwithstanding that the position of defts. had been changed by paying over part of the money to the forger.—DOMINION BANK *v.* UNION BANK OF CANADA (1908), 40 S. C. R. 366.—**CAN.**

be considered as well decided. It really proceeded on the authority of the extract from Pothier which makes the inability to recover depend upon the fault of the drawer of the cheque in the mode of drawing it (LORD FIELD); Scholfield *v.* Londesborough, [1896] A. C. 514, H. L. **Expld. & Distd.** Union Credit Bank *v.* Mersey Docks & Harbour Board, [1899] 2 Q. B. 205. The case of *Young* v. *Grote* appears to me to be still an authority for the proposition that where a customer of a bank entrusts another person with a signed cheque & at the same time authorises that other to fill up the amount which the banker is to pay, the banker is entitled to debit the customer's account with the amount which may be filled in. I am, however, of opinion that *Young* v. *Grote* can no longer be regarded as good law if the judgment in it is to be read as proceeding on the supposed negligence of pltf. (BIGHAM, J.). **Consd.** Colonial Bank of Australasia *v.* Marshall, [1906] A. C. 559, P. C. *Young* v. *Grote* was critically examined in the House of Lords in *Scholfield* v. *Earl of Londesborough*, & the latter case has now become the governing authority which must prevail so far as the principles laid down in it extend (SIR ARTHUR WILSON). **Dbtd.** Smith *v.* Prosser, [1907] 2 K. B. 735, C. A. *Young* v. *Grote* has indeed now ceased to be law (VAUGHAN WILLIAMS, L.J.). **Consd.** Kepitigalla Rubber Estates *v.* National Bank of India, [1909] 2 K. B. 1010; Macmillan *v.* London Joint Stock Bank, [1917] 2 K. B. 439, C. A. **Apprvd.** London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L. *Young* v. *Grote* has been frequently discussed. The outcome has been a substantial balance of authority in support of the result reached by the Ct. of Common Pleas (VISCOUNT HALDANE). **Refd.** Ingham *v.* Primrose (1859), 7 C. B. N. S. 82; British Linen Co. *v.* Caledonian Insce. (1861), 7 Jur. N. S. 587, H. L.; Gumm *v.* Tyrie (1864), 4 B. & S. 680; London & South Western Bank *v.* Wentworth (1880), 5 Ex. D. 96; Garrard *v.* Lewis (1882), 10 Q. B. D. 30; Vagliano *v.* Bank of England (1888), 22 Q. B. D. 103; Imperial Bank of Canada *v.* Bank of Hamilton, [1903] A. C. 49, P. C. **Mentd.** Stoessiger *v.* S. E. Ry. Co. (1854), 3 E. & B. 549; Woods *v.* Thiedemann (1862), 1 H. & C. 478; Arnold *v.* Cheque Bank, Arnold *v.* City Bank (1876), 1 C. P. D. 578.

641. —— —— —— ——.]—The course of business between the guardians of the H. Union & the H. Banking Co. was that sums of money were from time to time paid to the account of the guardians across the bank counter to the bank clerks, & the orders, signed on behalf of the guardians, were cashed like cheques payable to order. The clerk to the guardians had in his employ L., whose duty it was to fill up the orders for the signature of the guardians, & he drew a large number of orders in such a manner as to enable himself to increase the amounts after they had been signed by the guardians & countersigned by the clerk. These orders were presented & paid at the bank in the ordinary way. The guardians brought an action against deft., the salaried manager of the co., whom they had appointed as their treasurer without salary, to recover the money paid on such forged orders:—*Held:* as to the orders on which the amounts had been increased, pltfs. could not recover, the loss being primarily due to their own negligence.—HALIFAX UNION *v.* WHEELWRIGHT (1875), L. R. 10 Exch. 183; 44 L. J. Ex. 121; 32 L. T. 802; 39 J. P. 823; 23 W. R. 704.

Annotations:—**Distd.** Northern Counties of England Fire Insce. *v.* Whipp (1884), 26 Ch. D. 482, C. A.; Cosford Union Grdns. *v.* Grimwade (1892), 8 T. L. R. 775. **Consd.** Colchester Union Grdns. *v.* Moy (1893), 57 J. P. 265; Kepitigalla Rubber Estates *v.* National Bank of India, [1909] 2 K. B. 1010; Macmillan *v.* London Joint Stock Bank, [1917] 2 K. B. 439, C. A. **Refd.** Schofield *v.* Londesborough, 1895] 1 Q. B. 536, C. A. **Mentd.** London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L.

642. —— —— —— ——.]—Pltf. bought a ring off L., who was a stranger to him, & paid for it by cheque for £8 5*s*. Subsequently the cheque, which had been altered to one for £80 5*s*., was presented & paid by defts., who contended that the fraudulent alteration had been facilitated by spaces being left in the cheque as originally drawn. It also appeared that the "y" was in a different ink to the "eight." Pltf. sued to recover £72, the amount of the overpayment, & the jury found in favour of pltf. A new trial was ordered on the ground that the question whether defts. had been misled by pltf.'s negligence had not been sufficiently put to the jury.—MARCUSSEN *v.* BIRKBECK BANK (1889), 5 T. L. R. 646, C. A.

643. —— —— —— ——.]—Five cheques were drawn on defts. by pltfs. & M. to the debit of their joint account. After they were signed by pltfs. M. enhanced their apparent amounts by adding words & figures in the blank spaces to the left of those originally written. In a suit to recover the balance of account defts. claimed to debit it with the enhanced amounts of the cheques, & the jury found that defts. could not, by the exercise of ordinary care & caution, have avoided paying the cheques as altered, & that the cheques were drawn by pltfs. in neglect of their duty to defts.:—*Held:* (1) there was no evidence of negligence on the part of defts. proper to be left to the jury; (2) the mere fact that a cheque was drawn with spaces which could be utilised for the purpose of fraudulent alteration was not by itself any violation of duty by the customer to his banker.—COLONIAL BANK OF AUSTRALASIA, LTD. *v.* MARSHALL, [1906] A. C. 559; 75 L. J. P. C. 76; 95 L. T. 310; 22 T. L. R. 746, P. C.

Annotations:—**Consd.** London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L. **Refd.** Macmillan *v.* London Joint Stock Bank, [1917] 1 K. B. 363.

644. —— —— —— ——.]—A firm entrusted to a confidential clerk, whose integrity they had no reason to suspect, the duty of filling in their cheques for signature. The clerk presented to one of the partners of the firm for signature a cheque drawn in favour of the firm or bearer. There was no sum in words written on the cheque in the space provided for the writing & there were the figures "2. 0. 0." in the space intended for figures. The partner signed the cheque. The clerk subsequently added the words "one hundred & twenty pounds" in the space left for words & wrote the figures "1" & "0" respectively on each side of the figure "2," which was so placed as to leave room for the interpolation of the added figures. The clerk presented the cheque for payment at the firm's bank & obtained payment of £120 out of the firm's account:—*Held:* the firm had been guilty of a breach of the special duty arising from the relation of banker & customer to take care in the mode of drawing the cheque, & the alteration in the amount of the cheque was the direct result of that breach of duty, & the bank were entitled to debit the firm's account with the full amount of the cheque. In the case of a customer's cheque, admittedly genuine, no responsibility rests upon the banker for what has happened to the cheque before its presentation to the bank, but the responsibility for what has happened to it between the dates of signature & presentation rests upon the customer (LORD SHAW OF DUNFERMLINE).—LONDON JOINT STOCK BANK *v.* MACMILLAN & ARTHUR, [1918] A. C. 777; 119 L. T. 387; 34 T. L. R. 509; 62 Sol. Jo. 650, H. L.

645. —— —— **Alteration not apparent—Liability of bank.**]—A customer drew upon his banker a cheque for £3, & paid it away. The amount of the cheque was altered by the holder to £200, in such a manner that no one in the ordinary course of business could have observed it, & the cheque was presented, & the £200 paid by the banker:—*Held:* the banker was liable to the customer for £197, the difference between the amount of the genuine & the altered cheque.—HALL *v.* FULLER (1826), 5 B. & C. 750; 8 Dow. & Ry. K. B. 464; 4 L. J. O. S. K. B. 297; 108 E. R. 279.

Annotations:—**Distd.** Young *v.* Grote (1827), 4 Bing. 253. **Refd.** Scholfield *v.* Londesborough, [1896] A. C. 514, H. L.; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L. **Mentd.** Simmonds *v.* Taylor (1857), 6 W. R. 134.

646. —— —— **Alteration after certificate—Right to recover.**]—A cheque for £5 certified by

resps.' stamp was fraudulently altered to £500 & paid by resps. to applts., holders for value, under a mistake of fact, which was not discovered till the next day. In an action by resps. to recover back £495 from applts. :—*Held :* (1) resps. were at liberty to prove, as between themselves & an innocent holder for value, that the cheque had been fraudulently altered after it had been certified; (2) no negligence was imputable to resps. in cashing the cheque without examining the drawer's account ; & even if it were, it did not induce applts. to treat the cheque as good ; (3) notice of forgery was unnecessary & the cheque for £5 was not dishonoured, & the rule to the effect that notice of dishonour of a bill of exchange must be given on the due date did not apply.—IMPERIAL BANK OF CANADA *v.* BANK OF HAMILTON, [1903] A. C. 49 ; 72 L. J. P. C. 1 ; 87 L. T. 457 ; 51 W. R. 289 ; 19 T. L. R. 56, P. C.

Annotation :—**Refd.** Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

647. Alteration of date—Dishonour of cheque—Discharge of drawer.]—A person intrusted with a cheque by the payee to pay into a bank absconded with it, & after altering the date from Mar. 2 to Mar. 26, passed it to pltf. for value. The cheque was not paid, & pltf., who had not been guilty of any negligence in taking the cheque, sued the drawer :—*Held :* the alteration was material, & invalidated the cheque, & the circumstance that pltf. had not been guilty of negligence in taking it was immaterial.—VANCE *v.* LOWTHER (1876), 1 Ex. D. 176 ; 45 L. J. Q. B. 200 ; 34 L. T. 286 ; 24 W. R. 372 ; *sub nom.* LOWTHER *v.* VANCE, 40 J. P. 232.

648. Forged indorsement—Payment on—Right to debit customer.]—An insurance co. were in the practice of paying losses due to country customers by accepting drafts on the co. in London, drawn by their country agent to the order of the customer. The drafts were not drawn till the co. in London gave the agent leave to draw, nor accepted till they bore the indorsement of the payees, & were found, on examination, to correspond with the leave to draw. When accepted, they were made payable at the bank of R., the London banker of the co. R. was not informed of this practice. A loss of £5,000 became due to I. at Manchester. The agent of the co. at Manchester, in pursuance of their leave, drew on the co. a draft for £5,000 payable to the order of I., & delivered it to I.'s solr. This draft, purporting to be indorsed by I. to the order of J. & L. (London bankers), was by J. & L. presented for acceptance to the co., & accepted, payable at R.'s bank. On maturity, it was there paid to J. & L. This payment was debited to the co. in the pass-book delivered to them. They credited R. with the payment. No objection was made till, six months afterwards, it was discovered that the indorsement purporting to be that of I. was a forgery by the solr., & the co. were compelled to pay I. The co. brought *assumpsit* against R. :—*Held :* (1) the acceptance of a bill of exchange payable at a banker's was tantamount to an order to the banker to pay the bill to any person who according to the law merchant could give a valid discharge for it, & not merely to the lawful holder, & the banker might debit his customer with such payment ; (2) a banker could not debit his customer with the payment made to one who claimed through a forged indorsement, & so could not give a valid discharge for the bill, unless there were circumstances amounting to a direction from the customer to the bankers to pay the bill without reference to the genuineness of the indorsement, or equivalent to an admission of its genuineness, inducing the banker to alter his position, so as to preclude the customer from showing it to be forged ; (3) the facts afforded no evidence to go to the jury of such a direction, or of such an inducement.—ROBARTS *v.* TUCKER (1851), 16 Q. B. 560 ; 20 L. J. Q. B. 270 ; 15 Jur. 987 ; 117 E. R. 994, Ex. Ch.

Annotations :—**Consd.** Woods *v.* Thiedemann (1862), 1 H. & C. 478 ; Halifax Union *v.* Wheelwright (1875), L. R. 10 Exch. 183 ; Bank of England *v.* Vagliano, [1891] A. C. 107, H. L. **Refd.** *Re* North British Australasian Co., *Ex p.* Swan 1859), 7 C. B. N. S. 400 ; Arnold *v.* Cheque Bank, Arnold *v.* City Bank (1876), 1 C. P. D. 578 ; Scholfield *v.* Londesborough, [1895] 1 Q. B. 536, C. A. **Mentd.** Scholfield *v.* Londesborough, [1896] A. C. 514, H. L. ; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L.

649. —— Cheque stolen & indorsed abroad—Valid title by foreign law—Conversion in England.]—By Austrian law the holder of a stolen cheque, who takes the cheque *bonâ fide* for value & without gross negligence, acquires a valid title to the cheque even though he takes it under a forged indorsement, & if the holder pays it into an English bank, which presents it to the bank upon which it is drawn & receives the proceeds, the English bank is not liable to an action for conversion by the original owner of the cheque, as the validity of the indorsement & the transfer of the cheque in Austria depend upon Austrian law.—EMBIRICOS *v.* ANGLO-AUSTRIAN BANK, [1905] 1 K. B. 677 ; 74 L. J. K. B. 326 ; 92 L. T. 305 ; 53 W. R. 306 ; 21 T. L. R. 268 ; 49 Sol. Jo. 281 ; 10 Com. Cas. 99, C. A.

650.—— Unauthorised payment to wrong bank—Payment to innocent holder for value—Drawer's right to recover.]—Pltf. drew a cheque on his bankers, M. & Co., payable to order, crossed it "L. & C. Bank," sent it for value to the payee, from whom it was stolen & his indorsement forged. It was ultimately passed to deft., who took it *bonâ fide* in ignorance of the forgery. Deft. gave it to his country bankers, & their London agents, the L. & J. Bank, presented & received payment for it from M. & Co., who either did not perceive or disregarded the crossing, "L. & C. Bank." On hearing it was paid deft. gave value for it to a customer. Meanwhile pltf., at the payee's request, had sent him a second cheque for the same amount, which also was paid by M. & Co., & pltf.'s account was debited with both cheques. Pltf. having brought an action for the amount of the first cheque, for money had & received by deft., the jury found that all the parties concerned, except deft., namely, pltf., M. & Co., & the payee, had been guilty of negligence with regard to the payment of the first cheque :—*Held :* the first cheque had been paid by M. & Co. improperly & without authority, because they had paid it to the wrong

647 i. *Alteration of date—Negligence of bank—Avoidance of cheque.*]—Pltf., a customer of deft. bank, left with them a cheque payable to himself or bearer to meet a note. The cheque was not used for that purpose, nor returned to pltf., but was afterwards presented to defts. by some one unknown, the year having been changed from 1873 to 1874, & it was paid by defts. without noticing the alteration, & charged to pltf.'s account. How it got out of defts.' bank was not ascertained :—*Held :* the alteration avoided the cheque, & pltf. entitled to recover back the money.—BELTZ *v.* MOLSONS BANK (1877), 40 U. C. R. 253. —**CAN.**

s. *Alteration after acceptance — Order cheque made payable to bearer—Bank not liable.*]—Where a bank accepts or certifies a cheque at the request of the drawer, & the cheque is afterwards altered by the drawer so as to be made payable to bearer instead of to order, the bank is not liable to the drawer or his assignees on the altered cheque, such an alteration being a material one.—*Re* COMMERCIAL BANK OF MANITOBA, BANQUE D'HOCHELAGA'S CASE (1894), 10 Man. L. R. 171.—**CAN.**

648 i. *Forged indorsement—Payment on—Liability of bank for conversion.*]—MEYERS *v.* CROWN BANK OF CANADA (1909), 13 O. W. R. 533.—**CAN.**

648 ii. *S. P.* METROPOLITAN LIFE INSURANCE CO. *v.* QUEBEC BANK (1916), Q. R. 50 S. C. 214.—**CAN.**

bankers, & pltf. could maintain an action against deft., who had acquired no title to the cheque.—BOBBETT *v.* PINKETT (1876), 1 Ex. D. 368; 45 L. J. Q. B. 555; 34 L. T. 851; 24 W. R. 711.

Annotations:—**Refd.** Bissell *v.* Fox (1884), Cab. & El. 395; Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A. **Mentd.** Charles *v.* Blackwell (1877), 25 W. R. 472, C. A.; Durant *v.* Roberts & Keighley. Maxsted, [1900] 1 Q. B. 629, C. A.

SECT. 11.—FORGED OR ALTERED BILLS OF EXCHANGE OR OTHER DOCUMENTS.

651. Customer's acceptance forged—Payment—Delay in discovery of forgery—Right to repayment.]—Pltfs., bankers, paid a bill, purporting to be accepted by their customer, to defts., *bonâ fide* holders, who held under genuine indorsements. Notice that the acceptance was forged was given to defts. seven days after the payment:—*Held:* pltfs. could not recover the amount paid, as defts. had lost the opportunity of giving notice of dishonour to prior parties.—SMITH *v.* MERCER (1815), 6 Taunt. 76; 1 Marsh. 453; 128 E. R. 961.

Annotations:—**Consd.** Wilkinson *v.* Johnson (1824), 3 B. & C. 428; Young *v.* Grote (1827), 4 Bing. 253; Leeds Bank *v.* Walker (1883), 11 Q. B. D. 84. **Refd.** East India Co. *v.* Tritton (1824), 5 Dow. & Ry. K. B. 214; Davies *v.* Watson (1833), 2 Nev. & M. K. B. 709; London & River Plate Bank *v.* Bank of Liverpool, [1896] 1 Q. B. 7. **Mentd.** Guaranty Trust Co. of New York *v.* Hannay, [1918] 2 K. B. 623, C. A.

652. —— —— —— ——.]—A bill with a forged acceptance was presented in the ordinary course by defts., who were bankers & agents for the holders, to the bankers of the supposed acceptor. They, under the belief that the acceptance was genuine, paid the bill. The forgery was discovered on the following day, & notice given to defts., & to the other parties. The holders had not drawn out of the hands of defts. any sum of money upon the credit of the bill. The bankers sued defts. to recover back the money thus paid:—*Held:* pltfs. were not entitled to recover. *Qu.:* whether if the discovery & notice had been on the same day, it would have been in time.—COCKS *v.* MASTERMAN (1829), 9 B. & C. 902; Dan. & Ll. 329; 4 Man. & Ry. K. B. 676; 8 L. J. O. S. K. B. 77; 109 E. R. 335.

Annotations:—**Consd.** Robarts *v.* Tucker (1851), 20 L. J. Q. B. 270, Ex. Ch. **Expld.** Durrant *v.* Eccl. Comrs. (1880), 6 Q. B. D. 234; Leeds Bank *v.* Walker (1883), 11 Q. B. D. 84. **Consd.** Imperial Bank of Canada *v.* Bank of Hamilton, [1903] A. C. 49, P. C. **Apld.** Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A. **Refd.** Mather *v.* Maidstone (1856), 18 C. B. 273; Deutsche Bank *v.* Beriro (1895), 11 T. L. R. 591; London & River Plate Bank *v.* Bank of Liverpool, [1896] 1 Q. B. 7. **Mentd.** Aiken *v.* Short (1856), 1 H. & N. 210.

653. Discounting without indorsement—Drawer's & acceptor's signatures forged—Right of bank to recover.]—Pltfs., bankers, discounted for defts., bill brokers, a bill of exchange, which the latter did not indorse. The signatures of the drawer & acceptor, the latter of whom kept an account with pltfs., were forged:—*Held:* defts. were liable to refund the money, although they had paid over the amount to the indorsee for whom they were brokers.—FULLER *v.* SMITH (1824), 1 C. & P. 197; Ry. & M. 49, N. P.

Annotations:—**Distd.** *Re* Bourne, *Ex p.* Bird (1851), 4 De G. & Sm. 273. **Refd.** Dumont *v.* Williamson (1867), 17 L. T. 71.

654. —— **Subsequent discovery of forgery—Right of bank to recover.**]—An agent applied to a banking co., on several occasions, to discount bills drawn by his principal, & at the commencement of these transactions, informed the co. who were the drawers & acceptors of a bill, & inquired whether the co. would discount it without requiring the agent to indorse it. They agreed to do so in this & other instances; but upon some of the bills required & obtained the agent's indorsement. The acceptances turned out to have been forged by the principal, of which fact the agent was wholly ignorant. The agent became bkpt., & there was nothing to show that he had not handed over the proceeds of the bills to the principal, or that those proceeds were in such a position that they could be recalled:—*Held:* the co. could not prove upon the bills which the agent had not indorsed.—*Re* BOURNE, *Ex p.* BIRD (1851), 4 De G. & Sm. 273; 20 L. J. Bcy. 16; 17 L. T. O. S. 303; 15 Jur. 894; 64 E. R. 829.

655. —— —— ——.]—Pltfs. & defts. were both money dealers & bill brokers. A., a customer of defts., brought to defts. for discount a bill indorsed specially to A. & accepted by N. Defts. took it to pltfs. for discount, but refused to indorse or guarantee the bill. Pltfs. took it on the credit of N.'s name & gave defts. their cheque for the amount, & defts. gave their own cheque to A. for the amount at a higher rate of discount. All the names on the bill except A.'s own were forgeries. A. was convicted of forgery & became bkpt.:—*Held:* pltfs. were entitled to recover the money given for the bill from defts.—GURNEY *v.* WOMERSLEY (1854), 4 E. & B. 133; 24 L. J. Q. B. 46; 24 L. T. O. S. 71; 1 Jur. N. S. 328; 3 C. L. R. 3; 119 E. R. 51.

Annotations:—**Refd.** *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184; Pooley *v.* Brown (1862), 11 C. B. N. S. 566; Azémar *v.* Casella (1867), L. R. 2 C. P. 677, Ex. Ch.; Kennedy *v.* Panama, etc. Mail Co. (1867), L. R. 2 Q. B. 580. **Mentd.** Royal Exchange Assce. *v.* Moore (1863), 2 New Rep. 63.

656. Discounting bill restrictively indorsed—Forged indorsement—Payment for honour by drawers—Right to recover from bank.]—The Bank of England discounted a bill restrictively indorsed to D. D.'s indorsement was forged by E., & the Bank discounted the bill in the ordinary course of business. The bill was dishonoured at maturity, & pltfs.' agent paid it for their honour as the drawers. The forgery having been discovered, pltfs. sued the Bank to recover the money paid:—*Held:* pltfs. were entitled to succeed, as the indorsement to D. was restrictive & the bill was not negotiable when discounted by the Bank.—ANCHER *v.* BANK OF ENGLAND (1781), 2 Doug. K. B. 637; 99 E. R. 404.

Annotations:—**Consd.** Sigourney *v.* Lloyd (1828), 8 B. & C. 622. **Refd.** Potts *v.* Reed (1806), 6 Esp. 57, N. P.

657. Discounting forged Navy Bill—Right to recover.]—Pltf. discounted a forged navy bill for deft. Neither party was aware of the forgery:—*Held:* pltf. was entitled to recover back the money as had & received to his use upon failure of the con-

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PART II. SECT. 11.

t. *Acceptances forged by agent—Agent acting within scope of authority.*]—A firm wrote a letter to a bank authorising their agent to sign *per pro.* of their firm all bills, cheques, cash orders, & other documents necessary to the conducting of their business, & added, "& all vouchers so subscribed will be equally binding as if signed by any member of our firm." The firm thereafter granted to their agent a regularly stamped letter of procuration, repeating the above authority. The agent forged the acceptances on several bills which he drew *per pro.* of his principals, & discounted them with the bank, & applied the proceeds to his own purposes:—*Held:* his principals liable to the bank for the amounts so advanced.—MAKIN & SONS *v.* UNION BANK, MAKIN *v.* CLYDESDALE BANKING CO. (1873), 45 Sc. Jur. 323.—**SCOT.**

u. *Payment of forged bills by acceptor—Right of acceptor to recover.*]—Defts. discounted a forged bill & were paid by the acceptor, who afterwards, on discovering the forgery, demanded repayment from defts.:—*Held:* defts. having no title to the bill, the indorsement being a forgery, were not entitled to receive payment, &, having been paid, pltf. entitled to recover back the amount so paid.—RYAN *v.* MONTREAL BANK (1886), 12 O. R. 39; 14 A. R. 553.—**CAN.**

Sect 11.—*Forged or altered bills of exchange or other documents. Sect.* 12: *Sub-sects.* 1 & 2.]

sideration.—JONES *v.* RYDE (1814), 5 Taunt. 488; 1 Marsh. 157; 128 E. R. 779.

Annotations:—**Folld.** Bruce *v.* Bruce (1814), 5 Taunt. 495. **Distd.** Cocks *v.* Masterman (1829), 9 B. & C. 902; Westropp *v.* Solomon (1849), 19 L. J. C. P. 1. **Folld.** Gompertz *v.* Bartlett (1853), 2 E. & B. 849. **Refd.** Smith *v.* Mercer (1815), 6 Taunt. 76; Wilkinson *v.* Johnson (1824), 3 B. & C. 428; Gurney *v.* Womersley (1854), 4 E. & B. 133; Hall *v.* Conder (1857), 2 C. B. N. S. 22; *Re* Lawrence, Mortimore *v.* Schrader (1861), 4 L. T. 184; Dumont *v.* Williamson (1867), 17 L. T. 71; Leeds & County Bank *v.* Walker (1883), 11 Q. B. D. 84.

658. Notice of forgery—Silence after receipt of notice—Adoption & estoppel.]—A person, who knows that a bank is relying upon his forged signature to a bill, cannot lie by & not divulge the fact until he sees that the position of the bank is altered for the worse. But there is no principle on which his mere silence for a fortnight from the time when he first knew of the forgery can be held to be an admission or adoption of liability or an estoppel.—M'KENZIE *v.* BRITISH LINEN CO. (1881), 6 App. Cas. 82; 44 L. T. 431; 29 W. R. 477, H. L.

Annotations:—**Consd.** Ogilvie *v.* West Australian Mortgage Agency Corpn., [1896] A. C. 257, P. C. **Refd.** Ewing *v.* Dominion Bank, [1904] A. C. 806, P. C. **Mentd.** Mackie *v.* Herbertson (1884), 9 App. Cas. 303, H. L.; Colonial Bank *v.* Cady, London Chartered Bank of Australia *v.* Cady (1890), 63 L. T. 27, H. L.

659. Alteration of time of payment—Alteration after indorsement—Liability of indorsing bank.]—Defts. were in the habit of lending their name to a customer, S., by indorsing foreign bills for him, which when indorsed he sold, defts. collecting the proceeds & crediting S.'s account. S. brought defts. the first & second parts of a bill in two parts drawn by W. on Lille for 47,500 francs "at eight days' date." Both parts were fully stamped. Between the words "eight" & "days" there was a blank space in which several letters might be inserted. Defts. indorsed both parts, intending them to form one bill & returned them to S. S. sold a bill with defts.' indorsement to pltfs. through C., whom contrary to the prohibition of defts. he employed to negotiate his bills. C. delivered the second part marked "first with the drawee" to pltfs., the word "eight" having then been changed into "eighty." Defts. drew upon pltfs., received payment & placed the amount to the credit of S. Pltfs. paid on the faith of the indorsement, believing defts. were the vendors of the bill. It turned out subsequently S. had indorsed the first part with a spurious second part to R.; each part then purporting to be drawn at eighty days. The bill was dishonoured:—*Held:* defts. were not precluded by negligence from setting up the forgery as a defence to an action on the bill, or for the money received, because they had not received it for themselves.—SOCIÉTÉ GÉNÉRALE *v.* METROPOLITAN BANK, LTD. (1873), 27 L. T. 849; 21 W. R. 335.

Annotations:—**Refd.** Scholfield *v.* Londesborough, [1894] 2 Q. B. 660. **Mentd.** Colonial Bank of Australasia *v.* Marshall, [1906] A. C. 559, P. C.; Macmillan *v.* London Joint Stock Bank, [1917] 2 K. B. 439, C. A.; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L.

660. Alteration in amount—Payment of increased sum by bank—Bill negligently drawn—Recovery from acceptor.]—Deft. accepted a bill of exchange, leaving spaces in the writing, which enabled a fraudulent holder to increase the amount of the bill. Pltf. bank, having paid the increased amount, sued the acceptor, alleging that he had been guilty of negligence:—*Held:* deft. was not guilty of any negligence entitling the bank to recover.—ADELPHI BANK *v.* EDWARDS (1882), cited [1896] A. C. at p. 540.

Annotations:—**Consd.** Scholfield *v.* Londesborough, [1896] A. C. 514, H. L. **Refd.** Macmillan *v.* London Joint Stock Bank, [1917] 2 K. B. 439, C. A.; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L. **Mentd.** Colonial Bank of Australasia *v.* Marshall (1906), 22 T. L. R. 746, P. C.

661. Forged promissory note—Notice to supposed maker by discounting bank—Estoppel by conduct.]—W. forged the name of E. & Co. to a promissory note dated Aug. 14, & handed it to the D. Bank on Aug. 15, & the bank on that day gave E. & Co. notice that they had received the note. In the meantime the bank had paid out part of the proceeds to W., & on Aug. 17 all but a trivial amount had been drawn out. The note fell due on Dec. 17. E. & Co., wishing apparently to screen W., did not give the bank any information that the note was forged:—*Held:* there was evidence on which the cts. below might fairly find that E. & Co. were estopped from denying their signature & were liable on the note.—EWING (WILLIAM) & CO. *v.* DOMINION BANK, [1904] A. C. 806; 74 L. J. P. C. 21, P. C.

662. Payment on forged indorsement—On draft—Negligence of true owner—Right to recover.]—A., a foreign merchant, inclosed in a letter a draft directed to W. in England, & placed it in the letter box in his office to be posted in the usual course of business. The draft was stolen therefrom by A.'s clerk, & subsequently presented to defts.' bankers in England by C., with a forged indorsement of W.

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658 i. *Notice of forgery—Silence after receipt of notice—Adoption & estoppel.*]—A person, who knew that his brother-in-law was in the habit of forging his name on bills, received a notice from a bank informing him that a bill was past due on which his name appeared as an obligant, which proved to be also forged by his brother-in-law, but failed to inform the bank that his signature was a forgery for three weeks after receipt of the notice, during which time the forger absconded:—*Held:* he was barred from disputing his liability for the bill.—URQUHART *v.* BANK OF SCOTLAND (1872), 9 Sc. L. R. 508.—**SCOT.**

658 ii. ————————.]—L. forged the signature of B. *per pro.* deft. to two promissory notes, & discounted same with a bank, who were ignorant of the forgery, but knew that B. had deft.'s authority to sign notes. Deft., becoming aware of the forgery, in order to conceal same, at maturity paid them. Afterwards L. forged the signature of M. *per pro.* deft. to another note, which the bank similarly discounted, M. having succeeded B. as deft.'s agent. Before this note had matured deft. discovered the forgery, & immediately notified the bank:—*Held:* deft. was not estopped from denying liability on the note on the ground that it was a forgery.—UNION BANK'S LIQUIDATORS *v.* BEIT (1892), 9 S. C. 109; 2 C. T. R. 67.—**S. AF.**

658 iii. ————————.]—Y., who had been in partnership with defts., but had retired from the firm & become the general manager for defts., with no power to sign drafts, drew a bill of exchange for his own private purposes in the name of defts., which was discounted by pltfs. The bill purported to be indorsed by the firm *per* J. M. Y., one of defts. J. M. Y. called at the bank & examined the bill carefully, & in answer to a request from the manager for a cheque he said he would send a cheque. No cheque was sent, & a few days before the bill matured the manager & solr. of the bank called to see J. M. Y., who admitted that he had promised to send a cheque & at the time he thought he would. In an action against defts. on the bill, the jury found that the signature of J. M. Y. was forged:—*Held:* there could be no ratification of a forgery, & pltfs. had failed to show any injury by reason of the alleged representations, which was an essential element in a claim of estoppel by representation.—MERCHANTS BANK OF CANADA *v.* LUCAS (1890), 18 S. C. R. 704; Cam. Cas. 275.—**CAN.**

660 i. *Alteration in amount—Bonâ fide receipt of payment—Collecting bank not liable.*]—Applts. made a draft upon their branch at M. for $25, without advice to the branch of the fact. The holder altered the amount of the draft to $5,000, & deposited it to his own credit in his banking account with resps. Resps. presented it without delay, & it was paid by the branch at M. without objection. Resps. then paid part of the proceeds to the depositor. Six days afterwards applts. discovered the fraud & demanded back the amount of the forgery:—*Held:* that they could not recover.—UNION BANK OF LOWER CANADA *v.* ONTARIO BANK (1880), 2 L. N. 132; 23 L. C. J. 66; 3 L. N. 386; 24 L. C. J. 309.—**CAN.**

662 i. *Payment on forged endorsement—Bank drawers & drawees—Payment to de facto holder—Bank not liable.*]—E. purchased from defts.' branch at Mauritius a bill of exchange drawn on their bank at Bombay payable on demand to pltf.'s order in Bombay, &

Defts. presented it for C. at the bank where payable, received the proceeds, & with the same opened an account for C. at their bank, of which C. availed herself. At the trial defts. tendered evidence, which was rejected, that it was the custom in similar cases to send a duplicate letter of advice by way of caution so as to prevent fraud :—*Held :* (1) pltfs. were entitled to recover the proceeds of the draft as money received to their use or as damages for conversion ; (2) there was no evidence of negligence on the part of pltfs. sufficient to estop them from recovering & the evidence tendered was properly rejected.—ARNOLD *v.* CHEQUE BANK, ARNOLD *v.* CITY BANK (1876), 1 C. P. D. 578 ; 45 L. J. Q. B. 562 ; 34 L. T. 729 ; 40 J. P. 711 ; 24 W. R. 759.

Annotations :—**Apprvd.** Fine Art Soc. *v.* Union Bank of London (1886), 17 Q. B. D. 705, C. A. **Distd.** Staple of England, etc. *v.* Bank of England (1888), 21 Q. B. D. 160, C. A. **Consd.** McEntire *v.* Potter (1889), 22 Q. B. D. 438 ; Bank of England *v.* Vagliano, [1891] A. C. 107, H. L. ; Scholfield *v.* Londesborough, [1896] A. C. 514, H. L. **Refd.** Keith *v.* Burrows (1876), 1 C. P. D. 722 ; London & South Western Bank *v.* Wentworth (1880), 5 Ex. D. 96 ; Patent Safety Gun Cotton Co. *v.* Wilson (1880), 49 L. J. Q. B. 713, C. A. ; Kleinwort *v.* Comptoir National, D'Escompte De Paris, [1894] 2 Q. B. 157 ; Lacave *v.* Crédit Lyonnais, [1897] 1 Q. B. 148 ; Gordon *v.* London City & Midland Bank, Gordon *v.* Capital & Counties Bank, [1902] 1 K. B. 242, C. A. ; Macbeth *v.* North & South Wales Bank, [1906] 2 K. B. 718 ; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L. **Mentd.** Matthiessen *v.* London & County Bank (1879), 5 C. P. D. 7 ; Nähmaschinen Fabrik (late Frister & Rossman) Act. *v.* Pickford & Lee & Harris (1888), 4 T. L. R. 617 ; Brocklesby *v.* Temperance Bldg. Soc. (1893), 2 R. 594, C. A. ; Bavins *v.* London & South Western Bank (1899), 5 Com. Cas. 1, C. A. ; Macmillan *v.* London Joint Stock Bank, [1917] 2 K. B. 439, C. A.

663. —— Fictitious or non-existing payee—Right to debit acceptor.] — G., a clerk of resps., fraudulently manufactured bills made payable at applt. bank, by forging the signature of V. as drawer & making them payable to V.'s order or to the order of P. & Co., who were both existing persons & actual correspondents of resps. G. fraudulently induced resps. to accept these bills & to sign advice notes requesting applts. to pay them at maturity. G. then forged the indorsement of the persons named as payees & received payment of the bills in cash across the counter, & misappropriated the proceeds :—*Held :* applts. were entitled to debit resps. with the amount so paid.—BANK OF ENGLAND *v.* VAGLIANO BROTHERS, [1891] A. C. 107 ; 60 L. J. Q. B. 145 ; 64 L. T. 353 ; *sub nom.* VAGLIANO *v.* BANK OF ENGLAND, 39 W. R. 657 ; 7 T. L. R. 333 ; 55 J. P. 676, H. L.

Annotations :—**Consd.** Clutton *v.* Attenborough, [1895] 2 Q. B. 707, C. A. **Apld.** Clutton *v.* Attenborough, [1897] A. C. 90, H. L. **Distd.** Vinden *v.* Hughes, [1905] 1 K. B. 795. **Consd.** Macbeth *v.* North & South Wales Bank, [1908] 1 K. B. 13, C. A. **Distd.** North & South Wales Bank *v.* Macbeth, North & South Wales Bank *v.* Irvine, [1908] A. C. 137, H. L. **Consd.** Kepitigalla Rubber Estates *v.* National Bank of India, [1909] 2 K. B. 1010 ; Macmillan *v.* London Joint Stock Bank, [1917] 2 K. B. 439, C. A. **Refd.** Scholfield *v.* Londesborough, [1896] A. C. 514, H. L. ; Lewes Sanitary Steam Laundry Co. *v.* Barclay (1906), 22 T. L. R. 737 ; Macmillan *v.* London Joint Stock Bank, [1917] 1 K. B. 363 ; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L. **Mentd.** Robinson *v.* Canadian Pacific Ry. Co., [1892] A. C. 481, P. C. ; *Re* English Bank of the River Plate, *Ex p.* Bank of Brazil, [1893] 2 Ch. 438 ; *Re* Budgett, Cooper *v.* Adams, [1894] 2 Ch. 557 ; Scholfield *v.* Londesborough, [1895] 1 Q. B. 536, C. A. ; Thames Conservators *v.* Smeed, Dean, [1897] 2 Q. B. 334, C. A. ; Preist *v.* Last (1903), 89 L. T. 33, C. A. ; Holland *v.* Manchester & Liverpool District Banking Co. (1909), 14 Com. Cas. 241 ; Hall *v.* Hayman, [1912] 2 K. B. 5 ; Wimble *v.* Rosenberg, [1913] 3 K. B. 743, C. A. ; Maclaren *v.* A.-G. for Quebec, [1914] A. C. 258, P. C. ; Sanday *v.* British & Foreign Marine Insce., [1915] 2 K. B. 781, C. A. ; MacConnell *v.* Prill (E.), [1916] 2 Ch. 57 ; R. *v.* Kennaway (1916), 86 L. J. K. B. 300, C. C. A.

664. Bill accepted generally—Unauthorised addition making bill payable at bank—Discharge of acceptor.]—A. drew a bill payable to his order, which was accepted by deft., & after it became due A. applied to pltf. to advance money on it. Pltf. objected that the bill was not payable at a banker's, & A. then wrote under defts.' acceptance the words "Payable at Messrs. R. & Co., bankers, London" :—*Held :* the alteration was material & discharged deft., although made after the passing of 1 & 2 Geo. 4, c. 78.—MACINTOSH *v.* HAYDON (1826), Ry. & M. 362.

Annotation :—**Refd.** Burchfield *v.* Moore (1854), 3 E. & B. 683.

Forged bill of lading—Presentment by bank for acceptance—Warranty as to genuineness.]—*See* SHIPPING & NAVIGATION.

SECT. 12.—STATUTORY PROTECTION TO BANKERS PAYING CHEQUES.

SUB-SECT. 1.—BEARER CHEQUES.

See Nos. 667, 681, 685, 686, *post.*

SUB-SECT. 2.—ORDER CHEQUES.

665. Unauthorised indorsement by agent as agent—Payment—Stamp Act, 1853 (c. 59), s. 19.]—An indorsement of a cheque payable to order,

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sent it by registered post to Bombay addressed to pltf. During its transmission it was stolen & was presented by some person to defts.' bank in Bombay bearing a forged endorsement in blank of pltf., & it was paid by the bank. Pltf., as soon as he heard of the loss of the bill, made inquiry at the bank, & was told that the bill had been paid. On being shown the indorsement pltf. pronounced it to be a forgery, & demanded payment of the bill, which the bank refused :—*Held :* defts., as drawers, were discharged by payment to the *de facto* holder who presented it for payment.—SULLEMAN HUSSEIN *v.* NEW ORIENTAL BANK CORPN. (1890), I. L. R. 15 Bom. 267.—**IND.**

a. *Payment on forged draft — Negligence of customer—Customer's right to recover.*]—Pltfs., a banking corpn., with their head office at L. & a branch office at A., opened a current account with defts. & sent them a list of the officers authorised to sign for pltfs., including the name of M., the manager of the A. office. M. had acted on occasions previous to this date as the manager of the L. office. It was the custom of M., when leaving the bank premises for a short time, to leave with the accountant blank drafts & blank letters of advice ready signed by him for use as occasion occurred. Those drafts were not destroyed after his return. On Oct. 2 defts. cashed a draft presented to them for payment for Rs.10,000 purporting to have been signed by M. Defts. had previously received a letter of advice also purporting to have been signed by M. Defts debited pltfs. with the payment. Pltfs. repudiated the draft as a forgery & sued to recover Rs.10,000 from defts. :—*Held :* (1) pltfs. not estopped from contending that the draft was not the draft of pltfs. ; (2) it was not incumbent on pltfs. to contemplate the perpetration of such a crime as forgery or theft, & the negligent act of M. was not the proximate cause of the draft being cashed by defts., & pltfs. entitled to recover.—PANJAB NATIONAL BANK, LTD. *v.* MERCANTILE BANK OF INDIA (1911), I. L. R. 36 Bom. 455.—**IND.**

b. *Payment on forged letter of credit —Liability of bank.*]—The A. Bank in England received money there to be transmitted to B. in Upper Canada, & sent a letter of credit to B. to receive the money at a branch of the bank in Toronto. The letter was taken out of the post office in Canada (B. having in the meantime died) & B.'s name forged on the letter of credit, & the money received by some person unknown :—*Held :* B.'s extrix. entitled to recover the money from the bank in Toronto as money had & received to B.'s use.—GISSING *v.* HOPPER (1843), 6 O. S. 505.—**CAN.**

c. *Payment on forged express order —Liability to refund.*]—Pltfs. paid out money by mistake upon express orders fraudulently issued in their name in favour of A., who had committed forgery to obtain a blank express order book. Defts. cashed one order, which was repaid them by the local office :—*Held :* defts. must pay pltfs.—CANADIAN EXPRESS CO. *v.* O'NEIL CANADIAN EXPRESS CO. *v.* HOME BANK (1909), 14 O. W. R. 287.—**CAN**

PART II. SECT. 12, SUB-SECT. 2.

d. *Unauthorised indorsement — Payment—Stamp Act,* 1853 (*c.* 59), *s.* 19.]—The above sect is inapplicable to British Columbia, & did not come into force by

Sect. 12.—Statutory protection to bankers paying cheques: Sub-sect. 2.]

purporting to be by the agent of the person to whose order the cheque is payable, is, within the above sect., a sufficient authority to the banker to pay the amount of such cheque, though the person who indorsed the cheque had no authority to indorse.

K., an agent of S. & Co., pltfs., having authority to sell goods for them & to receive payment by cash or cheque, but not having authority to indorse cheques, received from defts., in payment for goods supplied, a cheque on their bankers drawn payable to S. & Co., or order. K. indorsed it "S. & Co., *per* K., agent," received the money from the bankers, & misappropriated part of it. The bankers returned the cheque to defts., & the amount was allowed in account by defts.:—*Held:* such payment by the bankers was within the protection of the above sect., & pltfs. could not maintain an action against defts., either for the price of the goods or for the cheque.—CHARLES *v.* BLACKWELL (1877), 2 C. P. D. 151; 46 L. J. Q. B. 368; 36 L. T. 195; 25 W. R. 472, C. A.

Annotation:—**Distd.** Bissell *v.* Fox (1884), 51 L. T. 663.

666. Unauthorised indorsement per procurationem—Customer credited by bank—No inquiry as to customer's authority.]—A commercial traveller received from customers seven cheques, payable to his employer or order. These it was his duty to forward to his employer, & he had no authority to indorse his employer's name thereon, or pay them in to his own account. The traveller indorsed his employer's name *per pro.* on all the cheques, & paid them in to his own account at his bankers. One of the cheques was uncrossed & was drawn upon themselves, & they placed the amount of this at once to the credit of the traveller. The bankers were told by the traveller who his employer was, but they never made any inquiries as to his authority to indorse cheques on behalf of his employer. The traveller having drawn out the amounts absconded, & never accounted to his employer for the amounts:—*Held:* as to the cheque drawn upon themselves, the bankers had paid the cheque, so as to be protected by Bills of Exchange Act, 1882 (c. 61), s. 19.—BISSELL & CO. *v.* FOX BROTHERS & CO. (1885), 53 L. T. 193; 1 T. L. R. 452, C. A.

Annotations:—**Consd.** Gordon *v.* London City & Midland Bank, Gordon *v.* Capital & Counties Bank, [1902] 1 K. B. 242, C. A. **Apld.** Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A. **Refd.** Hannan's Lake View Central *v.* Armstrong (1900), 16 T. L. R. 236.

667. Cheques obtained by fraud—Payable to order of non-existing person — Knowledge of drawer—Recovery from payer.]—By an elaborate system of fraud applts.' clerk obtained cheques drawn by applts. to the order of a non-existing person for work never executed & for goods never supplied. The clerk stole the cheques, forged their indorsements, & paid them to resps. for value. All the cheques were honoured by applts.' bankers. Applts. sued resps. for the amount so paid:—*Held:* applts. were not entitled to recover, as the cheques had been duly "issued" within Bills of Exchange Act, 1882 (c. 61), s. 2, & under s. 7 (3), were payable to bearer & it was not necessary that the payee should be a fictitious or non-existing person to the knowledge of the drawer.—CLUTTON *v.* ATTENBOROUGH & SON, [1897] A. C. 90; 66 L. J. Q. B. 221; 75 L. T. 556; 45 W. R. 276; 13 T. L. R. 114, H. L.

Annotations:—**Consd.** Vinden *v.* Hughes, [1905] 1 K. B. 795; Macbeth *v.* North & South Wales Bank, [1908] 1 K. B. 13, C. A.; North & South Wales Bank *v.* Macbeth, North & South Wales Bank *v.* Irvine, [1908] A. C. 137, H. L.

668. Cheque made to existing person—Indorsement forged by customer—Crediting customer & receiving proceeds—Liability of bank.]—W., by falsely representing to pltf. that he had agreed to purchase from K. certain shares then held by K. in a co., & that he had arranged to resell the shares at a profit, induced pltf. to agree to assist him in financing the transactions. For this purpose pltf. drew a cheque on the C. Bank payable to K. or order for the amount of the purchase-money, which cheque was delivered to W. in order that he might hand it to K. in payment for the shares. W. forged K.'s indorsement to the cheque & paid it in to his own account with defts., who credited him with the amount & collected the money from the C. Bank. W. had not agreed to buy any shares from K., & K. had at the time no shares in the co.:—*Held:* as K. was an existing person designated by pltf. & intended by him to be the payee of the cheque, the payee was not a "fictitious person" within Bills of Exchange Act, 1882 (c. 61), s. 7 (3), & defts. were liable to pay to pltf. the amount of the cheque as damages for the conversion.—NORTH & SOUTH WALES BANK,

virtue of English Law Act. Even if it were brought into force, it was annulled by the repugnant legislation of Bills of Exchange Act, although not mentioned in the repealing schedule to the Act.—HINTON ELECTRIC CO. *v.* BANK OF MONTREAL (1903), 9 B. C. R. 545.—**CAN.**

e. *Forged indorsement — Alleged negligence of bank—Stamp Act,* 1853 (*c.* 59), *s.* 19.]—A plaint alleged that A., pltf., drew a cheque upon a banking co., requiring them to pay to S. & K., or their order, £190 17*s.* 7*d.*, the bank having, at the time, funds of A. to meet same, that L. forged the signature of S. & K. as an indorsement on the back of the cheque, & presented same for payment to the bank, that the forged document was manifestly not in the handwriting of S. & K., or either of them, & was manifestly in the handwriting of L., & that the handwritings of S., K., & L. were well known to the bank, that the bank wrongfully cashed the cheque, & paid the money of pltf., to the amount of £190 17*s.* 7*d.*, to L., & the money was so paid to L. by the gross negligence of the bank:—*Held:* the allegations showed that the instrument was a draft for money payable to order, within the above sect., & that it purported to have been indorsed by S. & K., & the bank was protected.—HARE *v.* COPLAND (1862), 13 I. C. L. R. 426; 7 Ir. Jur. 242.—**IR.**

667 i. *Cheques obtained by fraud — Payable to fictitious or non-existing persons—Indorsements forged by agent — Right to charge principal.*] — N., the assistant superintendent of a life insurance co., as well as sole local agent at one of its branches, sent in to the head office claim papers, filling in the names of fictitious claimants & forging their signatures thereto, whereupon cheques for the respective amounts made by the co. in favour of alleged claimants, & payable at a branch of defts.' bank, were sent to N., whose duty it was, on the receipt, to see the payees & procure discharges from them. The indorsements of the payees' names were forged by N., the genuineness of the signatures on most of the cheques being certified to by his attestation. The cheques were presented to & paid by the bank in good faith, to whom or how did not appear, the amounts thereof being charged to the co.:—*Held:* the cheques must be regarded as payable to fictitious or non-existent persons, & the bank had the right to pay & charge the co. with the amounts.—LONDON LIFE INSURANCE CO. *v.* MOLSONS BANK (1904), 24 C. L. T. Occ. N. 330; 8 O. L. R. 238; 3 O. W. R. 858.—**CAN.**

f. *Forged indorsement — Bill drawn on banker payable to order on demand.*]—Applt., who was about to proceed from England to Sydney, obtained a draft for £30 issued in two parts & payable to his order. He retained the first of exchange in his possession & posted the second of exchange to his own address at the G.P.O., Sydney. The second of exchange was delivered at the G.P.O. to some other person, to whom the £30 was paid by the bank. The thief had presented the draft at the bank, representing himself to be the payee, & in order to prove his identity he was asked to write his signature for the purpose of comparison with a specimen signature of the payee sent to the bank by the drawers, whereupon the thief wrote his name twice on the back of the draft. & an officer of the bank then wrote his name on the draft as authority for its payment:—*Held:* (1) Bills of Exchange Act, 1887 (51 Vict., No. 2), s. 60, protected a banker only when a bill had been negotiated by indorsement before it came to him for payment, & the signature of the thief on the back of the draft did not relieve the bank from its liability to applt.; (2) there was no acceptance within s. 17 & Co.'s Act, 1899 (N.S.W. No. 40), s. 244. *Semble:* negligence *per se* did not disentitle the bank to the protection of s. 60.—SMITH *v.* COMMERCIAL BANKING CO. OF SYDNEY (1910), 11 C. L. R. 667.—**AUS.**

LTD. *v.* MACBETH, NORTH & SOUTH WALES BANK, LTD. *v.* IRVINE, [1908] A. C. 137; 77 L. J. K. B. 464; 98 L. T. 470; 24 T. L. R. 397; 52 Sol. Jo. 353; 13 Com. Cas. 219, H. L.

Annotations:—**Refd.** Crumplin *v.* London Joint Stock Bank (1913), 109 L. T. 856; Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

669. Drawn by branch bank—On head office—Payment by head office on forged indorsement.]—T. & Co. sent to pltfs. in payment for goods a draft drawn by the Madras branch of defts. upon their head office in London. It was in the form of a first & second of exchange, both of which were posted to pltfs. The first of exchange was stolen, pltfs.' indorsement forged to it, & on presentation at defts.' head office it was paid in good faith & in the ordinary course of business. Payment of the second of exchange when presented by pltfs. was refused. Pltfs. sued to recover the amount of the draft:—*Held*: the bankers were not protected by Bills of Exchange Act, 1882 (c. 61), s. 60, or by Stamp Act, 1853 (c. 59), s. 19.—BROWN, BROUGH & CO. *v.* NATIONAL BANK OF INDIA, LTD. (1902), 18 T. L. R. 669; 46 Sol. Jo. 617.

Annotation:—**Refd.** Capital & Counties Bank *v.* Gordon, London City & Midland Bank *v.* Gordon (1903), A. C. 240, H.L.

670. —— —— ——.]—Drafts payable to the order of G. were drawn by a country branch of applts. on their own head office & not crossed. They were paid in for collection to applts. by a customer, who had no title to the drafts & who forged the indorsements. Applts. gave their customer immediate credit for the amounts:—*Held*: these drafts were not cheques within Bills of Exchange Act, 1882 (c. 61), ss. 60, 82, nor were they within Revenue Act, 1883 (c. 55), s. 17, but applts. were protected by Stamp Act, 1852 (c. 59), s. 19, as having paid them *bonâ fide* to a holder claiming under forged indorsements.—CAPITAL & COUNTIES BANK, LTD. *v.* GORDON, LONDON CITY & MIDLAND BANK, LTD. *v.* GORDON, [1903] A. C. 240; 72 L. J. K. B. 451; 88 L. T. 574; 51 W. R. 671; 19 T. L. R. 462; *sub nom.* LONDON CITY & MIDLAND BANK, LTD. *v.* GORDON, CAPITAL & COUNTIES BANK, LTD. *v.* GORDON, 8 Com. Cas. 221, H. L.; *revsg.* on this point, S. C. *sub nom.* GORDON *v.* LONDON, CITY & MIDLAND BANK, GORDON *v.* CAPITAL & COUNTIES BANK, [1902] 1 K. B. 242, C. A.

Annotations:—**Refd.** Brown, Brough *v.* National Bank of India (1902), 18 T L. R. 669. **Mentd.** Akrokerri Mines *v.* Economic Bank, [1904] 2 K. B. 465; Bevan *v.* National Bank, Bevan *v.* Capital & Counties Bank (1906), 23 T. L. R. 65; Jones *v.* Coventry, [1909] 2 K. B. 1029; Holland *v.* Manchester & Liverpool District Banking Co. (1909), 14 Com. Cas. 241; Crumplin *v.* London Joint Stock Bank (1913), 109 L. T. 856; Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A..

Branch banks, generally, *see* Sect. 1, sub-sect. 3, *ante*.

671. Who is customer—Collection for stranger—Defect in title.]—M. drew & posted a cheque on a Louth bank to F. & Co. at Manchester, payable to their order & crossed generally. The cheque, having been stolen, was presented with a forged indorsement upon it purporting to be by F. & Co. to defts.' bank at Leeds, who sent the cheque on the same day to the bank at Louth, to inquire. The Louth bank answered next day that they were ordering payment (through a clearing-house) & subsequently the thief, who had no account with defts. & who was unknown to them, came back & was paid by defts. the amount of the cheque (less 1*s.* for commission), & M. was debited with the amount by the Louth bank in his account with them, they having had to pay the cheque to the true owner:—*Held*: the thief was not a customer of defts. & they were liable for conversion of the cheque.—MATHEWS *v.* BROWN & CO. (1894), 63 L. J. Q. B. 494; *sub nom.* MATTHEWS *v.* BROWN & CO., 10 T. L. R. 386, D. C.

Annotations:—**Refd.** Lacave *v.* Crédit Lyonnais, [1897] 1 Q. B. 148; G. W. Ry. Co. *v.* London & County Banking Co., [1900] 2 Q. B. 464, C. A.

672. —— —— ——.]—Defts. carried on business in London & had a branch in Paris. A cheque was drawn on defts. in London in favour of pltfs. specially indorsed by pltfs. to a firm in London & posted for collection to that firm, but it never reached them. After the posting a forged indorsement was put on the cheque, & it was presented at defts.' bank in Paris by a person, purporting to be the last indorsee, who had no account with defts. Defts. paid the cheque & sent it to their bank in London, who credited their bank in Paris with the value. The London bank refused to deliver the cheque to pltfs. The cheque, when it reached defts., was crossed generally. In an action for conversion of the cheque:—*Held*: (1) defts. by paying the cheque & forwarding it to their London bank, & crediting their Paris bank with the value, were guilty of a conversion of the cheque in England, & were not protected by Bills of Exchange Act, s. 82; (2) the person who obtained payment of the cheque was not a "customer" of defts. within that sect.—LACAVE & CO. *v.* CRÉDIT LYONNAIS, [1897] 1 Q. B. 148; 66 L. J. Q. B. 226; 75 L. T. 514; 13 T. L. R. 60; 2 Com. Cas. 17.

Annotations:—**Distd.** Embiricos *v.* Anglo-Austrian Bank, [1905] 1 K. B. 677, C. A. **Refd.** G. W. Ry. Co. *v.* London & County Banking Co., [1900] 2 Q. B. 464, C. A.; Gordon *v.* London City & Midland Bank, Gordon *v.* Capital & Counties Bank, [1902] 1 K. B. 242, C. A.

673. —— **Person getting cheques cashed—Defect in title—Liability of bank.**]—A person accustomed to get cheques cashed at a bank, but having no account & no entry of debit or credit in any book or paper of the bank, is not a "customer" within Bills of Exchange Act, 1882, s. 82; & where a bank gives cash to such person for a cheque obtained by fraud & marked "Not negotiable," & the cheque is honoured, the bank must refund the amount thereof to the drawer, its title being no better than that of the person for whom the cheque was cashed.—GREAT WESTERN RY. CO. *v.* LONDON & COUNTY BANKING CO., LTD., [1901] A. C. 414; 70 L. J. K. B. 915; 85 L. T. 152; 50 W. R. 50; 17 T. L. R. 700; 45 Sol. Jo. 690; 6 Com. Cas. 275, H. L.

Annotations:—**Consd.** Gordon *v.* London City & Midland Bank, Gordon *v.* Capital & Counties Bank, [1902] 1 K. B. 242, C. A. **Refd.** Capital & Counties Bank *v.* Gordon, London City & Midland Bank *v.* Gordon, [1903] A. C. 240, H. L.; Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A. **Mentd.** Crumplin *v.* London Joint Stock Bank (1913), 19 Com. Cas. 69.

674. —— **Stranger opening account with cheque crossed "account payee"—Defect in title.**]—A cheque drawn in favour of J. & crossed "account payee only" was stolen & produced to deft. by a young man, who stated that he was J. & the payee of the cheque. He paid 10*s.* 6*d.* to have the cheque specially cleared & stated that it was given him in respect of a betting transaction, & he did not wish it to appear in his banking account at Oxford. The young man was well-dressed & well-spoken. Deft. accepted the young man's explanation & opened an account, but told him he would not be able to draw on it until the cheque was cleared. The young man signed his name in the signature book of the bank, & deft. compared it with the indorsement on the cheque, which had been forged. The cheque was cleared & the money subsequently paid out to the young man:—*Held*: (1) the pretended man J. was a customer when he handed the cheque to deft.; (2) deft. was guilty of negligence in opening an account with a cheque marked

Sect. 12.—*Statutory protection to bankers paying cheques: Sub-sects.* 2 & 3.]

"account payee" without making any inquiries.—LADBROKE & Co. *v.* TODD (1914), 111 L. T. 43; 30 T. L. R. 433; 19 Com. Cas. 256.

675. What is payment for customer — Account overdrawn.] — Where a crossed cheque is delivered to a banker by a customer for collection, & the banker receives payment of it & places the amount to the customer's account, the fact that the customer's account is overdrawn at the time does not make such receipt of payment by the banker any the less a receipt of payment for the customer within Bills of Exchange Act, 1882 (c. 61), s. 82, or disentitle the banker to the protection of that sect.—CLARKE *v.* LONDON & COUNTY BANKING Co., [1897] 1 Q. B. 552; 66 L. J. Q. B. 354; 76 L. T. 293; 45 W. R. 383; 41 Sol. Jo. 352, D. C.

Annotations:—**Consd.** Gordon *v.* London City & Midland Bank, Gordon *v.* Capital & Counties Bank, [1902] 1 K. B. 242, C. A. **Refd.** G. W. Ry. Co. *v.* London & County Banking Co., [1901] A. C. 414, H. L.

676. —— Forged indorsement—Crossing by collecting bank.] — Bankers are protected by Bills of Exchange Act, 1882, s. 82, only where they receive payment of a crossed cheque as agents for collection for a customer. They are not so protected when they receive payment as holders of the cheque on their own account.

Applt. banks credited a customer, who had stolen cheques & forged the indorsements, with the amounts of the cheques as soon as they were handed in to his account & allowed him to draw against the amounts so credited before the cheques were cleared:—*Held:* they were not protected by s. 82, & the protection given by s. 82 applied only to cheques crossed before they were received by the bankers.—CAPITAL & COUNTIES BANK, LTD. *v.* GORDON, LONDON CITY & MIDLAND BANK, LTD. *v.* GORDON, [1903] A. C. 240; 72 L. J. K. B. 451; 88 L. T. 574; 51 W. R. 671; 19 T. L. R. 462; *sub nom.* LONDON CITY & MIDLAND BANK, LTD. *v.* GORDON, CAPITAL & COUNTIES BANK, LTD. *v.* GORDON, 8 Com. Cas. 221, H. L.; affg. S. C. *sub nom.* GORDON *v.* LONDON CITY & MIDLAND BANK, GORDON *v.* CAPITAL & COUNTIES BANK, [1902] 1 K. B. 242, C. A.

Annotations:—**Apld.** Brown, Brough *v.* National Bank of India (1902), 18 T. L. R. 669; Bevan *v.* National Bank, Bevan *v.* Capital & Counties Bank (1906), 23 T. L. R. 65. **Refd.** Akrokerri Mines *v.* Economic Bank, [1904] 2 K. B. 465; Jones *v.* Coventry, [1909] 2 K. B. 1029. **Mentd.** Holland *v.* Manchester & Liverpool District Banking Co. (1909), 14 Com. Cas. 241; Crumplin *v.* London Joint Stock Bank (1913), 109 L. T. 856; Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

677. —— —— ——.] — Defts., bankers, received from their customer cheques crossed generally. These they crossed specially to other bankers, adding words directing payment to their own account. They then entered the amounts of the cheques to the credit of their customer in their own books, but not in his pass-book. They did not themselves present the cheques for payment, but handed them to the bankers to whom they had specially crossed them, who cleared the cheques, credited defts.' account with the amount, & informed defts. that they had done so. Defts. then entered the amounts of the cheques in their customer's pass-book, & allowed him to draw against them:—*Held:* they had merely received payment for a customer within Bills of Exchange Act, 1882, s. 82, & were protected by that enactment, although their customer, having forged the indorsements, had no title to the cheques.—AKROKERRI (ATLANTIC) MINES, LTD. *v.* ECONOMIC BANK, [1904] 2 K. B. 465; 73 L. J. K. B. 742; 91 L. T. 175; 52 W. R. 670; 20 T. L. R. 564; 48 Sol. Jo. 545; 9 Com. Cas. 281.

Annotation:—**Refd.** Bevan *v.* National Bank, Bevan *v.* Capital & Counties Bank (1906), 23 T. L. R. 65.

678. —— Crediting pass book before clearance—Receipt of payment for customer—Crossed "Account payee"—Banker.]—A banker does not lose the protection of Bills of Exchange Act, 1882, s. 82, merely because, before a crossed cheque paid in by a customer is cleared, he makes a credit entry in the bank's books or in the pass-book not communicated to the customer. It may be negligence on the part of a banker to receive payment for a customer of a crossed cheque marked "account of payee," where the banker has information which may lead him to think that the account into which he is paying the amount of the cheque is not the payee's account.—BEVAN *v.* NATIONAL BANK, LTD., BEVAN *v.* CAPITAL & COUNTIES BANK, LTD. (1906), 23 T. L. R. 65.

Annotation:—**Refd.** Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

679. —— Cheque obtained by false pretences — Liability to true owner.] — A. obtained a cheque by false pretences & had a voidable title to it. He brought it to defts. intending, if it should be cleared, to open an account with it. At the time of its collection, A.'s title to the cheque had not been avoided:—*Held:* the bank were protected by Bills of Exchange Act, 1882, s. 82. *Semble:* a prospective customer, bringing a third party's cheque to open an account, is a customer within the sect.—TATE *v.* WILTS & DORSET BANK (1899), Journal of Institute of Bankers, Vol. XX., p. 376.

680. Crossed in blank—Bonâ fide receipt of payment—Defect in customer's title.]—*Held:* Crossed Cheques Act, 1876 (c. 81), s. 12, exonerated a banker from all liability to the true owner of a cheque crossed in blank,—that is, with the words "& company" or an abbreviation thereof between two parallel transverse lines, or two parallel transverse lines simply, but without the words "not negotiable,"—where the banker had *bonâ fide*, in the usual course of business, & without negligence, received payment of it for a customer, notwithstanding any defect in the title of the latter, whether by reason of a forgery of the indorsement or otherwise.—MATTHIESSEN *v.* LONDON & COUNTY BANK (1879), 5 C. P. D. 7; 48 L. J. Q. B. 529; 41 L. T. 35; 43 J. P. 560; 27 W. R. 838.

Annotations:—**Distd.** Bissell *v.* Fox (1884), Cab. & El. 395. **Consd.** Gordon *v.* London City & Midland Bank, Gordon *v.* Capital & Counties Bank, [1902] 1 K. B. 242, C. A. **Refd.** G. W. Ry. Co. *v.* London & County Banking Co., [1901] A. C. 414, H. L.

See, now, Bills of Exchange Act, 1882 (c. 61), s. 82.

SUB-SECT. 3.—CROSSED CHEQUES.

681. What is negligence — Cheque crossed by drawer—Additional crossing by holder—Payment to collecting bank of holder.]—The crossing of a cheque payable to bearer with the name of a banker, whether made by the drawer or the bearer, does not restrict the negotiability of the cheque to such banker, or to a banker only; but is a mere memorandum that the holder is to present it for payment through some banker. Such crossing is made as a protection to the owner of the cheque; & the payment of a crossed cheque otherwise than through a banker would be strong evidence of negligence, if the party presenting the cheque proved not to be the lawful owner of it.

In an action against a banker for money lent,

to which deft. pleaded payment, it appeared that pltf. had drawn on deft. a cheque & crossed it thus: "Bank of England, for account of the Accountant-General." A party to whom this cheque was given struck out the crossing by running a pen through it, leaving it however perfectly legible, & crossed the cheque a second time with the name of his own bankers, G. & Co., & paid it into their bank to the credit of his own account. The cheque, being presented by them for payment, was paid by deft., who charged it to the debit of pltf.'s account. The money was placed by G. & Co. to the credit of their principal in his account with them, & he converted the money to his own use. It appeared that the Accountant-General would not receive payment by cheque unless drawn on the Bank of England:—*Held:* the circumstance of the cheque being thus doubly crossed afforded no additional evidence of negligence against deft.—BELLAMY *v.* MARJORIBANKS (1852), 7 Exch. 389; 21 L. J. Ex. 70; 18 L. T. O. S. 277; 16 Jur. 106; 155 E. R. 999.

Annotations:—**Consd.** Carlon *v.* Ireland (1856), 5 E. & B. 765; Smith *v.* Union Bank of London (1875), 1 Q. B. D. 31, C. A.; Matthiessen *v.* London & County Bank (1879), 5 C. P. D. 7. **Refd.** Simmons *v.* Taylor (1857), 2 C. B. N. S. 528. **Mentd.** Leese *v.* Martin (1873), L. R. 17 Eq. 224; National Bank *v.* Silke (1890), 63 L. T. 787, C. A.

682. —— Erasure of crossing by holder—Crossing not apparent at time of presentment.]—If the crossing on a cheque crossed by the drawer is erased by a subsequent holder, the banker on whom it is drawn is justified in paying it, though it be not presented through another banker, for 19 & 20 Vict. c. 25 gives the crossing the force of a direction to the banker to pay through another banker only when the cheque bears the crossing upon its face at the time the cheque is presented for payment.—SIMMONS *v.* TAYLOR (1858), 4 C. B. N. S. 463; 27 L. J. C. P. 248; 30 L. T. O. S. 242; 4 Jur. N. S. 412; 6 W. R. 548; 140 E. R. 1165, Ex. Ch.

Annotations:—**Consd.** Smith *v.* Union Bank of London (1875), 1 Q. B. D. 31, C. A.; Suffell *v.* Bank of England (1882), 9 Q. B. D. 555, C. A.

683. —— Cheque crossed by payee — Receipt of payment by bonâ fide holder.] — The payee of a cheque drawn on defts., payable to him or his order, indorsed his name on it, & crossed it with two lines & the name of his bankers, the L. & C. Bank. The cheque was stolen, & ultimately came into the hands of a *bonâ fide* holder for value, who paid it to his bankers, the L. & W. Bank. They presented it to defts., who, notwithstanding the crossing, paid the amount. In an action by the payee to recover the amount from defts.:—*Held:* although by 21 & 22 Vict. c. 79, s. 2, defts. were bound to pay only through the L. & C. Bank, yet as pltf. had ceased to be holder of the cheque, he could not recover either for the breach by defts. of the duty created by the stat., or on an allegation that they had converted the cheque.—SMITH *v.* UNION BANK OF LONDON (1875), 1 Q. B. D. 31; 45 L. J. Q. B. 149; 33 L. T. 557; 24 W. R. 194, C. A.

Annotations:—**Mentd.** *Re* Plumbly, *Ex p.* Grant (1880), 13 Ch. D. 667, C. A. National Bank *v.* Silke (1890), 63 L. T. 787, C. A.

684. —— Giving customer immediate credit—Unauthorised indorsement per procurationem — No inquiry as to authority.] — Pltfs. employed a traveller, who was to remit all cash, bills, & cheques to pltfs. every week. The traveller afterwards opened an account at defts.' bank, & paid into this account, without the sanction or knowledge of pltfs., seven cheques received by him on account of pltfs., & payable to pltfs. or order. These cheques were indorsed by the traveller "*per pro.* B. & Co. S." without authority. Defts., without inquiry as to the traveller's authority to indorse, & with knowledge of his position, received the cheques as cash, & placed them at once to the traveller's credit. Six of these cheques were drawn on other bankers than defts., three of these being crossed "& Co." when received by them, & three being uncrossed. These six cheques were crossed by defts. with the name of their London agents for collection. The traveller afterwards absconded with the proceeds of the cheques. In an action by pltfs. to recover the proceeds of the cheques:—*Held:* defts. were not protected by Bills of Exchange Act, 1882, s. 82, because they had not received payment "without negligence."—BISSELL & CO. *v.* FOX BROTHERS & CO. (1885), 53 L. T. 193; 1 T. L. R. 452, C. A.

Annotations:—**Consd.** Gordon *v.* London City & Midland Bank, Gordon *v.* Capital & Counties Bank, [1902] 1 K. B. 242, C. A. **Refd.** Hannan's Lake View Central *v.* Armstrong (1900), 5 Com. Cas. 188; Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

See, now, Bills of Exchange (Crossed Cheques) Act, 1906 (c. 17).

685. —— Death of payee—Cheque paid into account of customer & not payee.] — Pltfs. drew a cheque for £800 on the S. Bank payable to "F. S. H. Esq. & others or Bearer" & crossed "account payee," & sent the cheque to N., a solr. F. S. H. had died before the cheque was issued. N. paid the cheque to defts., who collected it for him & credited his account with the proceeds. N. drew out the money & absconded:—*Held:* defts. were put on inquiry as to the customer's authority to receive payment on his own account of a cheque so drawn, & having made no inquiry, were guilty of conversion.—HOUSE PROPERTY CO. OF LONDON *v.* LONDON COUNTY & WESTMINSTER BANK (1915), 84 L. J. K. B. 1846; 113 L. T. 817; 31 T. L. R. 479.

686. —— Defective title of customer — Receipt of payment for customer — Remittance after receipt.] — T., a cattle dealer, sold cattle & received in payment three cheques which were sent to S. at Hamburg. In due course the cheques were sent over to defts. for collection on June 24, 1886. They were all drawn on the J. S. Bank in favour of T. or bearer, & crossed, & were dated June 17. Defts. at once indorsed them, & sent one of their clerks to present them for payment, but they were dishonoured, & when they were presented for payment at the offices of the drawers they all refused to pay them, their reason being that between the time of giving them to T. & their presentation they had discovered that T. had perpetrated a fraud upon them in the matter of the cattle. This fact was not known at this date by defts. On June 30 O., the agent of S., sent the cheques back to defts., with a request that they would take steps to enforce their payment, stating that S. & the second indorsers had paid value for them. On July 2 defts. wrote to O. requesting that he would have the cheques indorsed to them & the existing indorsements cancelled. This was done, & defts. obtained payment from the drawers, & on Nov. 1 paid the proceeds over to O. T. had been made a bkpt. on June 22. In an action by the trustee to recover the proceeds of such cheques evidence was given that it was the ordinary custom among London bankers, when collecting cheques from abroad, in cases of such being dishonoured at once to send them back, & that it would be a most unusual thing to have them re-indorsed to themselves for the purpose of putting them in a position legally to enforce payment, & so collect the proceeds:—*Held:* the manner in which defts. had collected the cheques was most unusual & quite out of the ordinary custom of London bankers, & they had no right to pay the money over to O. as they

Sect. 12.—*Statutory protection to bankers paying cheques: Sub-sects.* 3 *&* 4. *Sect.* 13: *Sub-sect.* 1.]

had, & pltf. was entitled to judgment.—GILLESPIE *v.* INTERNATIONAL BANK OF LONDON, LTD. (1888), 4 T. L. R. 322.

687. —— —— Knowledge of bank.]—A cheque for £542 was drawn in favour of pltfs., or order, & crossed generally. Pltfs.' secretary, M., indorsed the cheque with the name of pltfs., followed by his own name, & the word "secretary," &, without the authority of pltfs., paid the cheque into his account at defts.' bank for collection. Defts. knew that pltfs. had an account of their own at another London bank & that M. was their secretary. M. had never previously paid into his own account a cheque drawn in favour of pltfs. Defts., without making any inquiry as to M.'s authority to deal with the cheque, placed the amount to his credit, & collected the proceeds from the paying bank:—*Held:* defts. had not acted without negligence, & were liable to pltfs. for the amount of the cheque.

The words "without any negligence" mean without want of reasonable care in reference to the interests of the true owner, the principal whose authority the customer purports to have (KENNEDY, J.).—HANNAN'S LAKE VIEW CENTRAL, LTD. *v.* ARMSTRONG & CO. (1900), 16 T. L. R. 236; 5 Com. Cas. 188.

Annotation:—**Refd.** Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

688. —— —— Forged indorsement.] — Defts. specially collected for their customer, A., three cheques drawn by pltf. which were crossed & marked not negotiable & were payable respectively to the order of V., W., & K. The cheques had been stolen in the post before they reached the payees. The indorsements were forged, & two of them were in the same handwriting, although the payees were different persons:—*Held:* defts. had been guilty of negligence & pltf. was entitled to recover the value of the cheques.—TURNER *v.* LONDON & PROVINCIAL BANK, LTD. (1903), Journal of Institute of Bankers, Vol. XXIV., p. 220.

689. —— —— Cheques signed per procurationem.] — A series of cheques crossed "not negotiable" & drawn in favour of a person other than the customer was paid by the customer into his banking account with defts., the indorsements being forged. Two of the cheques were signed "*per pro.*" pltf. by a person having authority to draw cheques for him:—*Held:* (1) the fact that the cheques were crossed "not negotiable" & drawn in favour of a person other than the customer did not impose an obligation on defts. to make inquiry so as to make them negligent in receiving the cheques & crediting their customer's account therewith; (2) the fact that some of the cheques were signed "*per pro.*" pltf. merely operated as a notice that the drawer of the cheques had a limited right to sign them.—CRUMPLIN *v.* LONDON JOINT STOCK BANK, LTD. (1913), 109 L. T. 856; 30 T. L. R. 99; 19 Com. Cas. 69.

690. —— —— —— Fraud of agent — Acquiescence of principal.] — Pltf. authorised A. to draw cheques for the purposes of his business on the banking account of B. M. & Co., & to sign them in his (A.'s) name "*per pro.* B. M. & Co."; & he gave directions to his bankers to honour cheques so drawn. A. opened a private banking account with defts. without pltf.'s knowledge & from May, 1907, to Nov., 1911, paid into that account fifty cheques, which he had drawn &, when necessary, indorsed by means of the "*per pro.*" signature in fraud of pltf. They were collected by defts. & the proceeds credited to A.'s account. Two were open cheques; the others were crossed generally or specially. Pltf. discovered the frauds in 1912. One of the cheques was made payable to defts. or order & indorsed by their manager:—*Held:* (1) in regard to crossed cheques collected after the first year or two, defts., having during one or two years collected cheques for A. without any protest from pltf., were justified in assuming that A. was acting within his authority & were protected by Bills of Exchange Act, 1882 (c. 61), s. 82, as having acted without negligence; (2) upon the facts, in regard to cheques collected during the first year or two defts. were not liable because pltf. had subsequently, either himself or through his accountants, ratified the acts of A.; (3) it was no objection that the bank were the nominal payees of one of the cheques.—MORISON *v.* LONDON COUNTY & WESTMINSTER BANK, LTD., [1914] 3 K. B. 356; 83 L. J. K. B. 1202; 111 L. T. 114; 30 T. L. R. 481; 58 Sol. Jo. 453; 19 Com. Cas. 273, C. A.

Annotations:—**Refd.** Crumplin *v.* London Joint Stock Bank (1913), 19 Com. Cas. 69. **Mentd.** John *v.* Dodwell, [1918] A. C. 563, P. C.

691. —— —— Collection for stranger.] — A crossed cheque drawn on a London bank & specially indorsed to pltfs. by the payee was posted at Barcelona to them at Paris. Pltfs. were the bankers of the payee. In the course of transmission to Paris the cheque was stolen. Four days after it was posted a stranger produced the cheque at defts.' bank at Paris, & requested them to forward it to London for collection there from the London bank. The cheque at that time bore the stranger's name as special indorsee in place of that of pltfs., which had been obliterated & also bore the indorsement of the stranger. Defts. forwarded the cheque to their agents in London for collection, &, on receiving a telegram from the agents that the cheque had been honoured, paid the amount to the stranger in Paris. Defts. made a charge for the transaction:—*Held:* (1) by the indorsement & posting of the cheque pltfs. acquired a good title to it, & could maintain an action in their own names against a wrong-doer or person without title; (2) there had been a conversion in London by defts. when the amount of the cheque was received from the London bankers on whom it was drawn, & pltfs. were entitled to recover from defts. the amount of the cheque.—KLEINWORT, SONS & CO. *v.* COMPTOIR NATIONAL D'ESCOMPTE DE PARIS, [1894] 2 Q. B. 157; 63 L. J. Q. B. 674; 10 T. L. R. 424; 10 R. 259.

Annotations:—**Folld.** Lacave *v.* Crédit Lyonnais, [1897] 1 Q. B. 148. **Consd.** Gordon *v.* London City & Midland Bank, Gordon *v.* Capital & Counties Bank (1900), 83 L. T. 762. **Mentd.** Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

692. —— Discounting for stranger — Forged indorsement.]—A crossed cheque, drawn on London bankers, payable to order of W. on demand, was sent by post to W. at Liverpool. It was lost or stolen in its transit. W. telegraphed its non-arrival to the drawer, who did not stop payment. The cheque was presented to a banker & money-changer at Liverpool to be cashed, with W.'s name indorsed, & the banker, after some questions, agreed to cash it, & told the person who brought it to call in a day or two for the money. The cheque was then forwarded to London & duly honoured. The Liverpool banker then handed over the money, less commission, to the person who brought him the cheque. It turned out that the indorsement of W.'s name was a forgery:—*Held:* although the London bankers were protected against the forged indorsement of W.'s name by Stamp Act, 1853 (c. 59), s. 19, the Liverpool banker who discounted it was not, & pltf. might recover the amount from him, he having received the amount & paid it away without lawful authority.—OGDEN *v.* BENAS (1874), L. R. 9 C. P.

513; 43 L. J. C. P. 259; 30 L. T. 683; 38 J. P. 519; 22 W. R. 805.

Annotations:—**Consd.** Matthiessen *v.* London & County Bank (1879), 5 C. P. D. 7; McEntire *v.* Potter (1889), 22 Q. B. D. 438. **Refd.** Arnold *v.* Cheque Bank, Arnold *v.* City Bank (1876), 1 C. P. D. 578; Robbett *v.* Pinkett (1876), 1 Ex. D. 368; Bissell *v.* Fox (1884), Cab. & El. 395; Macbeth *v.* North & South Wales Bank, [1906] 2 K. B. 718; Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

SUB-SECT. 4.—PAYMENT OF ORDERS WITH RECEIPT ATTACHED.

693. Conditional on payee signing receipt—Customer credited—Defect in customer's title—Conversion.]—Defts., a bank, received for collection for a customer an order in the following form: "Pay to J. Bavins, junr., & Sims the sum of £69 7*s.* 0*d.* provided the receipt form at foot hereof is duly signed, stamped, & dated. Received the above-named sum as *per* particulars furnished. This receipt is not to be detached from the cheque." The document was the property of pltfs. & had been stolen from them. An indorsement, appearing to be "J. Bavins, Trench & Sims," had been forged thereon & the receipt was signed in the same way. Defts. collected the sum mentioned in the document from the paying bank & credited their customer therewith:—*Held:* the document not being an unconditional order to pay, was not a cheque within Bills of Exchange Act, 1882, s. 82, & defts. had been guilty of negligence in dealing with the document, inasmuch as the name of the payees was incorrectly given in the indorsement & receipt, & defts. were not protected from liability by s. 82, as amended, & applied to such documents by Revenue Act, 1883 (c. 55), s. 17, even assuming the latter Act applied to such a document.—BAVINS, JUNR. & SIMS *v.* LONDON & SOUTH WESTERN BANK, [1900] 1 Q. B. 270; 69 L. J. Q. B. 164; 81 L. T. 655; 48 W. R. 210; 16 T. L. R. 61; 5 Com. Cas. 1, C. A.

Annotation:—**Mentd.** Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

694. ——— ——— ——— ———.]—Orders addressed to a bank other than the collecting bank for the payment of money to G., conditional on the signature & presentation of a subjoined receipt, & crossed when received by the collecting bank, were paid in for collection by a customer, who had no title to the orders & who forgot the indorsements. The collecting bank gave their customer immediate credit for the amounts:—*Held:* the collecting bank were liable for conversion & were not protected either by Bills of Exchange Act, 1882, s. 82, or by Revenue Act, 1883, s. 17, or Stamp Act, 1853 (c. 59), s. 19.—CAPITAL & COUNTIES BANK, LTD. *v.* GORDON, LONDON CITY & MIDLAND BANK, LTD. *v.* GORDON, [1903] A. C. 240; 72 L. J. K. B. 451; 88 L. T. 574; 51 W. R. 671; 19 T. L. R. 462; *sub nom.* LONDON CITY & MIDLAND BANK, LTD. *v.* GORDON, CAPITAL & COUNTIES BANK, LTD. *v.* GORDON, 8 Com Cas. 221, H. L.; *affg.* on this point S. C. *sub nom.* GORDON *v.* LONDON, CITY & MIDLAND BANK, GORDON *v.* CAPITAL & COUNTIES BANK, [1902] 1 K. B. 242, C. A.

Annotations:—**Mentd.** Brown, Brough *v.* National Bank of India (1902), 18 T. L. R. 669; Akrokerri Mines *v.* Economic Bank, [1904] 2 K. B. 465; Bevan *v.* National Bank, Bevan *v.* Capital & Counties Bank (1906), 23 T. L. R. 65; Holland *v.* Manchester & Liverpool District Banking Co. (1909), 14 Com. Cas. 241; Jones *v.* Coventry, [1909] 2 K. B. 1029; Crumplin *v.* London Joint Stock Bank (1913), 109 L. T. 856; Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

695. ——— **Condition not addressed to bank—Negotiability.**]—A cheque had printed at the foot thereof the words "The receipt at the back hereof must be signed, which signature will be taken as an indorsement of the cheque." On the back was printed "Received from H., liquidator of O., Limited, this cheque for £ , being my share of the second & final bonus distribution of the co.":—*Held:* the cheque was a negotiable instrument notwithstanding the words printed at the foot, as the order to pay to the bankers was unconditional, the words at the foot not being addressed to them.—NATHAN *v.* OGDENS, LTD. (1905), 93 L. T. 553; 21 T. L. R. 775; *affd.* without reference to this point, 94 L. T. 126, C. A.

Annotation:—**Apprvd.** Roberts *v.* Marsh, [1915] 1 K. B. 42, C. A.

SECT. 13.—**THE PASS-BOOK.**

SUB-SECT. 1.—IN GENERAL.

696. Passing to & fro of—Account stated.]—*Semble:* the passing to & fro of the pass-book is evidence of a stated & settled account.—BLACKBURN BUILDING SOCIETY *v.* CUNLIFFE, BROOKS & CO. (1882), 22 Ch. D. 61; 52 L. J. Ch. 92; 48 L. T. 33; 31 W. R. 98, C. A.; *affd.* on another point, *sub nom.* BROOKS & CO. *v.* BLACKBURN BENEFIT SOCIETY (1884), 9 App. Cas. 857, H. L.

Annotations:—**Mentd.** *Re* Guardian Permanent Benefit Bldg. Soc. (1882), 23 Ch. D. 444, n.; Wenlock *v.* River Dee Co. (1883), 36 Ch. D. 675, n., C. A.; Small *v.* Smith (1884), 10 App. Cas. 119, H. L.; Walton *v.* Edge (1884), 10 App. Cas. 33, H. L.; Redman *v.* Rymer (1889), 60 L. T. 385; *Re* East & West India Dock Co. (1891), 7 T. L. R. 623; General Auction Estate & Monetary Co. *v.* Smith, [1891] 3 Ch. 432; Portsea Island Bldg. Soc. *v.* Barclay, [1895] 2 Ch. 298, C. A.; *Re* Wrexham, Mold & Connah's Quay Ry. Co., [1899] 1 Ch. 440, C. A.; *Re* Johnston Foreign Patents, [1904] 2 Ch. 234, C. A.; A.-G. *v.* De Winton, [1906] 2 Ch. 106; Bannatyne *v.* MacIver, [1906] 1 K. B. 103, C. A.; *Re* Birkbeck Permanent Benefit Bldg. Soc., [1912] 2 Ch. 183, C. A.; Reversion Fund & Insce. *v.* Maison Cosway, [1913] 1 K. B. 364, C. A.; Sinclair *v.* Brougham (1914), 83 L. J. Ch. 465, H. L.

697. Balance stated in—Bankers also treasurers of building society—Settled account.]—Where treasurers of a building society are also its bankers & keep a regular pass-book, which passes to & fro between the bank & the society, there is nothing to prevent it from being treated as a settled account.—MOYE *v.* SPARROW (1870), 22 L. T. 154; 18 W. R. 400.

Annotations:—**Mentd.** Hill's Case, Jones' Case (1870). L. R. 9 Eq. 605; Davis' Case (1871), L. R. 12 Eq. 516; Portsea Island Bldg. Soc. *v.* Barclay, [1894] 3 Ch. 86.

698. ——— **Lunacy of customer—Account continued with customer's family—Account stated with lunatic.**]—A. kept cash with B., a banker, & the balances to his credit were stated from time to time in a pass-book. A. became a lunatic, but the account continued to be kept with his family, & in the pass-book, the entries in which were in B.'s handwriting, a balance was stated to the credit of A.:—*Held:* this was not evidence to support a count on an account stated with A., in an action brought by his representative against B., to recover the amount of such balance.—TARBUCK *v.* BISPHAM (1836), 2 M. & W. 2; 6 L. J. Ex. 49; 150 E. R. 643.

699. Entries in—When primâ facie evidence against banker & customer.]—Statements in the

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PART II. SECT. 13, SUB-SECT. 1.

699 i. *Entries in—When primâ facie evidence against banker & customer.*]—Entries in a customer's pass-book of sums paid into the bank, duly initialled by a bank official, are *primâ facie* evidence against the bank that the money had been paid in.

The law agent & factor of a trust was also agent of a branch bank with which the trustees had a current account, & was authorised by them to operate on the account. After some years he absconded. It was then found that

pass-book are *primâ facie* evidence against the banker & also against the customer where the pass-book has been in his custody.—HOLLAND *v.* MANCHESTER & LIVERPOOL DISTRICT BANKING CO., LTD. (1909), 25 T. L. R. 386; 14 Com. Cas. 241.

700. Entries on one side only—Pass-book kept by customer without objection—Settled accounts.]—A pass-book delivered to a customer, in which there are entries on one side only, is not evidence of a settled account between the banker & the customer, although the customer keeps the book without making any objection to the entries in it.—*Re* HOBSON, *Ex p.* RANDLESON (1833), 2 Deac. & Ch. 534, Ct. of R.

701. Returned without objection—Customer debited with forgeries—Estoppel.]—Pltf. sued to recover over £500, being the aggregate amount of about twenty-five forged cheques paid by defts. between Sept. 27, 1887, & Aug. 20, 1888. The cheques in question were forged by N., a confidential clerk of pltf. It was the practice of pltf. to have his pass-book in once a week or a fortnight. On these occasions he went through the pass-book with the assistance of N., who read out entries or what purported to be entries from a ledger. Pltf. ticked each item in the pass-book, including those which referred to the forged cheques. Pltf. never looked at the returned cheques, & the forged cheques were apparently abstracted from the pass-book before it reached pltf.'s hands. The pass-book was returned periodically to defts., who continued to pay similar forgeries. There was no evidence that defts. had in fact been misled by the ticks:—*Held:* pltf. entitled to judgment.—CHATTERTON *v.* LONDON COUNTY BANK (1891), *Times*, Jan. 21.

Annotation:—**Apld.** Kepitigalla Rubber Estates *v.* National Bank of India, [1909] 2 K. B. 1010.

702. Title in—Account in name of one partner—Ownership of funds by both partners.]—The form of the heading of a pass-book is evidence that the contract was intended to be with the customer named, but it is not conclusive. C. & F. carried on business in partnership as B. Coal Co., but that fact was not known to defts., bankers. F. had an account with defts. & the pass-book was headed "F. B. C. C." Moneys belonging to the co. were paid into this account from time to time. In an action by C. & F. for money lent, etc., pltfs. were nonsuited, on the ground that there was no evidence of a joint contract:—*Held:* there was evidence to go to the jury that F. opened the account for both pltfs.—COOKE *v.* SEELEY (1848), 2 Exch. 746; 17 L. J. Ex. 286; 154 E. R. 691.

Annotation:—**Mentd.** Alliance Bank *v.* Kearsley (1871), L. R. 6 C. P. 433.

703. Receipt & return by customer—Entries debiting forged bills—Negligence of customer.]—A clerk of resps. from time to time forged bills of exchange purporting to be drawn by V. to the order of P. as payee, & by fraud obtained the genuine acceptances of resps. to these documents. He forged the indorsement of P. as payee, & obtained payment from applts. across the counter. The amounts paid in respect of the forged bills were debited to resps. in their pass-book & the forged bills were returned to & retained by them. It was apparent on the face of the returned bills that they had been paid over the counter. On each occasion when forged bills reached the bank for payment

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four entries in the trustees' pass-book of sums paid in had no corresponding entries in the bank ledger. All the entries in the pass-book were initialled by the agent himself, & not by the bank teller, as was the usual course with such entries, & two of the four entries had also the forged initials of the bank cheque clerk. The other, like the rest of the entries, had only the initials of the agent, who kept the pass-book in his custody. The agent had also annually signed dockets in the bank ledger as "factor," certifying the correctness of the balance as appearing in the bank ledger. In an action by the trustees against the bank for payment of the sums as entered in their pass-book:—*Held:* the money had never been paid into the bank, &, consequently, that the bank were not liable.—DOLLAR OR COUPER (COUPER'S TRUSTEES) *v.* NATIONAL BANK (1889), 16 R. (Ct. of Sess.) 412.—**SCOT.**

699 ii. —— ——.]—Where the customer of a bank has two accounts, one to pay off sums due to the bank, the other for his current account, entries made in the pass-books are imputations of payment wherein the depositor acquiesces & which are equivalent to discharges to the bank.—VALENTINE *v.* BANK OF B. N. A. (1915), Q. R. 25 K. B. 747.—**CAN.**

g. *Entries crediting customer—Amount not received by bank—Right of bank to correct.*]—Credit entries in a customer's account and pass-books of the amount of cheques are only *primâ facie* evidence against the bank, which can be contradicted by parol evidence, & do not prevent the bank from recovering, when it is proved that, as a matter of fact, it did not receive the amount placed at the customer's credit.—PYKE *v.* SOVEREIGN BANK (1915), Q. R. 24 K. B. 198; 24 D. L. R. 720.—**CAN.**

h. *S. P.* COLLINS *v.* DOMINION BANK (1915), 8 O. W. N. 432.—**CAN.**

k. *Entry debiting customer with payment of cheque—Cheque mislaid after payment—Denial of payment by customer—Liability of bank.*]—Action on a deposit account kept by pltf. in defts.' bank for the sum of $732,18 which had been charged against pltf. in his pass-book & in the bank ledger, but which he declared he had never withdrawn. Pltf., before bringing his action, had called on defts. to produce the cheque, but this they had failed to do, & they admitted the cheque had been mislaid, but sought to prove that the cheque was drawn by pltf. & paid by themselves:—*Held:* although, on the evidence, pltf. had been careless he ought not to be made answerable for defts.' carelessness in mislaying the cheque, & defts. liable.—FOURNIER *v.* UNION BANK (1873), Steph. Q. Dig., Vol. II., 99, 100, 101 (22).—**CAN.**

l. *Customer's duty to examine—Liability to bank for breach of.*]—A customer owes a duty to his banker to verify returned vouchers by the record kept by him of cheques issued for the purpose of detecting forgeries. The customer's negligence in failing to detect forgeries or give notice thereof to the bank does not estop the customer from asserting the forgeries, but renders him liable in damages to the bank, if such omission has caused it loss, *e.g.*, by enabling the forger to repeat his fraud, or by depriving the bank of an opportunity to obtain restitution.—CRITTEN *v.* CHEMICAL BANK OF NEW YORK (1902), 171 New York Reports, 219.—**N.Y.**

m. *Receipt & return by customer—Fraud of customer's agent—Departure from ordinary course of dealing.*]—A bank received from a customer's agent cheques drawn in favour of X., or order, not indorsed by X., &, in return, gave the agent its own cheques in favour of X., such cheques corresponding in the total, but not in the separate amounts of the cheques received. The agent fraudulently used some of the cheques for the payment to X. of other debts, & the customer thereby suffered loss. The customer had no knowledge of the method adopted by the bank in dealing with his agent, but he received his pass-book & vouchers from time to time, &, upon a careful examination he would have been able to discover the method of dealing in time to have stopped such dealings in the transactions through which he suffered loss. He did not examine the vouchers, & signed & returned statements acknowledging that the balance & entries were correct:—*Held:* the customer was not estopped through his conduct or on account of the statements appearing from the vouchers & pass-book, & the bank was liable for the damages suffered by its customer.—BURKE (EDWARD & JOHN), LTD. *v.* STANDARD BANK OF S. A., LTD. (1905), T. H. 123.—**S. AF.**

n. *Entry denoting payment to third party—Signature of third party affixed to entry.*]—An entry in a depositor's pass-book with a savings bank of a payment made to a third party, who affixed his signature to the entry, is competent evidence of the receipt of the money by the third party.—FRASER *v.* BRUCE (1857), 20 D. 115.—**S. AF.**

o. *Post-dated cheque deposited for collection—Initialled entry to credit of customer—Dishonour of cheque—Estoppel.*]—A post-dated cheque for Rs.9,500 was sent by pltfs. for collection to deft. bank, & the pass-book was returned to pltfs. with Rs.9,500 duly credited therein & initialled by one of the bank's officers. Subsequently the cheque was dishonoured:—*Held:* (1) the returning of the pass-book & the noting & initialling of the entry of Rs.9,500 therein was a representation by the bank that it had received payment of the cheque & was prepared to give pltfs. credit for the amount; (2) the bank was not estopped by the entry in the pass-book from alleging the non-payment of the cheque.—MOWJI SHAMJI *v.* NATIONAL BANK OF INDIA (1900), I. L. R. 25 Bom. 499.—**IND.**

they were accompanied with a considerable number of genuine bills, many drawn by V., & regularly entered in the letters of advice, together with the forged bills :—*Held :* the conduct of resps. had misled the bankers & they were entitled to debit them with the forged bills. *Semble :* a customer is bound to know the contents of his own pass-book.—BANK OF ENGLAND *v.* VAGLIANO BROTHERS, [1891] A. C. 107 ; 60 L. J. Q. B. 145 ; 64 L. T. 353 ; 39 W. R. 657 ; 7 T. L. R. 333 ; *sub nom.* VAGLIANO *v.* BANK OF ENGLAND, 55 J. P. 676, H. L., *affg.* (1889), 23 Q. B. D. 243, C. A.

Annotations :—**Consd.** Lewes Sanitary Steam Laundry Co. *v.* Barclay (1906), 22 T. L. R. 737 ; Holland *v.* Manchester & Liverpool District Banking Co. (1909), 14 Com. Cas. 241. **Distd.** Kepitigalla Rubber Estates *v.* National Bank of India, [1909] 2 K. B. 1010. **Refd.** Scholfield *v.* Londesborough, [1896] A. C. 514, H. L.; Macmillan *v.* London Joint Stock Bank, [1917] 2 K. B. 439, C. A. ; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L. **Mentd.** Robinson *v.* Canadian Pacific Ry. Co., [1892] A. C. 481, P. C. ; *Re* English Bank of the River Plate, *Ex p.* Bank of Brazil, [1893] 2 Ch. 438 ; *Re* Budgett, Cooper *v.* Adams, [1894] 2 Ch. 557 ; Scholfield *v.* Londesborough, [1895] 1 Q. B. 536, C. A. ; Clutton *v.* Attenborough, [1897] A. C. 90, H. L. ; River Thames Conservators *v.* Smeed, Dean, [1897] 2 Q. B. 334, C. A. ; Preist *v.* Last (1903), 89 L. T. 33, C. A. ; Vinden *v.* Hughes, [1905] 1 K. B. 795 ; Macbeth *v.* North & South Wales Bank, [1908] 1 K. B. 13, C. A. ; North & South Wales Bank *v.* Macbeth, North & South Wales Bank *v.* Irvine, [1908] A. C. 137, H. L. ; Hall *v.* Hayman, [1912] 2 K. B. 5 ; Wimble *v.* Rosenberg, [1913] 3 K. B. 743, C. A. ; Maclaren *v.* A.-G. for the Province of Quebec, [1914] A. C. 258, P. C. ; Sanday *v.* British & Foreign Marine Insce., [1915] 2 K. B. 781, C. A. ; MacConnell *v.* Prill, [1916] 2 Ch. 57 ; R. *v.* Kennaway (1916), 86 L. J. K. B. 300, C. A.

704. —— Entries debiting forged cheques—Settled account.]—The secretary of a co. forged the signatures of certain of the directors to a number of cheques purporting to be drawn on behalf of the co., & obtained payment thereof from the co.'s bankers. In an action by the co. claiming to recover from the bank the amount so paid, none of the bank's cashiers or officers were called to show that they had been misled into paying any of the cheques by any conduct of the co. or to show what induced them to pay the cheques :—*Held :* (1) the fact that the directors of the co. had not regularly examined the co.'s finance book & pass-book during the period within which the forgeries were committed did not preclude the co. from recovering ; (2) the fact that the pass-book had been returned to the bank without objection being taken by the co., who at the time had no knowledge of the forgeries, did not constitute a settled account between the bank & the co.—KEPITIGALLA RUBBER ESTATES, LTD. *v.* NATIONAL BANK OF INDIA, LTD., [1909] 2 K. B. 1010 ; 78 L. J. K. B. 964 ; 100 L. T. 516 ; 25 T. L. R. 402 ; 53 Sol. Jo. 377 ; 14 Com. Cas. 116 ; 16 Mans. 234.

Annotations :—**Folld.** Walker *v.* Manchester & Liverpool District Banking Co. (1913), 108 L. T. 728. **Refd.** Macmillan *v.* London Joint Stock Bank, [1917] 1 K. B. 363. **Mentd.** Morrison *v.* London County & Westminster Bank (1913), 108 L. T. 379 ; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L.

705. —— —— Estoppel.]—Pltfs., solrs., kept a trust account with defts. This account was looked after by a clerk. In Mar., 1910, in Aug., 1911, & in Aug., 1912, the clerk forged three cheques drawn on the account, which were paid. The customer did not examine the pass-book between Mar., 1910, & Dec., 1912 ; but it was made up & returned periodically. Pltfs. sued for the amount of the forged cheques as money lent :—*Held :* the fact that the customer did not examine his pass-book when it was periodically returned to him did not preclude him from recovering the amounts paid on the forged cheques, although such cheques were debited to his account in the pass-book.—WALKER *v.* MANCHESTER & LIVERPOOL DISTRICT BANKING CO., LTD. (1913), 108 L. T. 728 ; 29 T. L. R. 492 ; 57 Sol. Jo. 478.

706. Entry of charges by bank—Agreement—Acquiescence of customer.] — Pltfs., bankers, charged defts. interest with half-yearly rests in accordance with their general practice. Defts. by themselves, their clerk or solr., were in the habit of taking their banking book to pltfs. to have the account made up ; & no objection was ever made by defts. to the charges for compound interest :—*Held :* defts. having assented to that mode of keeping the accounts, it was not unlawful on the ground of usury.—EATON *v.* BELL (1821), 5 B. & Ald. 34 ; 106 E. R. 1106.

Annotations :—**Mentd.** Sprott *v.* Powell (1826), 3 Bing. 478 ; Burls *v.* Smith (1831), 7 Bing. 705 ; Pell *v.* Stephens (1833), Coop. *temp.* Brough. 266 ; Tildasley *v.* Stephenson (1834), 10 Bing. 545 ; Cane *v.* Chapman (1836), 1 Nev. & P. K. B. 104.

707. —— —— ——.]—A banking account, which was largely overdrawn, was for the half-year ending June, 1867, charged with interest at 5 per cent., & with a gross sum of £500 for commission, in lieu of the charge of ½ per cent. previously made. The pass-book balanced on this footing was sent to the customer, & the charges were explained to his agent (the customer himself being in weak health, & unable to attend to business matters). Afterwards the pass-book was made up several times at the request of customer's agent. The customer, who died in Dec., 1867, had not raised any objection to the charges :—*Held :* the charge of £500 for commission had been acquiesced in, & was valid for the half-year ending June, 1867, but acquiescence could not be inferred for subsequent half-years, since it was unusual to charge at a lower or higher rate according to the amount of business done.—WILLIAMSON *v.* WILLIAMSON (1869), L. R. 7 Eq. 542 ; 20 L. T. 389.

Annotation :—**Mentd.** Barfield *v.* Loughborough (1872), 8 Ch. App. 1, L.C.

708. —— —— ——.]—Pltf. in 1874 obtained an advance from defts., bankers, upon security. Defts. issued a pass-book to pltf., in which they made half-yearly rests & entered charges for "interest & commission." Pltf. from time to time paid in sums to the credit of the account, but never drew on it. The pass-book was from time to time received by pltf. & on two occasions he wrote to defts. acknowledging the accounts to be correct. In Dec., 1884, pltf. paid the balance appearing in the pass-book to be due to defts. & closed the account. Two years later pltf. sued defts. to recover the sum of £95, being the aggregate amount of the commissions charged, on the ground that commission was not chargeable on a single advance with gradual repayments : — *Held :* pltf. had assented to the accounts & had no cause of action.—SPENCER *v.* WAKEFIELD (1887), 4 T. L. R. 194.

709. Entry in wrong place—Mistake of banker's clerk—Denial of mistake by customer.]—Where an entry is alleged to have been made by mistake in the wrong place in a customer's pass-book by the banker's clerk, but is denied by the customer to be any mistake, the question is for the jury upon the evidence.—SNEAD *v.* WILLIAMS (1863), 9 L. T. 115.

710. Entries appropriating payments—Communication to customer—Right of bank to alter.]—*Semble :* where a banker receives moneys, which he has the option of appropriating to one of two accounts, entries in the pass-book relating to one particular account, communicated to the customer, will preclude the banker from altering the appropriation.—SIMSON *v.* INGHAM (1823), 2 B. & C. 65 ; 3 Dow. & Ry. K. B. 249 ; 1 L. J. O. S. K. B. 234 ; 107 E. R. 307.

Annotations :—**Consd.** Pemberton *v.* Oakes (1827), 4 Russ. 154 ; Siebel *v.* Springfield (1863), 3 New Rep. 36. **Refd.** Simson *v.* Cooke (1824), 1 Bing. 452 ; Hume *v.* Bolland (1826), Ry. & M. 371, N. P. ; Field *v.* Carr (1828), 5 Bing. 13 ; Smith *v.* Wigley & Tunnicliffe (1833), 3 Moo. & S. 174 ;

Sect. 13.—*The pass-book: Sub-sects.* 1, 2 & 3.]

Chitty *v.* Naish (1834), 2 Dowl. 511; Mills *v.* Fowkes (1839), 7 Scott, 444; Bank of Scotland *v.* Christie (1841), 8 Cl. & Fin. 214, H. L.; Aberystwith & Welsh Coast Ry. Co. *v.* Piercy (1864), 2 Hem. & M. 713; Hooper *v.* Keay (1875), 1 Q. B. D. 178; Brown, Janson *v.* Cama & Salberg (1890), 6 T. L. R. 250; Friend *v.* Young, [1897] 2 Ch. 421; Smith *v.* Betty, [1903] 2 K. B. 317, C. A.; Deeley *v.* Lloyds Bank, [1912] A. C. 756, H. L. **Mentd.** Nash *v.* Hodgson (1855), 6 De G. M. & G. 474, L.C. & L.JJ.; Bell *v.* Buckley (1856), 11 Exch. 631; City Discount Co. *v.* McLean (1874), L. R. 9 C. P. 692, Ex. Ch.; Prince *v.* Oriental Bank Corpn. (1878), 3 App. Cas. 325, P. C.; Seymour *v.* Pickett, [1905] 1 K. B. 715, C. A.; London & Westminster Bank *v.* Button (1907), 51 Sol. Jo. 466.

711. —— Evidence of agreement—Acquiescence of customer.]—H. & C., who carried on business in partnership, were indebted to R., their banker, to the amount, as admitted by H., of £979. In 1851 R., with the concurrence of H., transferred his business to the M. Bank, including the account in question. The partnership account of H. & C. with the M. Bank commenced with this item of £979, & continued open for a considerable time, during which H. paid in moneys to an amount exceeding the sum of £979. The pass-book was regularly sent to H. The deed transferring the business from R. to the M. Bank contained a provision, "That at the expiration of twelve months, as to such accounts as should not be taken to by the M. Bank, the M. Bank should, during a period not exceeding ten years, either accept or compel payment, or permit same to remain due, & should be possessed of all moneys paid in discharge of such accounts in trust for R." In 1852 the M. Bank gave notice to R. that they would not take to this account. An action having been brought by the M. Bank against H. & C. to recover the balance due:—*Held:* the debt of £979 was extinguished by the payments subsequently made by H. to the credit of the partnership account, & the assent to the appropriation to be inferred from H. not objecting to the pass-book, & after such extinguishment, as between the M. Bank & the partnership, the account could not be treated as an existing debt remaining due to R.—BEALE *v.* CADDICK (1857), 2 H. & N. 326; 26 L. J. Ex. 356; 29 L. T. O. S. 355; 157 E. R. 135.

712. Change of title of banking firm—Interest to new firm on bonds assigned to old firm—Notice of assignment.]—A change of the title of a banking firm in a pass-book, & entries therein to the credit of the new firm of the interest on bonds given by the customer to the original firm:—*Held:* notice of the assignment to the new firm of the bonds given by the customer to the old firm.—CAVENDISH *v.* GEAVES (1857), 24 Beav. 163; 27 L. J. Ch. 314; 29 L. T. O. S. 256; 3 Jur. N. S. 1086; 5 W. R. 615; 53 E. R. 319.

Annotation:—**Apprvd.** Pellas *v.* Neptune Marine Insce. (1879), 5 C. P. D. 34, C. A.

713. Handing over of pass-book & cheque—Death of customer—Donatio mortis causâ.]—Delivery by an intestate of his pass-book at a bank & of a cheque drawn on the bank in favour of the person, to whom the pass-book & cheque are delivered, is not a good *donatio mortis causâ.*—*Re* BEAK'S ESTATE, BEAK *v.* BEAK (1872), L. R. 13 Eq. 489; 41 L. J. Ch. 470.

Annotations:—**Follid.** *Re* Mead, Austin *v.* Mead (1880), 28 W. R. 891. **Consd.** *Re* Beaumont, Beaumont *v.* Ewbank, [1902] 1 Ch. 889.

SUB-SECT. 2.—ADVANCE CREDIT IN.

714. Crediting customer for money not received—No communication to customer—Whether credit binding on bank.]—Bankers who knowingly credit a customer with moneys which they have not received, so as to lead the customer to believe that the moneys have been received, cannot revoke the credit.

Bankers were employed by P. to purchase annuities, which they collected for P. & deft., his exor., charging a commission of 2½ per cent. The bankers acted for many other grantees of annuities & also for some of the grantors, & in their own books they entered on the credit side of the accounts of the grantees & on the debit side of the accounts of the respective grantors the instalments of annuities from time to time as they thought fit, but not always at the precise periods when they became payable. Deft. had a pass-book, which from time to time he left with the bankers to be made up, & balances were struck in it at the times of making up the pass-book. No accounts were settled between the bankers & defts., except by such making up the pass-book & returning it with the balances struck therein. The bankers became bkpt. & an action was brought by their assignees to recover an alleged balance of moneys advanced by the bankers, a part of such balance arising upon the account stated in the pass-book by withdrawing from the credit side thereof several sums in respect of an annuity which had been entered without being received. The bankers had received certain rents upon which the annuity was secured, but in keeping their account with P. & deft. they did not enter the rents received or the outgoings, but credited the instalments of the annuity & charged commission. The bankers kept a distinct account of rents & outgoings in their own books, but deft. had no notice of this account. A sum of £363 was in this way credited to deft. in excess of the moneys actually received:—*Held:* the bankers having given credit for £363 with knowledge that the moneys had not been received & without informing deft. of that fact, the assignees could not compel deft. to refund the amount.—SHAW *v.* PICTON (1825), 4 B. & C. 715; 7 Dow. & Ry. K. B. 201; 4 L. J. O. S. K. B. 29; 107 E. R. 1226.

Annotations:—**Apld.** Shaw *v.* Dartnall (1826), 6 B. & C. 56. **Distd.** Cave *v.* Mills (1862), 7 H. & N. 913. **Refd.** Hume *v.* Bolland (1832), 1 Cr. & M. 130; Bate *v.* Lawrence (1844), 7 Man. & G. 405; Townsend *v.* Crowdy (1860), 8 C. B. N. S. 477; Swan *v.* North British Australasian Co. (1862) 7 H. & N. 603. **Mentd.** Pierce *v.* Evans (1835), 2 Cr. M. & R. 294.

715. —— Customer debited on non-receipt—No objection by customer — Revocation of credit.]—Bankers were employed to collect annuities for deft., to whom a pass-book was delivered, which was made up & balanced from time to time. No accounts were settled between the parties except by the making up of the pass-book & striking balances therein. Deft. was credited with instalments of the annuities & debited with 2½ per cent. commission thereon. In respect of G.'s annuity deft. was credited with £144 ("not yet received"), & debited with the commission thereon. In respect of W.'s annuity deft. was credited at various times with five quarterly payments amounting to £188 15*s.* & debited with the commission, a balance being struck on each occasion. The moneys had not been received from the grantor of the annuity. Deft. was subsequently debited with £188 15*s.*, but there was no evidence of any specific assent thereto on his part. Deft. afterwards sued W. for arrears of the annuity, including £151 (four quarters) part of the £188 15*s.* above mentioned. In respect of M.'s annuity deft. was credited with £100 & debited with commission. Subsequently he was debited with the same £100 & credited with the commission.

713 i. *Handing over pass-book—Death of customer—Donatio mortis causâ.*]—The delivery of the book of a depositor in a savings bank is not a sufficient delivery to constitute a donation of the money deposited.—M'GONNELL *v.* MURRAY (1869), I. R. 3 Eq. 460.—IR.

The bankers had not received the £100 from M. A balance was struck in the pass-book on two or three occasions after entry of the debit & the pass-book was returned by deft. to the bankers without objection :—*Held :* (1) deft. could not retain the credit in respect of G.'s annuity, as he knew it had not been received ; (2) on the evidence deft. had assented to the debits in respect of W.'s annuity to the extent of four quarterly payments only ; (3) on the evidence deft. had assented to the debit in respect of M.'s annuity.—SHAW *v.* DARTNALL (1826), 6 B. & C. 56 ; 9 Dow. & Ry. K. B. 54 ; 5 L. J. O. S. K. B. 35 ; 108 E. R. 373.

Annotations :—**Refd.** Shaw *v.* Woodcock (1827), 7 B. & C. 73 ; Hume *v.* Bolland (1832), 1 Cr. & M. 130 ; Swan *v.* North British Australasian Co. (1861), 31 L. J. Ex. 425. **Mentd.** Garnett *v.* M'Kewan (1872), 42 L. J. Ex. 1.

716. Cheque credited before clearance—Evidence of receipt of proceeds.]—A bank had agreed with pltfs. that they would cash their cheques & discount their bills in consideration of pltfs. keeping a balance of £100 at the bank. On a certain Saturday morning the balance was slightly below the £100, but in the course of the day pltfs. paid in a cheque for £150 ; this, however, as defts. alleged, was after the walking clerk had gone to the clearing-house. On the Monday morning, before the walking clerk had returned from the clearing-house, a cheque drawn by pltfs. for £17 10*s.* was presented for payment by the person in whose favour it had been drawn, but was returned to him indorsed " effects not cleared." Somewhere about this time, but whether before or after the cheque was presented was not proved, one of pltfs. came to the bank & called for the pass-book of the firm, & saw an entry crediting them with £150 (cash). In an action against the bank for not cashing the cheque :—*Held :* these facts showed some evidence to go to the jury that the bank were in possession of funds, & a non-suit ought to be set aside & the case sent back for trial.—BRANSBY *v.* EAST LONDON BANK (1866), 14 L. T. 403 ; 14 W. R. 652.

717. —— Customer not advised—Right to draw against credit.]—Giving immediate credit in the pass-book for cheques before clearance does not of itself, if the entries have not been communicated to the customer, entitle him to draw against the cheques.—BEVAN *v.* NATIONAL BANK, LTD., BEVAN *v.* CAPITAL & COUNTIES BANK, LTD. (1906), 23 T. L. R. 65.

Annotation :—**Apld.** Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.

718. Immediate credit on certified cheque—Dishonour of cheque—Right to revoke credit.]—An entry in a pass-book giving the customer credit for the amount of a certified cheque is not conclusive proof of its acceptance as cash by the bank issuing the pass-book, & does not exclude evidence of the real nature of the transaction so recorded. Applt. drew a cheque on a bank, which certified on the face of the cheque that the drawer had assets to meet it. Applt. immediately deposited the cheque with resps., who issued to her a pass-book, & credited her therein with the amount of the cheque. If the cheque had been presented by resps. on the same day it would have been paid. But in the ordinary course of business resps. paid the cheque to their bank, & before it was presented the bank on which the cheque was drawn became insolvent :—*Held :* the cheque was accepted by resps. as the agents of applt., & not with the intention of acquiring title to it or gratuitously guaranteeing its payment, & the loss fell on applt.—GADEN *v.* NEWFOUNDLAND SAVINGS BANK, [1899] A. C. 281 ; 68 L. J. P. C. 57 ; 80 L. T. 329 ; 15 T. L. R. 228, P. C.

Annotation :—**Refd.** Imperial Bank of Canada *v.* Bank of Hamilton, [1903] A. C. 49, P. C.

SUB-SECT. 3.—ERRONEOUS ENTRIES.

719. Alteration by bank—Alleged correction of mistake—Statement by bank clerk—Evidence.]—Pltf. sued defts., bankers, to recover £50, the alleged balance of his account. His servant proved paying in £81 10*s.* by a cheque for £31 10*s.* & £50 in cash, the clerk entering £81 10*s.* to the credit of pltf. in a pass-book which he always sent when he paid in money. Several months later, when more money was paid in, the clerks altered the entry of £81 10*s.* to £31 10*s.*, saying they had made what was wrong right. Pltf. called & asked a clerk whether they had made the alteration & why :—*Held :* the clerk's answer to the effect that no cash had been paid in was admissible in evidence against the bankers.—PRICE *v.* MARSH (1823), 1 C. & P. 60, N. P.

720. Wrong double entry by bank—Right to rectify.]—Resp. had been a customer of the C. Bank for some years prior to 1855 & had been supplied with the usual pass-book. The account between him & the bank was balanced on Oct. 31 in each year. Resp. alleged that from Oct. 31, 1854, to July 21, 1855, his payments to the bank amounted to £683 3*s.* 4*d.*, while the sums received by him from the bank during the same period amounted to no more than £616 14*s.* 6*d.*, leaving a balance in his favour of £66 8*s.* 10*d.* In his pass-book were entered the various payments & receipts occurring between him & the bank, the payments into the bank being acknowledged by the agent & accountant of the bank appending their initials opposite to the sums so entered. The bank alleged that there was a double entry on June 6, 1855, of the sum of £80 credited to resp. on the preceding day, namely, June 5, which by mistake was twice entered to his credit in the pass-book by the bank accountant :—*Held :* the entries in the pass-book were only *primâ facie* evidence against the bank & it was open to the bank to show that the double entry was erroneous.—COMMERCIAL BANK OF SCOTLAND *v.* RHIND (1860), 3 Macq. 643, H. L.

721. Mistake in calculating interest—No objection by customer—Reopening account.]—If in a pass-book a clerk by error calculates the interest at a wrong rate & the customer allows it to pass, believing it to be the right rate, that is a mistake which is remediable by reopening the account.—ADAMS *v.* ASTON (1859), 1 F. & F. 604.

722. Customer overcredited—Right to draw against.]—Pltf., a customer of defts., finding on examining his pass-book that it showed a balance of £70 17*s.* 9*d.* in his favour, drew a cheque for £67 11*s.* in favour of a firm to whom he owed that amount. On the cheque being presented by that firm, it was dishonoured by defts., whereby pltf. suffered damage, in respect of which he sued defts. From the evidence it appeared that at the time pltf. drew the cheque for £67 11*s.* he had a balance at the bank of £60 5*s.* 9*d.* only, but that in his pass-book one of the bank clerks had, in error, entered to pltf.'s credit a sum of £10 12*s.* twice, with the result that from the pass-book pltf. appeared to be in credit to the amount of £70 17*s.* 9*d.* :—*Held :* although defts. were entitled to have the wrong entry ultimately corrected, pltf. (who had not been guilty of any negligence or fraud in connection with the matter) was entitled, until that correction had been made, to act upon defts.' statements in the pass-book, &, having acted upon those statements & suffered damage thereby, he was entitled to recover against defts. the amount of such damage.—HOLLAND *v.* MANCHESTER & LIVERPOOL DISTRICT BANKING CO., LTD. (1909), 25 T. L. R. 386 ; 14 Com. Cas. 241.

SECT. 14.—REMITTANCES TO BANK TO MEET ACCEPTANCES.

723. Bills deposited with country bank to meet acceptances—Remittances forwarded to London firm—Specific appropriation — Failure of bank & firm.]—A., B., C. & D. were partners in a banking house at Liverpool, & C. & D. also carried on a separate mercantile business in London. S. having accepted bills payable at the house of C. & D., employed A., B., C. & D. to get them paid, & agreed to deposit with them good bills indorsed by him for the purpose of enabling them to do so. A., B., C. & D. debited S. in account for his acceptances & credited him for all the bills deposited. Some of the bills deposited by S. were remitted by A., B., C. & D. to C. & D. upon the general account between the two houses, & before any of the acceptances of S. became due both houses failed, & S. was obliged to pay his own acceptances : — *Held :* (1) the assignees of C. & D. were entitled to retain the bills remitted to them ; (2) it made no difference that one of the bills did not arrive in London until after the bkpcy. of C. & D. though sent by A., B., C. & D. before that event.—BOLTON *v.* PULLER (1796), 1 Bos. & P. 539 ; 126 E. R. 1053.

Annotations :—**Distd.** Pedder *v.* Watt (1795), Peake, Add. Cas. 41. **Apld.** Johnson *v.* Robarts (1875), 44 L. J. Ch. 465. **Refd.** *Re* Boldero, *Ex p.* Pease (1812), 1 Rose, 232 ; Thompson *v.* Giles (1824), 2 B. & C. 422. **Mentd.** Jacaud *v.* French (1810), 12 East, 317 ; Sparrow *v.* Chisman (1829), 7 L. J. O. S. K. B. 173.

724. —— Bills sent to London agents—Specific appropriation—Failure of country bank.]—Customers of country bankers paid into the bankers a sum of money in bank-notes, & also some bills of exchange to be remitted to London in order to meet certain acceptances. The bankers sent to their London agents the bills & some bank-notes, with a letter directing them to pay a certain sum of money, also giving them notice of the acceptances as payable at their bank, & giving directions as to other business. The country bankers stopped payment, owing a large balance to the London bankers :—*Held :* as between the country customers & the London bankers, there was no appropriation of the bills & notes to meet the acceptances, & the London bankers could retain the bills & notes without meeting the acceptances.—JOHNSON *v.* ROBARTS (1875), 10 Ch. App. 505 ; 44 L. J. Ch. 678 ; 33 L. T. 138 ; 23 W. R. 763, L.JJ.

Annotations :—**Expld.** *Re* Gothenburg Commercial Co. (1880). 42 L. T. 174. **Mentd.** *Re* Broad, *Ex p.* Neck (1884), 13 Q. B. D. 740, C. A.

725. Bills remitted to meet bills drawn on & accepted by bank—Misappropriation—Bankruptcy of bank—Right to remitted bills with bank.]—B. was in the habit of drawing bills on H. & Co., bankers, & of remitting bills to them to an amount fully sufficient to meet their acceptances. H. & Co. became bkpt. At that time there were in the hands of holders for value undue bills to a large amount drawn by B. upon H. & Co., & accepted by them, but H. & Co. had misappropriated the greater part of the bills remitted to meet them :—*Held :* B. could not claim to have returned to him such of the remitted bills as remained in the hands of H. & Co. at the time of their bkpcy., but they must be applied so far as they would extend in payment of the bills accepted by H. & Co.—*Re* HARRISON, *Ex p.* CARRICK (1858), 2 De G. & J. 208 ; 44 E. R. 968, L.JJ.

Annotation :—**Consd.** Frith *v.* Forbes (1862), 6 L. T. 847.

726. Remittances sent from abroad to cover drafts on firm—Advances to be repaid out of remittances from abroad—Bankruptcy of firm.]—Pltfs., bankers at L., established a credit agency with the G. Co. in London, & agreed to send remittances within ninety days to cover drafts. The G. Co., being in difficulties, obtained an advance of money from the P. Bank, to be repaid out of expected remittances from the L. Bank to cover bills then current, & the P. Bank employed as agents to receive & select from the expected securities the managing director of the G. Co. & their own managing director, who had been, two years previously, the manager of the G. Co., & was cognisant of & party to the arrangement with the L. Bank. The securities were selected by & handed over to the P. Bank upon their arrival, & the following day the G. Co. stopped payment & was wound up :—*Held :* the L. Bank had no title to recover the securities from the P. Bank.—BANCO DE LIMA *v.* ANGLO-PERUVIAN BANK (1878), 8 Ch. D. 160 ; 38 L. T. 130.

Annotation :—**Mentd.** *Re* Gothenburg Commercial Co. (1880), 42 L. T. 174.

727. Acceptance of bill payable at bank—Bill lodged with bank for payment—Payment by acceptor—Right of bank to apply to debt from acceptor.]—P. accepted a bill payable at defts.' banking house. Pltf. was holder of the bill & lodged it with defts. for payment. When the bill became due, P.'s clerk went to defts. & told them that he had brought the money to take up the bill, & laid the money down on the counter & demanded the bill. Defts. took the money, but did not deliver up the bill or pay pltf. but applied the money in satisfaction of a debt due to themselves from P. :—*Held :* defts. had received the money for the use of pltfs.—DE BERNALES *v.* FULLER (1810), 14 East, 590, n. ; 104 E. R. 728 ; *subsequent proceedings*, 2 Camp. 426, N. P.

Annotations :—**Distd.** Williams *v.* Everett (1811), 14 East, 582 ; Stewart *v.* Fry & Chapman (1816), Holt, N. P. 372, N. P. ; Yates *v.* Bell (1820), 3 B. & Ald. 643. **Consd.** Hennings *v.* Rothschild (1827), 4 Bing. 315 ; Thomas *v.* Tyler (1838), 3 Y. & C. Ex. 255 ; Warwick *v.* Rogers (1843), 5 Man. & G. 340. **Refd.** Kilsby *v.* Williams (1822), 5 B. & Ald. 815 ; *Re* Douglas, *Ex p.* Hankey (1838), 4 Deac. 1 ; Powles *v.* Hargreaves (1853), 3 De G. M. & G. 430, L.JJ. ; Prince *v.* Oriental Bank Corpn. (1878), 3 App. Cas. 325, P. C. **Mentd.** Bell *v.* Free (1818), 1 Swan. 90 ; Fruhling *v.* Schroeder (1835), 2 Bing. N. C. 77 ; Duncombe *v.* Brighton Club Co. (1875), L. R. 10 Q. B. 371 ; McKewan's Case (1877), 6 Ch. D. 447, C. A. ; L. C. & D. Ry. Co. *v.* S. E. Ry. Co., [1892] 1 Ch. 120, C. A.

728. —— Payment of money into bank to meet bill—Death of acceptor—Right of bank to retain for debt from acceptor.]—A. having accepted a bill of exchange, paid money into his bank upon the express understanding that it was to be applied in taking up the bill at maturity. A. suddenly died before the bill fell due, & the bank retained the money in satisfaction of moneys owing to them upon A.'s general account. The bill was returned dishonoured to the drawers, who thereupon sued the bank for the amount :—*Held :* there was no privity to sustain the suit.—HILL *v.* ROYDS (1869), L. R. 8 Eq. 290 ; 38 L. J. Ch. 538 ; 20 L. T. 842.

729. —— —— Specific appropriation—Dishonour of bill—Money returned to acceptor.]—A., an acceptor of a bill payable at his London bankers, remitted them funds to pay it, or take it up if overdue, which last being the case, the bankers called on the holders, intending to take it up, but finding the bill had been sent back to Ireland as dishonoured, they remitted the money back to the acceptor, &, upon a subsequent presentment of the bill, refused payment :—*Held :* this was not such a specific appropriation of the money, as to render the bankers liable to the holder for the amount remitted.—STEWART *v.* FRY (1817), 1 Moore, C. P. 74 ; 7 Taunt. 339 ; 129 E. R. 136.

730. Dishonour of bill—Remittance by acceptor to pay bill—Refusal to pay bill.]—A bill of exchange, payable at the house of defts., had been there presented & dishonoured, & the acceptor afterwards remitted to defts. a sum of money for the purpose of enabling them to pay the dishonoured bill, & also another of less value. Defts. in answer stated the fact of the bill having been dishonoured, but added

that the money received should be carried to the acceptor's account. Defts. afterwards paid the smaller bill but refused to pay that of pltfs. :—*Held :* pltfs. could not sue defts., there being no privity between them.—YATES *v.* BELL (1820), 3 B. & Ald. 643 ; 106 E. R. 796.

731. Bill payable at correspondents'—Payment of money to bank to meet bill—Amount credited to acceptor in bank books—Correspondents not advised.]—The acceptor of a bill paid money to his bankers, defts. (at whose correspondents' house it was payable), for the purpose of taking up that & other bills, & they promised him to apply it to such purposes, & entered the particular bill to their credit in their books, but it did not appear that they had advised their correspondents to pay it :—*Held :* the drawer, the holder of the bill, could not sue the bankers for the amount of the bill, there being no privity to sustain the action.—MOORE *v.* BUSHELL (1857), 27 L. J. Ex. 3.

Annotation :—**Apld.** Hill *v.* Royds (1869), L. R. 8 Eq. 290.

732. —— —— —— Liability of bank.]—A. paid to a banking co. a sum of money, for the specific purpose of providing for a bill of exchange, for that amount, drawn by A. upon the co.'s London bankers. A. was at that time indebted in a larger amount to the co., who, instead of applying the money according to his instructions, placed it to the credit of his account with them. The bill was refused acceptance, & while it remained unpaid in the hands of the holder A. became bkpt. :—*Held :* his assignees were entitled to recover from the co., in a special action of *assumpsit*, the whole amount of the bill.—HILL *v.* SMITH (1844), 12 M. & W. 618 ; 13 L. J. Ex. 243 ; 2 L. T. O. S. 424 ; 8 Jur. 179 ; 152 E. R. 1346.

Annotations :—**Distd.** Garnett *v.* M'Kewan (1872), L. R. 8 Exch. 10. **Mentd.** Alder *v.* Keighley (1846), 15 M. & W. 117 ; Bell *v.* Carey (1849), 8 C. B. 887 ; Valpy *v.* Oakeley (1851), 16 Q. B. 941 ; Ashdown *v.* Ingamells (1880), 5 Ex. D. 280, C. A.

733. —— Money remitted by indorser to meet bill—Money applied by mistake in payment of another bill.]—Pltf. having indorsed a bill drawn by C. for £130 payable at A. & Co.'s, & finding that it would not be honoured by the acceptor, paid in this sum of money to the bankers for the purpose of retaining it. Deft. held another bill of exchange for the same sum, accepted by the same person, due the same day, & payable at the same place. The latter bill being presented for payment first, & no funds being provided to pay it, the banker's clerk, by mistake, gave deft. the £130 paid in by pltf. :—*Held :* pltf.'s remedy was against the bankers & he could not maintain an action against deft. to recover the money.—ROGERS *v.* KELLY (1809), 2 Camp. 123, N. P.

734. Remittance under mistake—Liability to refund.]—Applt., who lived in England, had a standing arrangement with a firm of bankers in New York, in virtue of which they were to honour the drafts of a co. carrying on business in Mexico, in which applt. was interested, up to £500, applt. agreeing to put them in funds by paying that amount from time to time to their account at resps.' bank in London. On Oct. 21, 1907, the New York firm wrote to applt. informing him that the Mexican Co. had been credited with £500 & requesting him to pay that amount to their account with resps. On receipt of this letter on Oct. 29 applt. paid £500 to resps. to the credit of the New York firm. On Oct. 30 the New York firm became bkpt., & applt., on becoming aware of this fact on Oct. 31, immediately applied to resps. for the repayment of the £500. Resps. claimed a right to retain it in reduction of the indebtedness of the New York firm to them :—*Held :* the money had been paid under a mistake of fact as to the true position of the New York firm & resps. had no better right to retain the money than their principals would have had, if it had been paid over to them.—KERRISON *v.* GLYN, MILLS, CURRIE & Co. (1911), 81 L. J. K. B. 465 ; 105 L. T. 721 ; 28 T. L. R. 106 ; 56 Sol. Jo. 139 ; 17 Com. Cas. 41, H. L.

735. Remittances with instructions to pay creditors—Refusal of payment by bank—Rights of creditors.]—K., residing abroad, remitted bills on England to defts., his bankers in London, with directions in the letters inclosing such bills to pay the amount, in certain specified proportions, to pltf. & other creditors of K., who would produce their letters of advice from him on the subject. Before the bills became due pltf. gave notice to defts. that he had received a letter from K., ordering payment of his debt out of that remittance, & offered them an indemnity if they would hand over one of the bills to him, but defts. refused to indorse the bill away, or to act upon the letter, but admitted they had received the directions to apply the money, defts. in fact afterwards received the money on the bills when due :—*Held :* (1) they did not by the mere act of receiving the bills & afterwards the produce of them, with such directions, & without any assent on their part to the purport of the letter, & still more against their express dissent, bind themselves to pltf. so to apply the money in discharge of the debt due to him from K., & pltf. (between whom & defts. there was no privity of contract, express or implied) could not maintain an action against defts. for money had & received by them to his use ; (2) the property in the bills & their produce still continued in the remitter.—WILLIAMS *v.* EVERETT (1811), 14 East, 582 ; 104 E. R. 725.

Annotations :—**Apld.** Yates *v.* Bell (1820), 3 B. & Ald. 643. **Distd.** Gibson *v.* Minet (1824), 2 Bing. 7 ; Fitzgerald *v.* Stewart (1828), 2 Sim. 333. **Folld.** Wedlake *v.* Hurley (1830), 1 Cr. & J. 83. **Consd.** Garrard *v.* Lauderdale (1831), 2 Russ. & M. 451. **Apld.** Baron *v.* Husband (1833), 4 B. & Ad. 611. **Distd.** Frühling *v.* Schröder (1835), 1 Hodg. 105. **Apld.** Brind *v.* Hampshire (1836), 1 M. & W. 365. **Consd.** *Re* Douglas & Anderson, *Ex p.* Cotterill, Mill (1837), 3 Mont & A. 376, Ct. of R. ; *Re* Douglas, *Ex p.* Hankey (1838), 4 Deac. 1 ; Thomas *v.* Tyler (1838), 3 Y. & C. Ex. 255. **Distd.** Cobb *v.* Becke (1845), 6 Q. B. 930. **Apld.** Robbins *v.* Fennell (1847), 11 Q. B. 248 ; Harland *v.* Binks (1850), 15 Q. B. 713. **Distd.** Collins *v.* Brook (1860), 5 H. & N. 700, Ex. Ch. **Apld.** Fleet *v.* Perrins (1868), L. R. 3 Q. B. 536. **Distd.** New Zealand & Australian Land Co. *v.* Ruston (1880), 5 Q. B. D. 474. **Refd.** Rowe *v.* Young (1820), 2 Bli. 391, H. L. ; Tibbitts *v.* George (1836), 2 Har. & W. 154 ; Hutchinson *v.* Heyworth (1838), 9 Ad. & El. 375 ; Siggers *v.* Evans (1855), 5 E. & B. 367 ; Sloper *v.* Cotterell (1856), 27 L. T. O. S. 198 ; Liverside *v.* Broadbelt (1859), 28 L. J. Ex. 332 ; Browne *v.* Hare (1859), 4 H. & N. 822, Ex. Ch. ; Fleet *v.* Perrins (1869), L. R. 4 Q. B. 500. **Mentd.** R. *v.* Beaumont (1854), 18 J. P. 103, C. C. R. ; Godts *v.* Rose (1855), 25 L. J. C. P. 61 ; Lizardi *v.* Pennell (1856), 2 Jur. N. S. 1227 ; Conflans Stone Quarry Co. *v.* Parker (1867), 17 L. T. 283 ; Rustomjee *v.* R. (1876), 1 Q. B. D. 487 ; Prince *v.* Oriental Bank Corpn. (1878), 38 L. T. 41, P. C.

736. —— —— ——.]—A general remittance to bankers, to whom the remitter is indebted, accompanied by a letter requesting them to pay certain specific sums to particular persons, not expressly out of the sum remitted, does not so fix the bankers as to give the persons, to whom such sums were so directed to be paid, a right of action against them for money had & received without an assent on their part to such an appropriation of the money remitted. It is not necessary that the bankers should express a dissent from the required appropriation.—GRANT *v.* AUSTEN (1816), 3 Price, 58 ; 146 E. R. 191.

737. Bills held under agreement to accept customer's draft—Bankruptcy of drawer—Refusal to pay acceptance & receive payment of other bills—Conversion.]—Defts., bankers in London, agreed with K. in New York to open a credit account in favour of K., upon the terms that defts. would accept drafts upon themselves by K. to be drawn against shipping documents for shipments of cotton by K. to Liverpool, & also against simultaneous remit-

Sect. 14.—Remittances to bank to meet acceptances. Sect. 15.]

tances of bills without any bills of lading attached. Defts. charged K. a commission. The credit was subsequently divided into two accounts; account A. being for drafts against simultaneous remittances & account B. for drafts against shipping documents. After the separate accounts were opened K. drew upon & made remittances to defts. in respect of each account, & K. inclosed each remittance in a letter specifying, almost invariably, the account to which it was to be credited, & each draft was notified by a letter specifying the account to which it was to be debited. Defts., in reply to such letters, notified the remittances & drafts to have been credited or debited to the respective accounts as directed. K. forwarded to defts. two bills on mercantile firms & advised two drafts at sixty days upon defts. By a letter inclosing the bills & advising the drafts K. directed defts. to place the bills to K.'s credit, & the drafts to their debit, in account A. Before defts. received the bills & letter, K. was adjudged bkpt. under the law of the United States, & his property vested in pltfs. as assignees in bkpcy. At the time K. stopped payment a considerable balance was due to defts. on account B. Defts. refused to accept K.'s two drafts & having received payment of the two bills when they became due refused to pay over any part of the proceeds to pltfs.: —*Held:* (1) defts. held the two bills upon the condition precedent that they would accept pltfs.' drafts, & the condition having been broken, pltfs. were entitled to recover the proceeds of the two bills, which defts. had wrongfully converted to their own use; (2) defts. were not entitled to any set-off or counterclaim in respect of the balance due to them on account B.—SELIGMANN *v.* HUTH (1877), 37 L. T. 488, C. A.

SECT. 15.—BILLS OF EXCHANGE DRAWN AGAINST SHIPPING DOCUMENTS AND ACCEPTED OR DISCOUNTED BY BANK.

738. Against goods consigned by drawer—Specific appropriation—Security for payment transferred to bank—Rights of bank to goods.]—C. & Co., cotton brokers, accepted bills of exchange for K. & Co., merchants, against delivery of the bills of lading for cotton, & C. & Co. also made other advances to K. & Co. without any specific security. Pltf. bank discounted the bills upon K. & Co., transferring to the bank their security on the cottons for the payment of the bills. Both C. & Co. & K. & Co. stopped payment, & the bills were dishonoured. Pltf. bank claimed to have the proceeds of the cotton applied in satisfaction of the bills, & C. & Co. claimed the right to apply such proceeds in satisfaction of what was due to them on their general account by virtue of their general lien:—*Held:* the cotton had been specifically appropriated for the purpose of satisfying the bills, & the drawers' rights having been transferred to pltf. bank, they were entitled to have the proceeds so applied in the first instance.—INMAN *v.* CLARE (1858), John. 769; 32 L. T. O. S. 353; 5 Jur. N. S. 89; 70 E. R. 629.

Annotations:—**Expld. & Distd.** Frith *v.* Forbes (1862), 31 L. J. Ch. 793. **Distd.** *Re* Barned's Banking Co., *Ex p.* Stephens (1868), 3 Ch. App. 753, L.JJ. **Apld.** *Re* Leggatt, *Re* Gledstanes, *Ex p.* Dewhurst (1873), 8 Ch. App. 965, L.JJ. **Consd.** Brown, Shipley *v.* Kough (1885), 29 Ch. D. 848, C. A. **Refd.** *Re* Suse, *Ex p.* Dever (1884), 13 Q. B. D. 766, C. A.; Spartali *v.* Crédit Lyonnais (1885), 2 T. L. R. 178, C. A. **Mentd.** *Re* Yglesias, *Ex p.* Gomez (1875), 10 Ch. App. 639, L.JJ.; *Re* Strachan, *Ex p.* Cooke (1876), 4 Ch. D. 123, C. A.

739. —— —— Insolvency of acceptor—Right of drawer to goods.]—S. & S., bankers in London, granted to Q., a merchant at Shanghai (at the request of M., a London merchant acting as his agent) a letter of credit authorising Q. "to draw on us, at four months' sight, for any sums not exceeding £20,000, such draft or drafts to be accompanied by bills of lading & invoices of tea, purchased according to order of M., & shipped by steamers to London, & marine policies relating thereto, & those documents to be surrendered to us against our acceptances." The document continued: "We hereby agree with you, & also as a separate engagement with the *bonâ fide* holders respectively of the bills drawn in compliance with the terms of this credit, that the same shall be duly accepted on presentation, & paid at maturity." It was also agreed that S. & S. should receive commission at 1 per cent. on all drafts drawn under this credit, & that M. should meet all their acceptances on or before their due dates, "2½ per cent. being allowed on all prepayments." Q. drew, under the letter of credit, bills on S. & S. for £18,000 against tea consigned by him to M., each bill mentioning the date of the letter of credit, & purporting to be drawn under it against a particular consignment of tea, "as per shipping documents herewith." The shipping documents were attached to the bills, & Q. advised S. & S. by post of the drawing of each bill, mentioning the tea against which it was drawn & the name of the ship by which it was sent. Q. discounted each bill with a bank in China, which forwarded the bill & shipping documents to their London agents, who obtained the acceptance of S. & S., on delivery to them of the shipping documents. As

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PART II. SECT. 15.

738 i. *Against goods consigned by drawer—Bank entitled to give up bill of lading on acceptance.*] — WISCONSIN MARINE & FIRE INSURANCE CO. BANK *v.* BANK OF BRITISH NORTH AMERICA (1861), 21 U. C. R. 284; 2 E. & A. 282. —**CAN.**

738 ii. —— *Acceptance by bank against forged bill of lading—Liability of bank.*]—Deft., a merchant, instructed his banker to accept the drafts of L., on being handed clean bill of lading of a cargo consigned to the latter. A bill of lading, professing to answer the description in the instructions, was handed by L. to the banker, who accepted his drafts, &, it turning out that the bill of lading was forged, paid the amount of the acceptances:—*Held:* the banker was not bound to see that the bill of lading was genuine, but only that it was regular on the face of it.

The indorsement of the bill of lading purported to be signed by an agent of the shippers:—*Held:* the banker was not responsible for the authority of the agent to sign for his principals.—ULSTER BANK *v.* SYNNOTT (1871), I. R. 5 Eq. 595.—**IR.**

738 iii. —— *Attachment of goods—Delivered to acceptor for sale—Insolvency of acceptor.*]—Pltfs. received goods as collateral security for a draft, which they had discounted & had intrusted to P., the acceptor of the draft, since insolvent, for sale, taking from him the following bailee receipt: "Received from the M. Bank for one thousand two hundred & eighty-four hams, one hundred shoulders & ten pieces of bacon, & I hereby undertake to sell the property therein specified for account of the bank, & collect the proceeds of the sale or sales thereof, & deposit same in the bank to the credit of acceptance two thousand four hundred & fourteen, due July 11, hereby acknowledging myself to be bailee of the property for the bank":—*Held:* the bank did not lose control of the goods, &, on the bailee becoming insolvent, had a right to revendicate them as pledged for the amount of the acceptance.—MERCHANTS BANK *v.* MCGRAIL (1878), 1 L. N. 231; 22 L. C. J. 148.—**CAN.**

738 iv. —— *Assignment of carrier's receipt as collateral security—Whether bank entitled to retain possession until payment.*]—C. shipped flour to the order of a bank for account of L. &, at the same time, drew on L., discounted the bill at the bank, indorsed & delivered to the bank the carrier's receipt, & signed a memorandum stating that the receipt had been indorsed as collateral security for the payment of the draft, the bank to sell the flour, applying the proceeds to pay the draft, & to place the property in charge of any respectable broker or warehouseman, without prejudice to the bank's claim upon any party to the draft:—*Held:* the bank, though bound to retain the flour until the bill was accepted, might then, if they chose, deliver the flour to L., the fair construction of the agreement being that the retaining of possession until payment was optional with the bank.—CLARK *v.* BANK OF MONTREAL (1867), 13 Gr. 211. —**CAN.**

the tea arrived in London it was warehoused in the name of S. & S., who from time to time gave delivery orders for parcels to M., who gave them cheques for the value of the parcels. The amount of the cheques was carried to the credit of M. in a special account in the books of S. & S., & M. was also credited with 2½ per cent. for prepayment, & debited with the amounts of the bills, freight & other charges. The cheques were paid into the current banking account of S. & S. Before the bills had matured, S. & S. filed a petition for liquidation. Some consignments of tea remained in specie at the time of the stoppage:—*Held:* Q. was entitled to have the tea in specie applied in payment of the bills, on the ground that it had been specifically appropriated to meet them, but the bank which had discounted the bills was not entitled to have the proceeds of sale of the teas previously sold so applied.—*Re* SUSE, *Ex p.* DEVER (1884), 13 Q. B. D. 766; 51 L. T. 437; 33 W. R. 290, C. A.

Annotation:—**Refd.** Phelp, Stokes *v.* Comber (1885), 29 Ch. D. 813, C. A.

740. —— Hypothecation of bills of lading & policy of insurance given to bank—Receipt by bank of policy money on loss — Rights of bank to surplus.]—A shipper at Bombay having consigned goods to merchants in England, drew on them for £1,200, & insured the goods for £1,700. He sold the draft to defts., a bank, & handed them at the same time the policy of insurance & the bills of lading, with a letter of hypothecation signed by him. This letter stated that the shipper, having sold the bills to the bank, & having at the same time handed to them, "as collateral securities for the due payment of" the bill, "the bills of lading & shipping documents of the several goods stated at foot," thereby authorised the bank, "on default being made in acceptance on presentment, or in payment at maturity" of the bill, to sell the goods & apply the proceeds in payment of the bill, "the balance, if any, to be placed against any other of my bills which may at the time be in the hands of the bank, or any other liability of me to the bank." The only documents stated at foot were the bill of exchange & the bill of lading. The ship was burnt at sea & the cargo lost. The draft for £1,200 was duly accepted, but the acceptors failing, it was dishonoured at maturity. The bank recouped themselves out of the policy moneys which had been paid to them by the insurance office, & had a balance in their hands. This balance having been claimed by pltfs., who were assignees for value of it from the shipper, the bank claimed it as a collateral security for a debt due to them from the shipper on another account. He had shipped goods to other consignees & had drawn against the goods bills, which were also in the hands of the same bank. When the bills fell due, the drawees had requested the bank to defer presentment of the bills. The bills had not been presented, but the goods had been sold at a loss, & the bank had re-drawn upon the shipper for the deficiency, but he had failed:—*Held:* (1) the letter of hypothecation did not extend to any other liability of the shipper to the bank than that arising upon the £1,200 bill; (2) the bank having, at the request of the drawees, refrained from presenting the bills, had practically given them time, & had thus released the drawer, & the shipper was not indebted to the bank on this account; (3) pltf. was entitled to the surplus in the hands of the bank. —LATHAM *v.* CHARTERED BANK OF INDIA (1874), L. R. 17 Eq. 205; 43 L. J. Ch. 612; 29 L. T. 795; 2 Asp. M. L. C. N. S. 178.

741. Against bills of lading—Forged bill of lading —Rights of bank.]—A customer of a bank desired them to procure to be accepted bills of exchange, which a correspondent of his would draw against bills of lading he should send, & the bank got their agents to accept the bills of exchange on a document which was sent to them as, & purported to be, the bill of lading referred to. The bill of lading was in fact a forgery, no goods having been shipped, & the transaction being a fraud on the part of the customer's correspondent:—*Held:* the bank had not taken upon themselves the risk of the bill of lading being forged, & were entitled to recover from their customer the amount they had paid in respect of the bills of exchange.—WOODS *v.* THIEDEMANN (1862), 1 H. & C. 478; 10 W. R. 846; 158 E. R. 973.

Annotation:—**Mentd.** Guaranty Trust Co. of New York *v.* Hannay (1918), 87 L. J. K. B. 1223, C. A.

742. Authority to bank to advance sum on bills of lading subject to certificate—Fraud—Duty of bank.] —Pltf. having agreed to purchase cobalt ore from O., authorised deft. bank to pay cash in Sydney, N.S.W., against production of documents. The mandate was as follows: "Negotiate drafts of O. at sight on D. Bank (Berlin) London agency p. £800 account B. S. (against) bill of lading, policy of insurance & certificate analysis from H. (for) one hundred tons cobalt ore analysis not less than 5 per cent. protoxide shipped by steamer (to) Europe." O. intended to ship worthless ore, & in the bill of lading it was described as "P. M. two thousand six hundred & eighty bags containing one hundred tons cobalt ore." A sample of sound ore was submitted for analysis, which analysis the bank refused to accept, as the certificate did not refer to the bill of lading goods. O. then marked the sample as the bill of lading quantity was described. The analyst gave a second certificate, which was as follows: "Sample of cobalt ore marked 'P. M. two thousand six hundred & eighty bags representing one hundred tons' received from you on July 12 gave the following results: 4.14 per cent. cobalt, equal to 5.27 per cent. cobalt protoxide in the dry ore; 9.25 per cent. moisture." On producing the second certificate the bank paid O. £800. Subsequently O. was convicted of obtaining that money by fraudulent misrepresentation.

Pltfs. paid the bills, but the ore shipped being worthless, they sued deft. bank to recover the money:—*Held:* the certificate on its face was regular & came within the mandate, & there was no duty on the bank to see to the sampling, or verify the genuineness of the documents, & the bank was not liable.—BASSE & SELVE *v.* BANK OF AUSTRALASIA (1904), 90 L. T. 618; 20 T. L. R. 431.

743. Undertaking to accept bills—Failure of bank —Breach of contract.]—T., upon payment of £100 for commission, obtained from a bank a letter of credit, under which the bank, by their agent in the Mauritius, were to accept bills of exchange on London upon being fully secured by the deposit of shipping documents. Before the letter of credit reached T.'s agent in the Mauritius, news had arrived that the bank had stopped payment, & T.'s agent presented no bills for acceptance. The bank being in course of winding up:—*Held:* the mere stoppage of the bank gave T. no right to damages, as permission might have been given to the liquidators to accept the bills.—*Re* AGRA BANK, *Ex p.* TONDEUR (1867), L. R. 5 Eq. 160; 37 L. J. Ch. 121; 16 W. R. 270.

Annotation:—**Apld.** *Re* Barber, *Ex p.* Agra Bank (1870), L. R. 9 Eq. 725.

744. —— —— ——.]—A bank granted a letter of credit to a co. on terms that the co. should ship tea & forward bills of lading, invoices, & policy of insurance on the tea to the bank, & should also draw on B. & Co. bills to be accepted by B. & Co. to an amount sufficient to cover the amount authorised by the letter of credit. B. & Co. guaranteed the performance by the co. of these terms, "holding themselves responsible for the same." The co. drew on the bank, & the bank accepted the bills, but

Sect. 15.—*Bills of exchange drawn against shipping documents and accepted or discounted by bank. Sect.* 16.]

owing to the failure of the bank after the dates when the bills were drawn & before they became due the co. shipped no tea, & did not perform any of the terms agreed on. All the bills were eventually paid :—*Held :* the failure of the bank was no reason why the co. should not have performed its part of the contract, & B. & Co. were not relieved from their guarantee.—*Re* BARBER & Co., *Ex p.* AGRA BANK (1870), L. R. 9 Eq. 725 ; 39 L. J. Bcy. 39.

745. Rights of third parties against grantor of letter of credit—Negotiation of bills—Non-compliance with conditions—Notice to purchasers.]—Defts. at New York granted to M. & Co., of Rio & New York, a letter of credit authorising M. & Co. to draw on defts.' house in London at ninety days' sight, for any sums not exceeding £20,000, for the invoice cost of coffee, to be shipped from Rio " to New York, Philadelphia, or Baltimore," advice of the bills to be given to defts. in London accompanied by bill of lading filled up to order of the shipper, & blank indorsed with abstract of invoice thereon for the property shipped, all the bills of lading issued (except one to be forwarded by the vessel to defts. at New York, & the one retained by the captain of the vessel) to be forwarded direct to defts. in London, & defts. by the letter of credit agreed with the drawers, indorsers, & *bonâ fide* holders of bills, drawn in compliance with the terms of it, that the same should be duly honoured on presentation at their office in London. M. & Co. having purchased coffee at Rio, drew upon defts. in London, under the above letter of credit, for the invoice price of the coffee to the order of pltfs. at ninety days' sight, & pltfs., having referred to the letter of credit, purchased the bill. The coffee was shipped at Rio, & four bills of lading of the same tenor were given by the captain, in which the vessel was stated to be " bound for St. Thomas for orders." Two of these documents were delivered by M. & Co. to pltfs., but only one of them was forwarded by the latter to defts. in London, & with it was also sent to defts. in London, a letter of advice from M. & Co., stating that the coffee was shipped " to St. Thomas for orders, for either New York, Philadelphia, or Baltimore." On the bill of exchange being presented by pltfs. to defts. in London, together with the before-mentioned bill of lading & letter of advice, the latter refused to honour the bill of exchange on the ground that the bills of lading were not in accordance with the terms of the letter of credit. In pursuance of written directions sent by M. & Co., at the request of defts. in New York, to the captain at St. Thomas, the vessel proceeded thence to New York, & on arrival the coffee was sold, realising less by £1,500 than the amount of the bill of exchange. Pltfs. sued to recover that deficiency from defts., as damages for their refusal to honour the bill of exchange :—*Held :* defts. were not liable, as the conditions in the letter of credit on which they engaged to accept were unperformed, & the obligation upon them to accept under the letter of credit never attached, because the goods had not been consigned to any of the ports contracted for & the retention by pltfs. of a bill of lading gave them power to take possession of the coffee & deprive defts. of any security for their advances.—BRAZILIAN & PORTUGUESE BANK, LTD. *v.* BRITISH & AMERICAN EXCHANGE BANKING CORPN., LTD. (1868), 18 L. T. 823.

746. Documentary bills under letter of credit—Failure of drawee bank—Rights of bill holders.]—C. & Co. drew two sets of bills of exchange on the B. Co. under the authority of letters of credit of that co., against two cargoes of cotton. The letters of credit stated that the bills, drawn in pursuance of it, were to be accompanied by corresponding bills of lading for cotton to be given up to the B. Co. on their acceptance of the bills of exchange. One set of bills was accepted, but not paid by the B. Co., & another set was not accepted, as the B. Co. had stopped payment before those bills were presented for acceptance. C. & Co. claimed to prove in the winding-up of the B. Co. for the whole amount of the bills (which had been taken up by C. & Co.) without deducting the proceeds of sale of the cotton, which had been received by them :—*Held :* on the true construction of the letter of credit, the bills of lading were to be a security to the co., & C. & Co. could only prove for the balance.—*Re* BARNED'S BANKING CO., COUPLAND'S CLAIM (1869), 5 Ch. App. 167 ; 39 L. J. Ch. 287 ; 21 L. T. 807 ; 18 W. R. 122, L.J.

Annotations :—**Apld.** *Re* Barned's Banking Co., Leech's Claim (1871), 6 Ch. App. 388, L.JJ. **Consd. & Apld.** *Re* Barned's Banking Co., *Ex p.* Joint Stock Discount Co. (1874), L. R. 19 Eq. 1.

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746 i. *Documentary bills under letter of credit—Acceptance by bank—Payment.*]—Pltfs. contracted to sell to defts., & defts. contracted to buy, bales of cornsacks, at a certain price f.o.b. Calcutta, pltfs. to draw for the price at six months' sight on a London bank under a banker's letter of credit to be supplied them by defts. before shipment. Pltfs. shipped bales to defts. under bills of lading to the order of defts., invoicing the lots as shipped on account & risk of defts., & insuring them for the benefit of defts. For the price pltfs. drew on the London bank as arranged, under the letter of credit provided by defts. The invoice forwarded charged defts. with the price of the lots forwarded, & credited them with the amount of the draft :—*Held :* the acceptance by the bank of the draft of pltfs. under the letter of credit was not absolute payment, & defts. would have been liable for the price of the bales supplied to them, if the bank had not met the draft.—HINDLEY & Co. *v.* TOTHILL, WATSON & Co. (1894), 13 N. Z. L. R. 13.—**N.Z.**

746 ii. —— *Acceptance of drafts without policies of insurance—Purchaser acting on part performance by bank.*]—Applt. agreed to buy from a merchant in Buenos Ayres a cargo of wheat for delivery at a named Australian port, payment to be " by London banker's acceptance of seller's drafts at ninety days' sight under confirmed credit, with documents attached as usual which are to be given upon acceptance. Seller to give policies &/or certificates of insurance for 2 per cent. over invoice value." Applt., by letter, requested resp. bank to issue to him a credit authorising the seller to draw on London at ninety days' sight for the value of the wheat. The letter continued :—" Insurance to be effected by shippers. Drafts to be accompanied by bills of lading, policy of insurance, merchant's certificate of weight & quality. Separate documents for each one hundred tons of wheat & the certificate of your agents at Buenos Ayres that the conditions of the credit have been complied with." Applt. then undertook that, in consideration of the bank issuing such credit, he would provide funds by purchasing the bank's drafts on London at the exchange of the day to retire all bills drawn under the credit in time to meet the bills before maturity. On the same day the bank, at applt.'s instance, sent to their London house a cable message summarising the request. A credit was subsequently opened by the bank in London under which the seller drew certain drafts on the bank in London & negotiated them in Buenos Ayres. The drafts were subsequently accepted by the bank in London, but they were not then attached to their policies of insurance, & the policies were not delivered to the bank until a fortnight afterwards. Prior to his requesting the bank to issue the credit, applt. had sold the wheat by a contract, by which he bound himself to deliver with the wheat separate policies of insurance for each one hundred tons, & that fact was communicated to the bank in London before the issue of the credit. In those circumstances the separate policies could only be issued in London, & would not be issued until after the arrival of the bills of lading. When the wheat arrived in Melbourne applt. refused to accept delivery of the wheat. In an action by the bank against applt. to enforce his liability in respect of the drafts :—*Held :* (1) it was not a condition precedent that the drafts should at the time of presentment for acceptance be accompanied by policies of insurance, &, if it was, applt. had rendered its performance impossible & so had excused the bank from performance of it ; (2) if the bank, by accepting the drafts unaccompanied by policies of insurance, had failed to perform a condition precedent of the contract, applt., by his conduct after the arrival of the wheat in Australia, had elected to take advantage of the acceptance of the drafts & was liable to provide for them.—FRIEDLANDER *v.* BANK OF AUSTRALASIA (1909), 8 C. L. R. 85.—**AUS.**

747. —— —— ——.]—P. & Co. were cotton merchants at Pernambuco. A., at Liverpool, wished to obtain consignments of cotton from them. They desired some security other than his own. He obtained from B.'s banking co. a letter of credit, by which the bankers authorised the Pernambuco firm to draw on them "against cotton purchased in conformity with instructions." The drafts were to be "covered by shipping documents, say invoices & bills of lading of cotton addressed to this co., & forwarded under separate cover by the same mail which brings the drafts for acceptance, on receipt of which documents we engage to honour such drafts." Some shipping documents of cotton were sent, & some bills were accepted, & one bill was accepted without any shipping documents being sent. Before any one of the bills was due, the banking co. was wound up, & bills arriving immediately afterwards were left unaccepted. The Pernambuco firm claimed to prove against the bankers for the whole amount of the bills, without bringing into account the value of the cotton which had been sold, or which remained in hand:—*Held:* they were not in a position to do so, but were entitled only to prove for the balance, & the bill-holders had no lien over the goods in the hands of the bankers, who were only debtors to the bill-holders for the surplus remaining after the goods consigned had been applied to satisfy the acceptances.—BANNER *v.* JOHNSTON (1871), L. R. 5 H. L. 157; 40 L. J. Ch. 730; *sub nom.* BARNED'S BANKING CO. *v.* JOHNSTON, 24 L. T. 542, H. L.

Annotations:—**Refd.** *Re* Barned's Banking Co., *Ex p.* Joint Stock Discount Co. (1874), L. R. 19 Eq. 1; *Re* Suse, *Ex p.* Dever (1884), 13 Q. B. D. 766, C. A. **Mentd.** *Re* Jones, *Ex p.* Lovering (1874), 9 Ch. App. 586, L.JJ.; Fraser *v.* Province of Brescia Steam Tram. Co. (1887), 56 L. T. 771.

748. —— **Bills against "produce bought & paid for"—Non-performance of conditions.**]—A letter of credit was given by defts., merchants in London, to K. & Co., merchants at Batavia, to be availed of by drafts against "produce bought & paid for" by K. & Co., such produce to be held by K. & Co., under lien to defts. until the shipping documents were ready for transmission to them, & in the letter defts. undertook to accept & pay at maturity all drafts drawn by K. & Co. in conformity with the terms & conditions of the letter. Under this credit K. & Co. drew bills on defts., which they negotiated for value with pltfs., who were bankers at Batavia. In an action by the bankers against defts. for refusing to accept the bills so drawn:—*Held:* it was a condition precedent to pltfs.' right to recover on these bills against defts. that produce should have been both bought & paid for, against which the bills could be drawn.

Other bills, drawn by K. & Co., under the credit & negotiated by them with pltfs., were presented by pltfs. to defts. for acceptance, & defts. accepted & ultimately paid the same to the holders thereof, in the belief that produce had been bought & paid for by K. & Co. against such bills, whereas no such produce had been bought or paid for:—*Held:* the mere presentation of the bills by pltfs. to defts. for acceptance did not amount to a warranty or representation by pltfs. that produce had been bought & paid for by K. & Co. against which the bills could be drawn, & defts. were not entitled to recover from pltfs. the amounts so paid.—CHARTERED BANK OF INDIA, AUSTRALIA & CHINA *v.* MACFAYDEN (P.) & Co. (1895), 64 L. J. Q. B. 367; 72 L. T. 428; 43 W. R. 397; 11 T. L. R. 289; 39 Sol. Jo. 365; 1 Com. Cas. 1; 15 R. 333.

749. —— **Documents not in order—Liability of bank.**]—Pltf. carried on business in London as an importer of frozen meat. Defts. at pltf.'s request undertook to negotiate on the terms of a letter of credit, at their option, drafts drawn by the shippers on pltf. in respect of consignments of frozen meat, the drafts to be accompanied by shipping documents, *i.e.*, bills of lading, invoice, & policy of insurance. Defts. negotiated a draft, attached to which was a policy containing a clause: "To pay a total loss by total loss of a vessel only." The usual form of policy in the frozen meat trade was a policy covering all risks. Pltf. in the usual course of business afterwards accepted the draft before he had examined the documents. A partial loss of the consignment took place, which by reason of the clause in the policy pltf. could not recover from the underwriters:—*Held:* defts. had committed a breach of their contract with pltf. in negotiating a draft which was not accompanied by a policy of insurance in the proper form, & they were liable to make good the loss to pltf.—BORTHWICK *v.* BANK OF NEW ZEALAND (1900), 17 T. L. R. 2; 6 Com. Cas. 1.

See, further, BILLS OF EXCHANGE, PROMISSORY NOTES, & NEGOTIABLE INSTRUMENTS.

SECT. 16.—LETTERS OF CREDIT.

750. Payment on forged cheque—Negotiability.]—A., in Scotland being indebted in £460 to B. in England, paid £460 into a Scotch bank, in return for a letter of credit on an English bank in this form: "Please honour the drafts of B. to the extent of £460, which charge to the bank." A. inclosed this letter of credit in a letter to B., which arrived at B.'s office in B.'s absence. The only clerk in the office, who had no authority to draw cheques, opened the letter, took the letter of credit to the English bank, forged a cheque in B.'s name for the amount, lodged the letter of credit with the English bank, received payment, & absconded. On B.'s return he drew on the English bank for the £460, but his draft was dishonoured. B. & A. sued the Scotch bank in Scotland for repayment of the £460:—*Held:* (1) the Scotch bank was liable, unless it could show either that the English bank actually paid B.'s draft, or did something which, as between them & B., the English bank was entitled to treat as equivalent to payment; (2) a letter of credit was not a negotiable instrument & the person presenting it was not necessarily the person entitled to make the draft.—ORR & BARBER *v.* UNION BANK OF SCOTLAND (1854), 1 Macq. 513; 24 L. T. O. S. 1; 2 C. L. R. 1566, H. L.

Annotations:—**Consd.** Conflans Quarry Co. *v.* Parker (1867), L. R. 3 C. P. 1. **Refd.** British Linen Co. *v.* Wilson (1861), 4 L. T. 162, H. L. **Mentd.** Schofield *v.* Londesborough, [1896] A. C. 514, H. L.; London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L.

751. Payment on forged signature—Liability of issuing bank.]—A proposal was made to an in-

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PART II. SECT. 16.

a. *What amount to—Stamp.*]—A letter signed by a bank agent, "Be so good as pay the orders of A. on me, which will be paid on presentation here, the sum to be confined to £1,000, & to be paid within a fortnight from this date":—*Held:* a letter of credit, & must be stamped.—WATERSTON *v.* EDINBURGH & GLASGOW BANK (1858), 20 Dunl. (Ct. of Sess.) 642.—**SCOT.**

b. *Issued by foreign bank—Construction.*]—A letter of credit issued by a foreign bank is to be construed according to the laws of the place where it was issued.—SOVEREIGN BANK *v.* BELLHOUSE (1911), Q. R. 23 K. B. 413.—**CAN.**

751 i. *Payment on forged signature—Liability of issuing bank.*]—A bank in England received money there to be transmitted to B. in Upper Canada, & sent a letter of credit to B. to receive the money at a branch of the bank in Toronto. The letter was taken out of the post office in Canada (B. having in the meantime died), & B.'s name forged on the letter of credit, & the money received by some person unknown:—*Held:* B.'s extrix. entitled to recover the money from the bank in Toronto as money had & received to B.'s use.—GISSING *v.* HOPPER (1843), 6 O. S. 505.—**CAN.**

surance co. by H., one of their local agents, for an insurance on the life of K. & for a loan of £450 to the proposed insurer, on the security of the policy. A bond & other documents, purporting to be signed by K. & his sureties, were forwarded to the insurance co. by the agent, who requested the money to be sent to him by letter of credit, for K. The co. then paid to a bank £437, receiving a letter of credit to honour the drafts of K. at I., which they forwarded to H., who forged the signature of K. to the order & received the cash. It was subsequently discovered that the signatures to all the documents were forged, & the co. sued the bank to recover the amount of the letter of credit:—*Held:* (1) the payment upon the forged signature of K. was no discharge & as no draft of K. was ever given the co. had a right to demand the return of the money; (2) H. could not be considered the agent of the co. to receive the amount of the letter of credit.—BRITISH LINEN CO. *v.* CALEDONIAN INSURANCE CO. (1861), 4 Macq. 107; 4 L. T. 162; 7 Jur. N. S. 587; 9 W. R. 581, H. L.

Annotations:—**Consd.** Conflans Quarry Co. *v.* Parker (1867), L. R. 3 C. P. 1. **Mentd.** London Joint Stock Bank *v.* Macmillan & Arthur, [1918] A. C. 777, H. L.

752. Undertaking to accept bills—Failure of bank—Breach of contract.]—Defts., bankers at Liverpool, by their letter of credit to pltfs., grain merchants at Alexandria & Liverpool, undertook to accept the drafts of pltfs.' Alexandria firm, pltfs. undertaking to put them in funds to meet the bills at maturity & defts. receiving ½ per cent. for the accommodation. Bills were accepted by defts. under this arrangement, & pltfs. duly provided defts. with funds exceeding the amount of the acceptances. Before the bills became due defts.' bank stopped, & they gave notice to pltfs. that they would be unable to meet the bills. Pltfs. arranged with another house in Liverpool to take up the bills, paying 2½ per cent. commission; they were also obliged to pay to the holders the expenses of protesting the bills at Liverpool & Alexandria, & incurred expense in telegraphic communications between Liverpool & Alexandria. In an action against defts. for breach of the contract contained in their letter of credit:—*Held:* pltfs. were entitled to recover the commission & the notarial & telegraphic expenses.—PREHN *v.* ROYAL BANK OF LIVERPOOL (1870), L. R. 5 Exch. 92; 39 L. J. Ex. 41; 21 L. T. 830; 18 W. R. 463.

Annotations:—**Apld.** *Re* Oriental Commercial Bank (1871), L. R. 12 Eq. 501. **Folld.** *Re* General South American Co. (1877), 7 Ch. D. 637. **Distd.** *Re* English Bank of the River Plate, *Ex p.* Bank of Brazil, [1893] 2 Ch. 438; Banque Populaire de Bienne *v.* Cave (1895), 1 Com. Cas. 67. **Refd.** Larios *v.* Bonany y Gurety (1873), L. R. 5 P. C. 346, P. C.; Wallis Chlorine Syndicate *v.* American Alkali Co. (1901), 17 T. L. R. 656; Barnett *v.* Hatt (1903), 48 Sol. Jo. 14, C. A.

753. Open letter of credit—Negotiation of bills under—Failure of bank—Right of persons paying bills under letter of credit.]—A bank gave to D. T. & Co. a letter addressed to them, & expressed thus: "You are hereby authorised to draw upon this bank to the extent of £15,000, & such drafts I undertake duly to honour on presentation. This credit will remain in force for twelve months from its date, & parties negotiating bills under it are requested to indorse particulars on the back hereof." D. T. & Co. drew bills under this letter to the amount of £6,000, & indorsed them to applt., who duly indorsed particulars on the letter of credit. The bank was afterwards ordered to be wound up, & D. T. & Co. were indebted to the bank to an amount exceeding what was due on the bills:—*Held:* the letter of credit constituted a contract to the benefit of which all persons taking & paying for bills on the faith of it were entitled in equity, without regard to the equities between the bank & D. T. & Co., & applt. was entitled to prove for the amount due on the bills, without regard to the state of the account between the bank & D. T. & Co.—*Re* AGRA & MASTERMAN'S BANK, *Ex p.* ASIATIC BANKING CORPN. (1867), 2 Ch. App. 391; 36 L. J. Ch. 222; 16 L. T. 162; 15 W. R. 414, L.JJ.

Annotations:—**Distd.** *Re* Barned's Banking Co., *Ex p.* Stephens (1868), 3 Ch. App. 753, L.JJ. **Apld.** *Re* General Estates Co., *Ex p.* City Bank (1868), 3 Ch. App. 758, L.JJ. **Distd.** *Re* Natal Investment Co. (1868), 3 Ch. App. 355, L.C.; Graham *v.* Johnson (1869), L. R. 8 Eq. 36. **Apld.** Maitland *v.* Chartered Mercantile Bank of India, London, & China (1869), 38 L. J. Ch. 363. **Consd.** *Re* Imperial Land Co. of Marseilles, *Ex p.* Colborne & Strawbridge (1871), L. R. 11 Eq. 478; Union Bank of Canada *v.* Cole (1877), 47 L. J. Q. B. 100, C. A.; Rainford *v.* Keith & Blackmore Co., [1905] 1 Ch. 296. **Refd.** *Re* Romford Canal Co., Pocock's Claim, Trickett's Claim, Carew's Claim (1883), 24 Ch. D. 85. **Mentd.** *Re* Blakely Ordnance Co., *Ex p.* New Zealand Banking Corpn. (1867), 3 Ch. App. 154, L.J.; Pellas *v.* Neptune Marine Insce. (1880), 28 W. R. 405, C. A.; Bickerton *v.* Walker (1885), 31 Ch. D. 151, C. A.; *Re* Goy, Farmer *v.* Goy, [1900] 2 Ch. 149; Pickersgill *v.* London & Provincial Marine & General Insce., [1912] 3 K. B. 614.

754. —— —— Bonâ fide holder in due course—Constructive notice.]—Open marginal letters of credit were granted by a Scotch bank to F. & Co., a firm in China, on the guarantee of pltfs., an English firm, whereby F. & Co. were authorised to draw for a specified amount on London bankers, who were the agents of the Scotch bank. F. & Co., in fraud of their agreement with pltfs., drew bills under these letters of credit which were not protected by shipping documents, & indorsed them for value to the C. bank, which had no actual notice of the agreement between F. & Co. & pltfs. Pltfs. averred that, according to the ordinary course of dealing in reference to letters of credit granted to foreign firms, the foreign firm could only obtain letters of credit upon the guarantee of some English firm, & that the foreign firm stipulated to use the letters of credit only for the purpose of buying goods to be consigned to England, & to transmit the bills of lading to the English firm as a security for the repayment of the bills of exchange drawn under the letters of credit by a mail not later than that which carried the bills of exchange. Pltfs. sought to restrain the London bankers from accepting the bills:—*Held:* (1) The C. bank were entitled to require the grantors of the letters of credit to accept the bills; (2) in reference to open letters of credit, no such custom exists as pltfs. averred, & even if there were such a custom the rights of the C. bank as holders in due course would not be affected by the mere constructive notice of the agreement between pltfs. & F. & Co., which the custom would imply.—MAITLAND *v.* CHARTERED MERCANTILE BANK OF INDIA, LONDON & CHINA (1869), 38 L. J. Ch. 363.

Annotation:—**Distd.** Union Bank of Canada *v.* Cole (1877), 47 L. J. Q. B. 100, C. A.

755. Rights of third parties against grantor—Contract between.]—Letters of credit containing a pro-

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754 i. *Open letter of credit—Negotiation of bills under—Bonâ fide holder in due course.*]—*Bonâ fide* holders for value of bills of exchange drawn against, & in accordance with the terms of, a letter of credit are entitled to recover the amount of the bills from the grantor of the letter who has refused to accept them.—ORIENTAL BANKING CORPN. *v.* LIPPERT & Co. (1875), Buch. 152.—S. AF.

755 i. *Rights of third parties against grantor—Letter indorsed & discounted—Insolvency of grantee.*]—A bank letter of credit, dated July 1, was drawn in favour of C., payable "on or after 6th instant." On July 2 it was blank indorsed *per pro.* of C., & its contents, less the discount, were received by the indorser. July 7 was a Sunday, & the indorsee presented the letter for payment on Saturday, when payment was refused, as the estates of C. were in course of being sequestrated. Sequestration was awarded at a later period of the same day, & the indorser, who had

mise to accept bills create a contract between the giver of the letters & the person who advances money on the faith of them only when such letters are intended to be shown to third parties for the purpose of obtaining advances, or where the giver of the letter has so conducted himself that such an intention may fairly be presumed.

Documents in the form of letters of credit were addressed by defts. to S. & Co., authorising them to draw bills on defts. against shipments of grain. The documents were subject to certain expressed conditions. S. & Co. drew bills upon defts. under the credit so opened without performing the conditions. Pltfs., having notice of the conditions, & knowing that they were unfulfilled, advanced money on the bills so drawn, which defts. refused to accept. Pltfs. sued defts. for not accepting the bills :—*Held :* if the documents created a contract between pltfs. & defts., that contract was subject to such of the conditions as were not necessarily subsequent to the advance.—UNION BANK OF CANADA *v.* COLE (1877), 47 L. J. Q. B. 100, C. A.

Annotation :—**Apld.** Chartered Bank of India, Australia & China *v.* Macfayden (1895), 64 L. J. Q. B. 367.

756. Credit conditional on receipt of certificates—Refusal to grant certificates — Trust.] — Resp. entered into a contract in England with the French Govt. for the supply of a large number of cartridges, to be paid for through the ambassador, upon the production of certificates of approval from the agents of the Govt. The contract specified the times & quantities of each delivery, & time was to be of the essence of the contract. Applts., bankers in England, who had in their hands funds belonging to the French Govt., wrote to resp. that a special credit for £40,000 had been opened in his favour, & would be paid him on receipt of the certificates. Some cartridges were supplied & paid for, others were delivered, but the certificates were refused on the ground that the contract time had expired :—*Held :* the letter did not amount to an equitable assignment of the £40,000, or impress a trust upon funds in the banker's hands to that amount, but was simply a statement that the bankers would act as paymasters, & resp. had no claim on applts. for the price of the parcels for which certificates had been refused. *Semble :* if a trust had been created the fact that the French Govt. did not appear would not have prevented the ct. from dealing with the fund.—MORGAN *v.* LARIVIÈRE (1875), L. R. 7 H. L. 423 ; 44 L. J. Ch. 457 ; 32 L. T. 41 ; 23 W. R. 537, H. L.

Annotations :—**Mentd.** The Charkieh (1873), L. R. 4 A. & E. 59 ; Foreign Bondholders Corpn. *v.* Pastor (1874), 23 W. R. 109 ; The Parlement Belge (1880), 5 P. D. 197, C. A. ; Twycross *v.* Dreyfus (1887), 5 Ch. D. 605, C. A.

SECT. 17.—CIRCULAR NOTES.

757. Loss of—Recovery of money paid for—Obligation to refund money on offer to return letter of indication—Equitable relief.]—Pltfs. purchased circular notes of a bank, & posted them with the usual letter of indication to their agent at Paris, whose name appeared, both in the notes & letter, as the person who was to receive the amount of such notes. The letter, but not the notes, duly reached pltfs.' agent, but it did not appear what had become of the notes, or by whose fault they had been lost : —*Held :* as there was a possibility of the notes being made available & of the bank becoming liable to repay any of the indicated correspondents who might cash them, there was no obligation on the bank to refund to pltfs. the money they had paid simply on their offer to return the letter of indication. *Semble :* pltfs. had a claim to equitable relief on giving the bank a sufficient indemnity against the outstanding notes. — CONFLANS QUARRY CO., LTD. *v.* PARKER (1867), L. R. 3 C. P. 1 ; 37 L. J. C. P. 51 ; 17 L. T. 283 ; 16 W. R. 127.

758. —— —— Notes paid on forged signature—Breach of contract by holder.]—Pltf. lost circular notes which were payable to order of "the bearer named in the letter of indication." A notice was printed on the letter as to the necessity of keeping the letter & notes apart, but pltf. kept them both together in his pocket. The notes were cashed by correspondents of defts. for persons, who produced the letter of indication & forged pltf.'s name :—*Held :* the condition of keeping the letter & notes apart was a reasonable one, & a material part of the contract, & the breach of it having led to the loss, pltf. could not recover.—RHODES *v.* LONDON & COUNTY BANK (1880), Journal of Institute of Bankers, Vol. II., p. 779.

Annotation :—**Folld.** Hume-Dick *v.* Herries, Farquhar (1888), 4 T. L. R. 541.

759. ——————.]—Defts. issued circular notes in favour of pltf.'s daughter, D. The letter of indication requested the holder, as a precaution against forgery, to keep the notes & letter of indication separate. D. left the notes in a railway carriage & they were stolen & subsequently cashed by persons who altered the numbers of the notes & inserted the name of E. B. as payee. Pltf. had given immediate notice of the loss to defts. :—*Held :* defts. were not liable for the loss as pltf. had not complied with the terms on which the notes were issued. —HUME-DICK *v.* HERRIES, FARQUHAR & CO. (1888), 4 T. L. R. 541.

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kept the contents of the letter separate from the other funds of C., paid them to the trustee in the sequestration. In a multipoinding raised by the bank on which the letter was drawn :—*Held :* the indorsee, holding the letter, was entitled to uplift its contents preferably to the trustee.—STRUTHERS *v.* COMMERCIAL BANK (1842), 4 Dunl. (Ct. of Sess.) 460 ; *sub nom.* GLASGOW & SHIP BANK & FORBES & CO. *v.* STRUTHERS & COMMERCIAL BANK, 14 Sc. Jur. 194.—**SCOT.**

c. *Revocation of — Damages.*] — Pltf. sued a bank for the recovery of $100,000, damages alleged to have been suffered by him by reason of the cancellation of two letters of credit, one for £300 & the other for £3,000, & recovered a verdict for £6,500, which was confirmed by the ct. sitting in review. On appeal, the verdict was set aside on the ground of excessive damages & new trial ordered. —BANK OF TORONTO *v.* ANSELL (1875), 7 R. L. 262.—**CAN.**

d. —— *Drawn in favour of third party.*]—A person who induces a bank to issue to him a letter of credit may, by his subsequent conduct, give the bank cause for cancelling it, but not if the customer secured the letter of credit from the bank in favour of another person. In that event the customer cannot, as of right, oblige the bank to cancel it, for the contract is between the bank & such other person, not between the bank & its customer. A bank cannot cancel a letter of credit once it has been transferred to a third party.—SOVEREIGN BANK *v.* BELLHOUSE (1911), Q. R. 23 K. B. 413.—**CAN.**

e. *Dishonour of—Damages.*] — In an action against the public officer of a bank for discrediting a letter of credit for £500, after having granted same, a verdict was given for pltf., with £1,000 damages.—GRAHAM *v.* MAHONY, 1 Ir. L. Rec. (1st. Ser.) 385.—**IR.**

f. —— *Letter returned marked "amount already paid to payee"—Overdrawn account at another branch—No appropriation.*]—Pltf. received a letter of credit on defts.' branch at B., which he handed over to R., with his cheque for the amount, for presentation & payment. R. sent the cheque & letter of credit through his own bank to defts.' branch at B. The letter of credit was returned with the indorsement "amount already paid to payee." The cheque was not paid. At the time of the presentation of the letter of credit pltf. was indebted to the L. branch of defts.' bank to an amount exceeding the amount for which the letter of credit was given. But no appropriation was, in fact, then made of the credit in reduction of pltf.'s liability to the L. branch. Pltf. brought an action for the alleged libel indorsed on the letter of credit :—*Held :* there being no appropriation of the amount of the letter of credit, the statement indorsed was untrue, & was not privileged, & was actionable. *Semble :* if the appropriation had actually been made, the bank would have been entitled to treat the amount of the letter of credit as having been paid.—ELLIS *v.* BANK OF AUSTRALASIA (1882), 3 N. S. W. L. R. 96.—**AUS.**

SECT. 18.—SAFE CUSTODY OF SECURITIES AND OTHER VALUABLES.

760. Bank as bailee—Degree of care.]—Bankers, who accept the custody of their clients' & customers' deeds & securities, whether gratuitously or for reward, are not insurers, but are liable only to use reasonable care & diligence (FARWELL, L.J.).—LLOYD *v.* GRACE, SMITH & CO., [1911] 2 K. B. 489; 80 L. J. K. B. 959; 104 L. T. 789; 27 T. L. R. 409, C. A.; *revsd.* on another point, [1912] A. C. 716, H. L.

Annotations:—**Mentd.** Smith *v.* Martin, [1911] 2 K. B. 775, C. A.; Mair *v.* Rio Grande Rubber Estates, [1913] A. C. 853, H. L.; Radley *v.* L. C. C. (1913), 109 L. T. 162, D. C.; Armstrong *v.* Jackson, [1917] 2 K. B. 822.

761. Bank as gratuitous bailee—Degree of care—Theft by bank servant.]—In an action for damages against a bank as bailees for the negligent keeping of certain railway debentures placed in their care by a customer, in the ordinary way of their business as bankers, it appeared that the box containing such securities (of which the customer kept the key) was kept in a strong room in the bank, with the boxes of other customers, & specie & other securities belonging to the bank. Access to this room was only obtained by passing through a compartment where a cashier sat by day, & a messenger slept at night. The strong room had two iron doors, which were opened by separate keys, which during the day were kept by the cashier who occupied the compartment. One of the keys was kept at night by the cashier of the bank, & the other key by another officer of the bank. Beyond this strong room there were two other rooms; in the outer of the two uncoined gold, & in the inner bullion & unsigned notes were kept. The manager of the bank kept the key of the outer of these rooms, & one of the directors of the bank that of the inner. The owner of the box had free access to the room where his box was deposited during banking hours, in the presence of one of the bank clerks, when he had occasion to take out coupons from his debentures for collection. While in such custody the cashier of the bank abstracted the debentures from the box, & made away with them:—*Held:* the bank, as gratuitous bailees, were not bound to exercise more than ordinary care of the deposits entrusted to them, & the negligence for which alone they would be made liable would have been a want of that ordinary diligence, which a reasonably prudent man took of his own property of the like description.—GIBLIN *v.* M'MULLEN (1868), L. R. 2 P. C. 317; 5 Moo. P. C. C. N. S. 434; 38 L. J. P. C. 25; 21 L. T. 214; 17 W. R. 445; 16 E. R. 578, P. C.

Annotations:—**Distd.** *Re* United Service Co., Johnston's Claim (1871), 6 Ch. App. 212, L.JJ. **Refd.** Leese *v.* Martin (1873), L. R. 17 Eq. 224; Bullen *v.* Swan Electric Engraving Co. (1906), 22 T. L. R. 275; Banbury *v.* Bank of Montreal, [1917] 1 K. B. 409, C. A. **Mentd.** Lagunas Nitrate Co. *v.* Lagunas Syndicate, [1899] 2 Ch. 392, C. A.; *Re* National Bank of Wales, [1899] 2 Ch. 629, C. A.

762. —— Misappropriation by partner of bank—Proceeds not applied to use of partnership—Bank not liable.]—A customer deposited a box containing various securities with his bankers for safe custody, & afterwards granted a loan of such securities to one of the partners in the banking house for his own private purposes upon his depositing in the box certain railway shares to secure the replacing of the securities then lent. This partner afterwards for his own purposes, & without the knowledge of the customer or his co-partners, subtracted the railway shares, & substituted others of less value. The key of the box was in the custody & care of the partnership, but they had no right to examine its contents:—*Held:* (1) as the proceeds of the railway shares were not applied to the use of the partnership, the banking firm were not answerable for this tortious act of their partner for his own benefit; (2) the partners were not chargeable with any loss occasioned by this subtraction of shares, on the ground of negligence.—*Re* BIDDULPH, *Ex p.* EYRE (1843), 3 Mont. D. & De G. 12; 12 L. J. Ch. 266; 7 Jur. 162; *sub nom. Re* WRIGHT, *Ex p.* EYRE, 1 Ph. 227; 41 E. R. 618.

Annotations:—**Refd.** Bury *v.* Allen (1845), 1 Coll. 589; Hughes *v.* Twisden (1886), 55 L. J. Ch. 481.

763. Bank as bailees for reward—Culpable negligence—Fraud by servant of bank—Damages.]—J., the owner of railway shares in two cos., deposited the certificates for safe custody with a banking co., who undertook to receive the dividends for a small commission. On receiving the certificates from the railway cos. J. gave his address in one instance at the office of the bank, & in the other at a club. The manager of the bank, who had the key of the safe where the certificates were kept, fraudulently sold the shares, & forged the name of J. to the transfer. The cos. wrote to J., informing him of the transfers, & receiving, in one instance, no answer, & in another an answer in J.'s name forged by the manager, registered the transfer. J. afterwards, on discovery of the fraud, brought suits against the two cos. & the transferees of the shares, in which he recovered the shares, but the ct. gave him no costs. The banking co. being wound up, J. claimed to prove against the co. for the amount of his costs in the suit which had been occasioned by their negligence:—*Held:* (1) the banking co. were bailees for reward as they had charged a commission for collecting the dividends, & they had been guilty of culpable negligence in keeping them; (2) the loss of the costs was too remote a consequence of the negligence of the co. for them to be held liable for it.—*Re* UNITED SERVICE CO., JOHNSTON'S CLAIM (1870), 6 Ch. App. 212; 40 L. J. Ch. 286; 24 L. T. 115; 19 W. R. 457, L.JJ.

Annotations:—**Distd.** Jobson *v.* Palmer, [1893] 1 Ch. 71. **Refd.** Leese *v.* Martin (1873), L. R. 17 Eq. 224. **Mentd.** Arnold *v.* Cheque Bank (1876), 34 L. T. 729; *Re* Cooper, Cooper *v.* Vesey (1882), 20 Ch. D. 611, C. A.

764. Improper delivery to co-trustee—Fraudulent misappropriation by co-trustee — Negligence of bank.]—A trust fund standing in the name of three trustees consisted of Spanish bonds, which were ordered by the Spanish Govt. to be converted into a stock bearing a different rate of interest. The box containing the bonds was in 1852, by authority from the co-trustees, handed over by the bankers, in whose custody it had been placed, to C., one of the trustees & a stockbroker, for the purpose of effecting the conversion. C. converted the stock, but appropriated a large number of the new bonds, & the box, less the bonds thus abstracted, was returned to the bankers without examination by the co-trustees. The bankers subsequently without authority delivered over the box to C. to enable him to receive the dividends, & that opportunity was taken by him to make a further appropriation of the securities. The loss was not discovered until 1856, when C. absconded:—*Held:* the trustees were not responsible for the subsequent loss, which had arisen from no negligence on their part, but from the improper act of the bankers.—MENDES *v.* GUEDALLA (1862), 2 John. & H. 259; 31 L. J. Ch. 461; 6 L. T. 746; 8 Jur. N. S. 878; 10 W. R. 482; 70 E. R. 1054.

Annotations:—**Mentd.** *Re* Speight, Speight *v.* Gaunt (1883) 22 Ch. D. 727, C. A.; *Re* De Pothonier, Dent *v.* De Pothonier, [1900] 2 Ch. 529; *Re* Sisson's Settlmt., Jones *v.* Trappes [1903] 1 Ch. 262.

765. General lien on—Improper interference by bank—Injunction—Damages.]—Bankers have no general lien on boxes containing securities deposited with them for safe custody.

A customer who had deposited such boxes for safe custody became lunatic, & his committees

were appointed. The bankers, who claimed a general lien, having obtained garnishee orders against debtors of their lunatic customer through information obtained after opening the boxes, the ct. granted an injunction to prevent them from enforcing their garnishee orders with respect to the securities in question, but refused damages for the opening of the boxes.—LEESE *v.* MARTIN (1873), L. R. 17 Eq. 224; 43 L. J. Ch. 193; 29 L. T. 742; 22 W. R. 230.

766. Detention by bank—Writ of execution served on bank.]—It is no answer to a demand by a customer of a bank for delivery of property deposited by him with the bankers for safe custody that the bankers have been served with a writ in proceedings by way of execution authorised by the law of the State of Massachusetts & known as "trustee-process."—WARREN *v.* BARING BROTHERS (1910), 54 Sol. Jo. 720.

Lien on deposits for safe custody, *see* Sect. 23, sub-sect. 1, D., *post.*

SECT. 19.—**DISCOUNTING BILLS OF EXCHANGE, PROMISSORY NOTES, ETC.**

767. Definition.]—In an ordinary commercial document the word "discount" means rebate of interest, & not "true" or mathematical discount.—*Re* LAND SECURITIES CO., *Ex p.* FARQUHAR, [1896] 2 Ch. 320; 65 L. J. Ch. 587; 74 L. T. 400; 44 W. R. 514; 12 T. L. R. 373; 40 Sol. Jo. 500, C. A.

768. Effect — Bank as purchaser.] — Where bankers discount a bill of exchange for a customer, giving him credit for the amount of the bill, & debiting him with the discount, the bill becomes the property of the bankers.—CARSTAIRS *v.* BATES (1812), 3 Camp. 301, N. P.

769. ————.]—The difference between "lending money" & "discounting" is distinct & palpable. "Discounting" is purchasing, not lending. The discounter of a bill becomes the owner. If it turns out to be of less value than the price paid for it, the loss falls upon the discounter. If a profit is made upon the transaction, it belongs wholly & ex-

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PART II. SECT. 19.

g. *Representations by partner as to acceptance—Non-acceptance—Insolvency of firm—Rights as against assignee.*]—A. & H., a firm, had a draft for $1,200 accepted by B. for their accommodation, falling due on Apr. 27. H., in order to obtain funds to meet it, on Apr. 26 procured a draft on B. for $600 to be discounted by pltfs., telling them that it would be accepted, & the proceeds of it were placed to the general credit of the firm. On the 29th A. drew out on the cheque of the firm their balance in pltfs.' bank, consisting of the proceeds of the draft for $600, of which A. knew nothing, & of all other moneys, & handed it to their solr., for the benefit of their creditors generally, & on May 2 the firm became insolvent, & an assignee was appointed, to whom the solr. handed over the moneys deposited with him. Pltfs. claimed the amount of the $600 draft, contending that it was only discounted on the faith of its being accepted, & that, as one of the partners had caused its non-acceptance, there was a failure of consideration, & that they were entitled to follow the money in the assignee's hands:—*Held:* they were not so entitled, the case being the ordinary one of the discount of a draft on the belief that it would be accepted.—CANADIAN BANK OF COMMERCE *v.* DAVIDSON (1875), 25 C. P. 537.—**CAN.**

h. *Bill discounted for drawer—Retirement on terms—Bankruptcy of drawer — Liability of acceptor.*] — A drawer of a bill of £704, discounted with a bank, offered to retire it by transmitting another of £140, & applying in payment of the balance a sum at his credit in his account. The offer was accepted, & the new bill transmitted, but the drawer thereafter became bkpt., while the bill of £704 still remained with the bank:—*Held:* the bank could not impute the second bill, & the balance at the credit of the account, to other transactions with the drawer, so as to have recourse upon the acceptor of the bill for £704.—ALLAN *v.* ALLAN & CO. (1831), 9 Sh. (Ct. of Sess.) 519.—**SCOT.**

k. —— *Goods to secure payment—Specific appropriation—Lien on goods.*]—M., trading as a linen merchant & commission agent, was in the habit of receiving goods from H., a linen manufacturer, for sale on commission, & of making advances on such goods to H., which were more or less provided for by means of bills of exchange drawn by M., & accepted by H., who received the proceeds of the bills when discounted in the B. Bank, while, according as the goods were sold, M. retired the bills. H. used also to draw bills, which were accepted by M. The bills, none of which were for M.'s accommodation, were not drawn specifically against the goods, nor were the goods deposited specifically against any particular bills, but generally against any demand. It was arranged between them that, on the fourth of every month, if the sales did not cover the acceptances current, M would give H. either money or acceptances to cover those of M.'s then current. There was a continuous general debit & credit account between them, in which M. credited H. with the proceeds of the sales, & debited him with the money advanced, & at the end of each month the general balance was struck. In the end H. was largely indebted to M. It was alleged that M., who was a customer of the B. Bank, & kept his account there, had intimated to the bank that H.'s acceptances were for advances made to him by M. as a broker selling goods on commission, & that he was secured by the goods, & on the faith of this intimation the Bank had subsequently discounted three accptances of H.'s. On one occasion previously, M., in answer to an inquiry by one of the directors, had stated that he was not then covered by goods:—*Held:* (1) there was no specific appropriation of the goods to meet the bills discounted by the bank; (2) the bank could have no right to have the goods & their proceeds applied in payment of the bills under the doctrine of *Ex p. Waring* (1815), 19 Ves. 345.—*Re* J. R. M., *Ex p.* BELFAST BANK (1877), 11 I. L. T. 51. —**IR.**

l. *Accepted cheque given on discount—Acceptance of bill assured by drawer—Retirement of old bill without acceptance of new bill.*]—When a bank discounts for A. a draft by him on B., & accepts a cheque for the proceeds, & delivers it to A. for transmission to B. to enable B. therewith to retire a draft for a similar amount drawn by A., & accepted by B., for accommodation, & about to fall due at the branch of the bank where B. resides, on the faith of A.'s representations, assurance & undertaking (without authority, however, from B.) that B. will accept the new draft, & B. receives the cheque, & before using it has knowledge of the transaction as between A. & the bank, B. cannot legally use the cheque to retire the old draft without accepting the new one.—TORRANCE *v.* BANK OF BRITISH NORTH AMERICA (1868), 12 L. C. J. 325; (1871) 15 L. C. J. 169; (1873) L. R. 5 P. C. 246, P. C.—**CAN.**

m. *Authority by telegram to acceptor to draw—Discount by bank on faith of—Liability of drawer.*]—On the maturity of a bill of exchange the drawers thereof, thinking the acceptor would be unable to meet it, telegraphed him that, if unable to pay it, he was to draw on them for the amount. The acceptor took the telegram to the manager of pltf. bank, who, on the faith of it, discounted a sight bill drawn by the acceptor on the drawers, with the proceeds of which he retired his acceptance, which was held by another bank. The drawers refused to accept the bill so redrawn:—*Held:* a privity was created between pltfs. & the drawers, entitling the former to maintain an action against the latter for the money so advanced.—BANK OF MONTREAL *v.* THOMAS (1888), 16 O. R. 503.—**CAN.**

n. *Customer debited on non-payment—Recovery from acceptor.*]—J., a customer of resp. bank, discounted with that bank applt.'s acceptance. When it fell due, applt. failed to pay it, & the bank charged it to J.'s account, who at the time owed the bank a small balance, which balance was augmented by subsequent transactions, wherein, nevertheless, if the credits were imputed to the earliest indebtedness, the balance due when the acceptance matured would be more than covered. The bank retained possession of the acceptance & sued applt., the acceptor, to recover its amount. Applt. pleaded payment & compensation:—*Held:* the bank entitled to recover from applt. the amount of his acceptance, & applt. not discharged by the credits in the bank's account with J.—GOODALL *v.* EXCHANGE BANK OF CANADA (1887), M. L. R. 3 Q. B. 430.—**CAN.**

o. *Agreement to indorse on presentation—Dishonour after discount—Notice of dishonour.*]—A. addressed a letter to a bank agent to the effect that if B. should present his acceptance to the bank, at four months after date, for £30, A. would indorse same on presentation. A bill in similar terms, but blank in name of the drawer, & with no indorsers, was, along with the letter, presented on the following day by B. to the bank agent, who discounted the bill, which, when due, was dishonoured, but no protest taken, & no notice either of presentation or dishonour made to A. till several days after the date of the dishonour:—*Held:* A. liable for the amount.—WATT *v.* NATIONAL BANK OF SCOTLAND (1839), 35 Fac. Coll. 900. —**SCOT.**

p. *When indorser liable.*] — The indorser of a discounted note in a bank becomes debtor of the bank only when the note has been protested for non-payment, & notice of protest given to him.—VANIER *v.* KENT & RENSHAW (1902), Q. R. 11 K. B. 373.—**CAN.**

q. *Bill signed by directors of company—Not in official capacity—Proceeds received by company.*]—A bank sued a joint-stock co. for payment of a bill discounted by the bank, & the proceeds of which were received by the co. from the parties to the bill, who were two directors. The co. did not appear on the bill, & the names of the parties by whom the bill was made & indorsed did not appear on the bill in any official capacity, or so as to bind the co. by

Sect. 19.—Discounting bills of exchange, promissory notes, etc.]

clusively to the discounter.—LONDON FINANCIAL ASSOCN. *v.* KELK (1884), 26 Ch. D. 107; 53 L. J. Ch. 1025; 50 L. T. 492.

Annotations:—**Mentd.** *Re* Harrison (1886), 55 L. J. Ch. 768, C. A.; *Re* Oxford Bldg. Soc., *Ex p.* Smith (1886), 56 L. J. Ch. 98; *Re* Liverpool Household Stores Assocn. (1890), 59 L. J. Ch. 616; Oppenheimer *v.* Frazer & Wyatt, [1907] 2 K. B. 50, C. A.

770. —— —— Presumption.]—A. applied to B. to purchase a quantity of goods, offering him a bill, if he would pay him the difference between the value of the goods & the bill. B. agreed only if his bankers, defts., would discount the bill. In A.'s presence he called his clerk C. & told him to go to defts. & ask them to discount the bill, stating the transaction as to the proposed purchase. C. was in the habit of leaving bills at defts. to be discounted. Defts. subsequently placed the bill to the credit of B. C. not having been called as a witness to prove or disprove delivery of the message:—*Held:* the presumption that defts. took the bill *bonâ fide* for value was not disturbed, in the absence of positive evidence of notice of the transaction.—MIDDLETON *v.* BARNED (1849), 4 Exch. 241; 18 L. J. Ex. 433; 154 E. R. 1200.

Annotation:—**Mentd.** Shaw *v.* Beck (1853), 20 L. T. O. S. 211.

771. Bill indorsed for discount—Passing of property.]—By an agreement of Feb. 27, pltf. agreed to sell to deft. shares in a co. upon the terms (*inter alia*) that the book debts due to the co. should be taken as good at the amounts standing in the co.'s books. The co. received a bill of exchange which was properly accounted for in their books & on Feb. 22 handed it to their bankers to be discounted. On Feb. 28 the bankers credited the co.'s account with the amount of the bill:—*Held:* the property in a bill of exchange, indorsed to a bank for the purpose of being discounted, did not pass to the bank before it had been actually discounted & the amount credited to the account of the customer, & on Feb. 27 the bill was a "book debt" of the co. for the purposes of the agreement.—DAWSON *v.* ISLE, [1906] 1 Ch. 633; 75 L. J. Ch. 338; 95 L. T. 385; 54 W. R. 452; 50 Sol. Jo. 325.

Annotation:—**Mentd.** *Re* Haigh's Estate, Haigh *v.* Haigh (1907), 51 Sol. Jo. 343.

772. Bearer bill discounted without indorsement—Failure of acceptor—Liability of discounter.]—Deft. discounted a bill payable to bearer with the Bank of England without indorsing the bill. The acceptor having failed, the Bank sued deft. for money lent in respect of the amount paid for the bill:—*Held:* there was a sale of the bill, & deft. was not liable.—BANK OF ENGLAND *v.* NEWMAN (1699), 1 Com. 57;

force of the bill itself:—*Held:* where a claim was made by a banker, who had discounted a bill upon a party whose name did not appear on it, he must make out a very special & clear case before he could impose such a liability, & the proper mode of binding the party to the bill being to have his name on the bill, when that was not taken, the presumption was that he was not bound, but that the other parties whose names were on the bill were bound by it, & the co. were not liable.—NORTH BRITISH BANK *v.* AYRSHIRE IRON CO. (1853), 1 W. R. 536.—**SCOT.**

r. *Note signed by agent — Misapplication of proceeds on discount—Notice.*]—A bank discounting the personal notes of a customer, which are indorsed by him as agent for a third party, who is also a customer of the bank & has a current account therein, & who sees by its books that the principal's money, his account being closed, passes by such operation to the credit of the agent, whose account increases proportionately, is sufficiently advised to make further inquiry. If, without receiving satisfactory explanations, such bank continues to discount the notes, it becomes the accomplice of the agent, in his abuse of confidence, & responsible towards the principal, in favour of whom there lies a recourse against the bank to recover the amounts fraudulently converted.—GRATTON *v.* BANQUE D'HOCHELAGA (1909), Q. R. 37 S. C. 324.—**CAN.**

s. *Note signed by members of partnership—Subsequent incorporation — Discharge of one partner—Consent of bank.*]—When a note is signed by the members of a partnership, later on incorporated, & is discounted at a bank, one of the makers cannot be discharged without the consent of the bank, & he is not discharged by the fact that the new corpn. passed a resolution authorising the bank to erase his name from the note, & the bank manager erased his name & informed him that he was freed from his liabilities towards the bank.—GENDREAU *v.* WIDDER (1915), Q. R. 48 S. C. 142.—**CAN.**

t. *Note made in fraud of partners—Notice to bank.*]—E. was a member of the firm of C. & Co. & also a member of the firm of E. & Co., &, in order to raise money for the use of E. & Co., he made a promissory note, which he signed with the name of the other firm &, indorsing it in the name of E. & Co., had it discounted. The officers of the bank which discounted the note knew the handwriting of E., with whom the bank had had frequent dealings. In an action against the makers of the note:—*Held:* the note was made by E. in fraud of his partners, & the bank had sufficient knowledge that he was using his partners' names for his own purposes to put them on inquiry as to authority, & not having made such inquiry the bank could not recover against C.—CREIGHTON *v.* HALIFAX BANKING CO. (1890), 18 S. C. R. 140.—**CAN.**

u. *Note for accommodation of customer—Customer assuming liability on dishonour — Appropriation of partial credits.*]—Bankers discounted for a customer a note given, as they knew, for his accommodation by deft., which was dishonoured. They were afterwards requested or directed by the customer to look to him for payment:—*Held:* (1) they were not bound to appropriate in payment of the dishonoured note any partial payments or credits less than the amount of the note; (2) they would be, in such circumstances, bound so to appropriate in case of an equal or greater amount coming into their hands.—COMMERCIAL BANK *v.* GIBBONS (1865), 4 N. S. W. S. C. R. 223.—**AUS.**

w. *Note for accommodation of bank's solicitor—Neglect in giving notice of dishonour—Discharge of maker & indorser.*]—Defts. were maker & indorser respectively of a promissory note for the accommodation of D., who discounted it with pltfs., they having knowledge of the facts. On the maturity of the note, pltfs. handed it to D., their solr., for protest. D. did not protest or notify defts. of its dishonour, but delivered it to them, adding that he had paid it. About three months after its maturity D. absconded in insolvent circumstances, & after that defts. were for the first time notified of the non-payment of the note. In an action against defts. on the note, they pleaded, on equitable grounds, the above facts, & that by the laches of pltfs. they were prevented from obtaining indemnity from D., & that, if compelled to pay the note, they would be defrauded out of the amount:—*Held:* a good defence.—CANADIAN BANK OF COMMERCE *v.* GREEN (1880), 45 U. C. R. 81.—**CAN.**

a. *Note discounted for president of company—Unauthorised use of company's name—Proceeds paid to company's creditors—Right to debit company.*]—The president of an incorporated co. made a promissory note in the co.'s name, without authority, & discounted it with the co.'s bankers, the proceeds being credited to the co.'s account, & paid out by cheques in the co.'s name to its creditors, whose claims should have been paid by the president out of funds which he had previously misappropriated:—*Held:* the bankers, who had taken the note in good faith, entitled to charge the amount thereof at maturity against the co.'s account.—BRIDGEWATER CHEESE FACTORY CO. *v.* MURPHY (1896), 26 S. C. R. 443.—**CAN.**

b. *Notes discounted for maker — Accommodation indorsements.*]—Practice of taking notes for discount, not from the last indorser, but from the maker, who brings them indorsed, thus suggesting, not a business transaction, but accommodation indorsements, observed upon.—BANK OF MONTREAL *v.* REYNOLDS (1866), 25 U. C. R. 352.—**CAN.**

c. *Note by married woman — Unauthorised signature by husband—Right of bank to recover.*]—Where a bank discounts the note of a married woman, signed by her husband without authority, & she places the proceeds to her credit, & she then gives a power of attorney to her husband, & leaves the deposit under his control, the bank may recover the amount of the note from her, though the husband have used the proceeds for his own purposes.—BANQUE DE ST. JEAN *v.* MOLLEUR (1914), Q. R. 46 S. C. 347.—**CAN.**

d. *Renewal of note — Indorser's name erased by discounting bank — Indorser discharged.*]—Where an indorser's name, on the renewal of a promissory note, is erased by an officer of the bank which discounts it, such indorser is discharged.—HART *v.* BANK OF BRITISH NORTH AMERICA (1913), 19 R. L. 189.—**CAN.**

e. *Note lodged for discount — Refusal to discount—Right to return of note.*]—P. made a note in favour of R. & Co., for the purpose only of getting it discounted. & R. & Co. lodged the note with deft. bank for discount, but the bank refused to discount it. P. having demanded the note from defts. before it matured, & explained the circumstances in which it was made by him & given to R. & Co.:—*Held:* P. entitled to succeed in an action for its recovery on the refusal of the bank to give it up.—PROCTOR *v.* CITY BANK OF SYDNEY (1894), 15 N. S. W. L. R. 182.—**AUS.**

1 Ld. Raym. 442; 12 Mod. Rep. 241; 92 E. R. 957.

Annotations:—**Apld.** Emly *v.* Lye (1812), 15 East, 7. **Refd.** Evans *v.* Whyle (1829), 3 Moo. & P. 130. **Mentd.** Hartop *v.* Hoare (1743), 1 Wils. 8.

773. Discount or collection—Intention of customer.]—The question whether a bill has been paid in by a customer for discount or collection is one of intention. An indorsement by the customer is *primâ facie* evidence of an intention to discount; but such indorsement may be made merely to enable the indorsees to receive the merely from other parties & the real intention must be determined by all the circumstances of the case.—*Ex p.* TWOGOOD (1812), 19 Ves. 229; 34 E. R. 503.

Annotation:—**Consd.** *Re* Firth, *Ex p.* Schofield (1879), 48 L. J. Bcy. 122, C. A.

774. Amount of commission & interest—Usury.]—In an action for usury against deft., a country banker at S., it appeared that the practice was to discount bills in London for various correspondents at S., for which they had £5 per cent. for the time the bills had to run, & they had also 5*s.* per cent. on the gross sum without any reference to the time which the bill had to run; this commission had been taken by deft. on the bills in question. The jury found a verdict for deft. under the judge's direction.—WINCH *v.* FENN (1786), 2 Term Rep. 52, n.; 100 E. R. 30.

Annotations:—**Refd.** Auriol *v.* Thomas (1787), 2 Term Rep. 52; Matthews *v.* Griffiths (1793), Peake, 264; Stoveld *v.* Eade (1827), 5 L. J. O. S. C. P. 85.

775. —— ——.]—A., being a banker in the country, discounted bills at four months for B. & took the whole interest for the time they had to run. B. on being asked how he would have the money, directed part to be carried to his account, part to be paid in cash, & part by bills on London, some at three, some at seven, & some at thirty days' sight:—*Held:* not an usurious transaction, so as to induce the ct. to grant a new trial, since the surplus of interest taken by A. might be referable to the expenses of remittance.—HAMMET *v.* YEA (1797), 1 Bos. & P. 144; 126 E. R. 826.

Annotation:—**Refd.** Marsh *v.* Martindale (1802), 3 Bos. & P. 154.

776. —— ——.]—Reasonable commission 2*s.* 6*d.* per cent., allowed to a country banker on discounts, though for a person resident in London, & paid through a banker there, if not colourable.—*Ex p.* JONES (1810), 17 Ves. 332; 1 Rose, 29; 34 E. R. 128.

Annotation:—**Mentd.** *Re* Watson, *Ex p.* Henson (1815), 1 Madd. 112.

See, further, MONEY & MONEY-LENDING.

777. Calculation of interest—Period.]—When a bill is discounted the interest to be deducted is calculated up to the time when it becomes due & for no longer period.—THOMPSON *v.* GILES (1824), 2 B. & C. 422; 3 Dow. & Ry. K. B. 733; 2 L. J. O. S. K. B. 48; 107 E. R. 441.

Annotations:—**Mentd.** *Re* Dilworth, *Ex p.* Thompson (1828), Mont. & M. 102; *Re* Dilworth, *Ex p.* Armitstead (1828), 2 Gl. & J. 371; *Re* Dilworth, *Ex p.* Benson (1832), Mont. & B. 120; *Re* Maberly, *Ex p.* Cunningham (1833), 3 Deac. & Ch. 58; Jombart *v.* Woollett, Jombart *v.* Legg (1837), Donnelly, 229; *Re* Trye & Lightfoot, *Ex p.* Pauli (1838), 2 Jur. 208; *Re* Forster, *Ex p.* Bond (1840), 1 Mont. D. & De G. 10; *Re* Wise, *Ex p.* Atkins (1842), 3 Mont. D. & De G. 103; *Re* Houghton, *Ex p.* London Joint Stock Bank (1857), 28 L. T. O. S. 375; *Re* Harrison, *Ex p.* Barkworth (1858), 2 De G. & J. 194, L.JJ.; *Re* Lawrence, Mortimore & Schrader (1861), 4 L. T. 184; Harris *v.* Truman (1881), 7 Q. B. D. 340; *Re* Mills, Bawtree, *Ex p.* Stannard (1893), 10 Morr. 193; Gaden *v.* Newfoundland Savings Bank, [1899] A. C. 281, P. C.; *Re* A Debtor, *Ex p.* The Debtor, [1908] 1 K. B. 344, C. A.

778. Lost bill—Debiting customer with amount—Conversion.]—A banker, after notice, discounted a bill drawn on a customer, & by the acceptance made payable at his bank, after it had been lost by the holder, & afterwards debited his customer with the amount of the bill, wrote a discharge on it & delivered it up to the customer as the banker's voucher of his account:—*Held:* the banker was thereby guilty of a conversion, & the loser of the bill might recover in trover without a previous demand of the bill.—LOVELL *v.* MARTIN (1813), 4 Taunt. 799; 128 E. R. 545.

779. Bills obtained by fraud—Amounts placed to credit of customer—Notice of fraud.]—W. fraudulently obtained possession of bills of exchange accepted by C., & got them discounted by the L. & E. Banking Co., of which he was a director & local manager. The amount of the bills was passed to the credit of his account, which was largely overdrawn:—*Held:* (1) the bank were holders for value, although no money was actually paid; (2) on the facts proved the bank had notice of the fraud

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774 i. *Amount of interest — Excessive rate.*] — BANK OF BRITISH NORTH AMERICA *v.* BOSSUYT, 15 Man. L. R. 266. —**CAN.**

774 ii. —— —— *Recovery.*]—Banks can charge interest upon notes presented to them for discount only 7 per cent. per year. The prohibition of the law being a matter of public order, he who has paid a bank interest exceeding the rate fixed by the law has the right to obtain back from the bank the excess.—BANQUE DE ST. HYACINTHE *v.* SARRAZIN (1892), Q. R. 2 S. C. 96.—**CAN.**

774 iii. —— —— *How usury pleaded.*]—A bank stipulating for more than 7 per cent. (although prohibited by stat.) is not usury under the stat., which consists in the reservation or taking of more than 7 per cent.

Qu.: whether, in order to render a note void, the making of the note must have been stipulated for, as well as that the excessive rate of interest shall be afterwards taken upon it. Form of pleas of usury.—CITY BANK *v.* MACDONALD (1865), 16 C. P. 215.—**CAN.**

774 iv. ——————.]—Pltf. pleaded that the notes in question had been "discounted for G., R., & H. upon an illegal & corrupt agreement, whereby & by reason whereof the bank should & did receive from G., R., & H. upon the discount of the promissory notes a much larger & greater rate of interest than at the rate of 7 per cent. per annum, & that it was only through & by reason of such discount upon such illegal & usurious considerations that the bank became holder of the promissory notes":—*Held:* a sufficient allegation of the usury, as between a stranger & a party to the transaction to let in the evidence of the usury.—DRAKE *v.* BANK OF TORONTO (1862), 9 Gr. 116.—**CAN.**

774 v. —— —— *Royal Canadian Bank.*] — *Held:* (1) the above bank, having stipulated for & retained, in discounting a note, interest at a larger rate than 7 per cent., were not entitled to avail themselves of 27 & 28 Vict. c. 85, s. 21, allowing them to charge the same rate after maturity that they had charged on discounting the note, supposing the original charge to have been not more than 7 per cent.; (2) the note bearing no rate of interest on its face, they were not entitled to more than 6 per cent. from its maturity.—ROYAL CANADIAN BANK *v.* SHAW (1871), 21 C. P. 455.—**CAN.**

f. *Collateral security on discounting note—Renewal of note—Release of indorser on part payment—Right to recover security from bank.*]—A bank which, on discounting a note, receives from a third party a security in pledge, as collateral security for payment, upon the condition that it uses diligence in recovering the amount of the note from the maker & from the indorser before realising the security, lets in the condition on renewing the note & on agreeing with one of the indorsers with a view to his release on payment in part, thus giving him a means of defending an action brought against him. The third party owner of the security pledged is thereafter authorised to recover it from the bank.—BANQUE DU PEUPLE *v.* PACAUD (1893), Q. R. 2 Q. B. 424.—**CAN.**

g. —— *Right to take chattel mortgage.*]—A bank has the right to take a chattel mtge. as collateral for due notes discounted by it.—EASTERN TOWNSHIPS BANK *v.* PICARD (1913), Q. R. 23 K. B. 488.—**CAN.**

See, generally, MORTGAGE.

h. *By foreign bank—Right of action.*]—A foreign bank cannot sue upon notes received by them in the conduct of banking business in the Province, although they may sue, for money had & received, the person for whom such notes were discounted, & to whom money was advanced on them.—BANK OF MONTREAL *v.* BETHUNE (1836), 4 O. S. 341.—**CAN.**

See, generally, COMPANIES; CORPORATIONS.

Sect. 19.—*Discounting bills of exchange, promissory notes, etc.* *Sect.* 20: *Sub-sect.* 1.]

& could not be considered as holders in good faith. —*Re* CAREW'S ESTATE ACT (1862), 31 Beav. 39; 54 E. R. 1051.

Annotation:—**Mentd.** Greenwell *v.* National Provincial Bank (1883), Cab. & El. 56.

780. Fraudulent acceptances—Negligence.]—A partner's private bankers discounted bills, having full notice that their customer was using partnership property for his private purposes, & seeing that all the signatures except the acceptances were in his handwriting:—*Held:* they were guilty of gross negligence, & could not be allowed to prove in bkpcy. for the loss they had sustained on the fraudulent acceptances against the estate of the surviving partners.—*Re* RICHES, *Ex p.* DARLINGTON DISTRICT JOINT STOCK BANKING CO. (1865), 4 De G. J. & Sm. 581; 5 New Rep. 287; 34 L. J. Bcy. 10; 11 L. T. 651; 11 Jur. N. S. 122; 13 W. R. 353; 46 E. R. 1044, L.C.

Annotation:—**Refd.** *Re* Croudace (1866), 15 L. T. 19.

781. Bills discounted for unindorsed bills—Liability of bank.]—If a party discounts bills with a banker, & receives in part of the discount other bills, but not indorsed by the banker, which bills turn out to be bad, the banker is not liable.—FYDELL *v.* CLARK (1796), 1 Esp. 447, N. P.

782. Bill restrictively indorsed—Proceeds misapplied—Liability to refund.]—A bill of exchange, drawn in America on a house in London, payable to order, was indorsed by the payee generally to A., & by him in these words, "Pay to B. or his order for my use." B. applied to his bankers to discount the bill, & they, without making any inquiry, did so, & applied the proceeds to the use of B. by paying his acceptances & drafts:—*Held:* the indorsement was restrictive & the property in the bill remained in A., who was entitled to recover the amount from the bankers.—LLOYD *v.* SIGOURNEY (1829), 5 Bing. 525; 3 Y. & J. 220; 3 Moo. & P. 229; 130 E. R. 1164, Ex. Ch.

Annotations:—**Apld.** Williams, Deacon *v.* Shadbolt (1885), Cab. & El. 529. **Refd.** Bank of Bengal *v.* Macleod (1849), 5 Moo. Ind. App. 1, P. C.; Bellamy *v.* Majoribanks (1852), 7 Exch. 389.

783. Failure of bank—Credit balance on drawer's cash account—Satisfaction of bill.]—B. drew a bill for £320, which was accepted by C. & D. B. discounted the bill with his bankers, K. & Co., who became bkpt. before the maturity of the bill, having in their hands a balance of B.'s amounting to £310. K. & Co.'s assignees claimed to enforce payment of the bill. B., C. & D. as drawer & acceptors petitioned that the £310 should be applied *pro tanto* in satisfaction of the bill. The petition was dismissed.—*Re* KENSINGTON, *Ex p.* BURTON (1812), 1 Rose, 320.

784. Agent discounting bill for partner—Proceeds carried to partnership account—Rights of bank.]—One of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker through the medium of the same agent who procured the discount of other bills drawn in the partnership firm with the same banker:—*Held:* the banker had no remedy against the partnership, either upon the bills so drawn by the single partner, or for money had & received through the medium of such bills, though the proceeds were carried to the partnership account, the money being advanced solely on the security of the parties whose names were on the bills by way of discount, & not by way of loan to the partnership, & though the banker conceived at the time that all the bills were drawn on the partnership account.—EMLY *v.* LYE (1812), 15 East, 7; 104 E. R. 746.

Annotations:—**Distd.** Denton *v.* Rodie (1813), 3 Camp. 493, N. P. **Consd.** Beckham *v.* Knight (1838), 4 Bing. N. C. 243. **Expld.** Alliance Bank *v.* Tucker (1867), 17 L. T. 13. **Consd.** Yorkshire Banking Co. *v.* Beatson, Leeds & County Banking Co. *v.* Beatson (1879), 4 C. P. D. 204. **Refd.** South Carolina Bank *v.* Case, Beckett *v.* Case (1828), Dan. & Ll. 103; Evans *v.* Whyle (1829), 3 Moo. & P. 130; Smith *v.* Craven (1831), 9 L. J. O. S. Ex. 174; Bawden *v.* Howell (1841), 3 Man. & G. 638; *Re* Lawrance, Mortimore & Schrader (1861), 4 L. T. 184. **Mentd.** Trueman *v.* Loder (1840), 11 Ad. & El. 589; *Re* Laurence, *Ex p.* M'Kenna, City Bank Case (1861), 3 De G. F. & J. 629, L.C. & L.JJ.

785. Accommodation bill—General guarantee to bank for all bills rediscounted—Usage of London bill brokers.]—A. drew bills of exchange upon B., which the latter accepted for A.'s accommodation, B. receiving a part of the proceeds. S. & Co., bill brokers, discounted the bills for A., & rediscounted them with the L. & W. Bank. S. & Co. did not indorse the bills, but had previously given to the bank a general guarantee for the due payment of all bills discounted by them with the bank. When the bills were discounted the acceptors were not aware of this guarantee. The bill brokers made payments to the bank under their guarantee in respect of the bills, & sought to prove for the amount against the estate of the acceptors, who were bkpt. It being proved to be the common & almost invariable practice of bill brokers in the city of London not to indorse each bill of exchange which they had discounted for a customer, when they rediscounted it with their bankers, but to give to the bankers a general guarantee for all bills which they rediscounted with them:—*Held:* when an accommodation bill was drawn & accepted for the purpose of raising money for the drawer & the acceptor, the drawer in discounting the bill with bill brokers in the city of London had an implied authority from the acceptor to deal with them in the ordinary course of their business, & the bill brokers had an implied authority from the acceptor to make themselves liable on the bill under their guarantee to their bankers, & were entitled to prove against his estate in bkpcy. for what they had paid & for interest thereon.—*Re* FOX, WALKER & CO., *Ex p.* BISHOP (1880), 15 Ch. D. 400; 50 L. J. Ch. 18; 43 L. T. 165; 29 W. R. 144, C. A.

Annotations:—**Distd.** *Re* Bonacino, *Ex p.* Discount Banking Co. (1894), 1 Mans. 59. **Mentd.** Edmunds *v.* Wallingford (1885), 14 Q. B. D. 811, C. A.; Hand *v.* Blow (1900), 44 Sol. Jo. 551.

786. Promissory notes—Proceeds paid into discounting bank—Misapplication of proceeds.]—The L. Co. was formed to purchase the business of L. & Co., of Paris. The Paris firm would not complete unless 40,000 shares were taken. To satisfy them the I. Co., which was promoting the L. Co., guaranteed a subscription for 40,000 shares, & applied to the N. Bank to discount their promissory notes for £200,000, which the bank agreed to do upon the guarantee of the L. Co., which was signed by three of the directors, & sealed by the co., that, until the notes were paid, the L. Co. would leave in the hands of the bank an amount equal to the sum remaining due on the notes, & that if the notes were not paid, the bank might pay them out of such amount. The £200,000 was accordingly carried to the credit of the I. Co., who provided shareholders & paid the deposit & allotment money of £5 per share of the £200,000 which thus got to the credit of the L. Co. at the bank. The bank, in order to enable the L. Co. to obtain a settling day on the Stock Exchange, gave a certificate that there was £200,000 standing to the credit of that co. Afterwards, the promissory notes not being taken up at maturity, the N. Bank paid them out of the £200,000. After an order had been made for winding up the L. Co., a shareholder in that co. filed his bill on behalf of himself & all other shareholders, except defts., against the directors of the L. Co. & against the N. Bank, to recover the £200,000 for the

benefit of the L. Co. as having been applied in breach of trust. & a decree was made against the bank for the restoration of the £200,000. Subsequently the N. Bank, by its public officer, filed a bill against three of its own directors to compel them to make good the loss which the bank had sustained through the above transactions :—*Held :* (1) the remedy, assuming the L. Co. had a right to the £200,000, would have been at law by an action against the bank, for the guarantee was *ultra vires*, & known to the bank to be so, & was no answer to the demand of the L. Co. for the sum which had stood to their credit ; (2) the £200,000 never belonged to the L. Co. at all, for the whole transaction was an illegal & fraudulent scheme, out of which no rights could arise as between the parties to it ; (3) the three directors were not estopped from saying that the N. Bank had incurred no liability to pay anything to the L. Co. ; & as the N. Bank had not incurred any such liability, the bill must be dismissed.—GRAY *v.* LEWIS, PARKER *v.* LEWIS (1873), 8 Ch. App. 1035 ; 43 L. J. Ch. 281 ; 29 L. T. 12, 199 ; 21 W. R. 923, 928, L.JJ.

Annotations :—**Mentd.** Menier *v.* Hooper's Telegraph Works (1874), 43 L. J. Ch. 330, L.JJ. ; Parker *v.* McKenna (1874), 43 L. J. Ch. 802 ; MacDougall *v.* Gardiner (1875), L. R. 20 Eq. 383 ; Russell *v.* Wakefield Waterworks Co. (1875), L. R. 20 Eq. 474 ; Lloyd *v.* Dimmack (1877), 38 L. T. 173 ; New Sombrero Phosphate Co. *v.* Erlanger (1877), 46 L. J. Ch. 425, C. A. ; Mercantile Investment & General Trust Co. *v.* River Plate Trust Loan & Agency Co., [1894] 1 Ch. 578.

787. —— Guardian & ward—Bank put on inquiry.]—Pltf. was a young woman, who had been a ward of ct., & eighteen months after coming of age, while continuing to reside with her guardian, she had indorsed a promissory note, drawn by her guardian in her favour. The note was given by the guardian to certain creditors in part payment of a debt, & was by them presented to their bankers & discounted. The bankers knew the relative position of pltf. & her guardian, & also knew that the guardian had been in embarrassed circumstances previous to the note being presented :—*Held :* in such circumstances, it was the duty of the bankers to have investigated the transaction, & an injunction was granted to restrain them from taking proceedings at law upon the note.—MAITLAND *v.* BACKHOUSE (1848), 16 Sim. 58 ; 17 L. J. Ch. 121 ; 11 L. T. O. S. 237 ; 12 Jur. 45 ; 60 E. R. 794, L.C.

Annotations :—**Consd.** Dettmar *v.* Metropolitan & Provincial Bank (1863), 1 Hem. & M. 641. **Mentd.** Espey *v.* Lake (1852), 10 Hare, 260.

SECT. 20.—ADVANCES BY BANKERS.

SUB-SECT. 1.—LOAN AND OVERDRAFT.

788. Request for overdraft—Cheque drawn in excess of credit balance.]—Where a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is in effect a request for a loan, & if the cheque is honoured the customer has borrowed money ; but it does not follow that a transaction of this kind is a borrowing upon security not belonging to the customer & deposited for another purpose.—CUTHBERT *v.* ROBARTS, LUBBOCK & Co., [1909] 2 Ch. 226 ; 78 L. J. Ch. 529 ; 100 L. T. 796 ; 25 T. L. R. 583 ; 53 Sol. Jo. 559, C. A.

789. Promise to honour cheques—Validity—Consideration.]—A contract to honour cheques supported by consideration is binding on a banker.—FLEMING *v.* BANK OF NEW ZEALAND, [1900] A. C. 577 ; 69 L. J. P. C. 120 ; 83 L. T. 1 ; 16 T. L. R. 469, P. C.

Annotation :—**Mentd.** *Re* Gloucester Municipal Petn., 1900, [1901] 1 K. B. 683.

790. Overdraft by Inclosure Act commissioners—Personal liability.]—An Inclosure Act empowered the comrs. to make a rate to defray the expenses of passing & executing the Act, & enacted that persons advancing money should be repaid out of the first money raised by the comrs. Expenses were incurred in the execution of the Act before any rate was made. To defray such expenses the comrs. drew drafts upon their bankers, requiring them to pay the sums therein mentioned on account of the public drainage, & to place the same to their account as comrs. The bankers, during a period of six years, continued to advance considerable sums by paying the drafts :—*Held :* the comrs. were personally responsible to the bankers for the drafts so made.—EATON *v.* BELL (1821), 5 B. & Ald. 34 ; 106 E. R. 1106.

Annotations :—**Refd.** Sprott *v.* Powell (1826), 3 Bing. 478. **Mentd.** Burls *v.* Smith (1831), 7 Bing. 705 ; Pell *v.* Stephens (1833), Coop. *temp.* Brough. 266, L.C. ; Tildasley *v.* Stephenson (1834), 10 Bing. 545 ; Cane *v.* Chapman (1836), 1 Nev. & P. K. B. 104.

See, generally, COMMONS & RIGHTS OF COMMON.

791. Overdraft by partnership—Note of one partner given as indemnity to other partner—Note indorsed by other partner to bank.]—A. & B., partners, had an account with pltfs., bankers, & wishing to overdraw it, pltfs. consented on B.'s giving them his note for £2,000. A. afterwards gave B. his note for £1,000 as an indemnity to him for a moiety of his liability to pltfs. on his note. The advances

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PART II. SECT. 20, SUB-SECT. 1.

k. *Bank not bound to allow overdraft—Temporary overdraft—Termination.*]—In the absence of special agreement, express or implied, a banker is under no obligation to allow a customer to overdraw his account.

A temporary overdraft which is to be at the discretion of the manager of the bank terminates so soon after the agreement under which it has been allowed as the customer's account shows a credit balance.—MCINTYRE *v.* ROBINSON SOUTH AFRICAN BANKING CO., 17 E. D. C. 111.—**S. AF.**

l. *Request for loan — What amounts to.*]—Deft wrote to pltfs. :—"Gentlemen, Please pay to the bearer $850, & I will see you later" :—*Held :* the presumption was that deft. intended to borrow the $850, & not that he was drawing on money deposited with pltfs. as his agents or bankers.—NICHOLS *v.* RYAN (1868), 2 R. L. 111.—**CAN.**

m. *Agreement for overdraft — Customer allowed larger sum by mistake—Bank bound.*]—A banker agreed with his customer to allow him an overdraft of a certain amount, &, by mistake, the banker's letter embodying the agreement allowed a larger sum. The letter was not withdrawn by the banker, though the customer's construction was disputed & had been admitted by himself to be contrary to the real agreement :—*Held :* the banker was bound by the terms of his letter.—DORIA *v.* BANK OF VICTORIA (1879), 5 V. L. R. 393.—**AUS.**

n. *Loan or advance in contravention of Bank Act—On purchase of trust company's business.*]—As part of the consideration of an agreement by which the bank acquired the office site & business of a trust co., the bank became responsible for the claims of persons who had deposited money with the co., &, to secure the bank in respect to such liability & form a fund to meet payments to depositors, the co. gave the bank a promissory note for the amount of the deposits & assigned assets to the bank, including a bill of sale of certain farm property :—*Held :* the transaction was not a loan or advance made by the bank in contravention of Bank Act, s. 76 (2c), but a legitimate exercise of powers conferred by the Act.—BALL *v.* ROYAL BANK (1915), 52 S. C. R. 254 ; 9 W. W. R. 776.—**CAN.**

o. *Overdraft by married woman — Charge on trust fund subject to settlement.*]—A bank, having permitted a married woman to overdraw her account, on the supposition that they had a lien over a fund which was, in fact, subject to a settlement of which they had not been informed, filed a bill charging fraud in the married woman in concealing the settlement, & to establish the debt against the fund in priority to the settlement. Bill dismissed with costs, there being no evidence of such a concealment of the settlement as would amount to fraud.—LONDON CHARTERED BANK *v.* LEMPRIERE (1870), 1 V. R. 191.—**AUS.**

p. *Loan secured by void mortgage — Right to sue on loan.*]—Taking a void mtge. as security for a loan does not prevent a bank suing for the loan.—IMPERIAL BANK *v.* ROSS (1916), 34 W. L. R. 962 ; 10 W. W. R. 1174.—**CAN.**

Sect. 20.—*Advances by bankers: Sub-sect.* 1.]

amounted to £1,300, & being unpaid B., two years after, indorsed A.'s note to pltfs., who sued A. on it:—*Held:* pltfs. were entitled to recover.—HEYWOOD *v.* WATSON (1828), 4 Bing. 496; 1 Moo. & P. 268; 6 L. J. O. S. C. P. 72; 130 E. R. 859.

792. —— Account transferred to new bank—Assent of one partner—Appropriation of payments.]—H. & C., who carried on business in partnership, were indebted to R., their banker, to the amount, as admitted by H., of £979. In 1851 R., with the concurrence of H., transferred his business to the M. Bank, including the account in question. The partnership account of H. & C. with the M. Bank commenced with this item of £979, & continued open for a considerable time, during which H. paid in moneys to an amount exceeding the sum of £979. The pass-book was regularly sent to H. The deed transferring the business from R. to the M. Bank contained a provision, "that at the expiration of twelve months, as to such accounts as should not be taken to by the M. Bank, the M. Bank should, during a period not exceeding ten years, either accept or compel payment, or permit the same to remain due, & should be possessed of all moneys paid in discharge of such accounts in trust for R." In 1852 the M. Bank gave notice to R. that they would not take to this account. An action having been brought by the M. Bank against H. & C. to recover the balance due:—*Held:* (1) H. had power to bind his partner by assenting to the transfer of the debt on the account; (2) the debt of £979 was extinguished by the payments subsequently made by H. to the credit of the partnership account & the assent to the appropriation to be inferred from H. not objecting to the pass-book, & after such extinguishment, as between the M. Bank & the partnership, this account could not be treated as an existing debt remaining due to R.

Qu.: whether C. could have been bound by H. assenting to the sum of £979 as the balance of the account due to R., if it had not been the balance really due.—BEALE *v.* CADDICK (1857), 2 H. & N. 326; 26 L. J. Ex. 356; 29 L. T. O. S. 355; 157 E. R. 135.

See, further, PARTNERSHIP.

793. Overdraft by turnpike trust—Trustee also partner of bank—Personal liability.]—A., B., C., & Co., in their capacity of bankers to a turnpike trust, made advances to the trust on cheques drawn, payable to the treasurer, & signed by the clerks to the trustees. B., one of pltfs., was the treasurer. Deft. was in the habit of attending the meetings of the trustees, & took an active part in the concerns of the road:—*Held:* he was liable in an action for the amount of the advances made, although C., who was also one of pltf.'s firm, was a trustee.—BECKETT *v.* WILSON (1841), 10 L. J. C. P. 325.

See, generally, HIGHWAYS, STREETS, & BRIDGES.

794. Overdraft by agent—Authority & knowledge of principal.]—An agent has no right, without the authority of his principal, to overdraw a banking account. But if it appear that the agent has done so with the knowledge of his principal, the jury will be warranted in inferring from this that the agent had, in fact, the requisite authority.

Deft., as administrator of W., deceased, carried on gas works at H. & appointed X. to manage the same for him. D. & Co.'s bank, through the agency of X., opened an account "with the administrator of the late W., deceased," & the account continued until the bank stopped payment. Deft. came occasionally to H. & frequently communicated with X. respecting the gas works. X. stated in evidence that deft. was well aware that he drew cheques on the bank on account of the gas works, that he sent statements of account to deft., & that on one occasion he told deft. there was a balance due to the bank. At the time of the failure the account was overdrawn:—*Held:* deft. was liable.—POTT *v.* BEVAN (1844), 1 Car. & Kir. 335; *subsequent proceedings,* 7 Man. & G. 604.

795. —— ——.]—In pursuance of an arrangement between applt. bank & the Govt. the Registrar-General opened an account which, to the knowledge of the bank, was simply for the purpose of the daily lodgment of the collections of his department & the weekly transfer by his cheque of such lodgments to the Treasury. The cashier sent to lodge such moneys continuously kept back a part thereof, concealing his fraud by means of forged receipts, & the weekly cheques of the Registrar-General in favour of the Treasury resulted in overdrafts to the extent of £6,127, of which he was ignorant. In an action by the bank against the Govt. to recover the same:—*Held:* the latter was not liable for the overdraft, which was not merely unauthorised, but entirely outside the scope & object of the dealings of the parties.—LONDON CHARTERED BANK OF AUSTRALIA *v.* MCMILLAN, [1892] A. C. 292; 61 L. J. P. C. 44; 66 L. T. 801; 8 T. L. R. 473, P. C.

See, further, AGENCY, Vol. I., pp. 316 *et seq.*, 594 *et seq.*

796. Loan to executor—For executorial purposes—Assent of co-executor.]—One of two exors., who was himself a residuary legatee, entered an account with a banker in his own name for executorial purposes, & the banker, with notice of the dispositions under the will, made advances to the exor. for payments connected with the exorship., & securities were deposited for repayment of the advances. The co-exor. assented to the first advance, but on a second advance being made to the acting exor. upon other securities, he withdrew his assent, & objected to the banker being repaid out of the trust property, on the ground that the money had been placed on the separate account of the acting exor. The advances were duly applied to the purposes of the administration. Upon an action being brought by the banker for a lien upon the second securities for repayment of his advances:—*Held:* (1) the banker was justified in advancing money to the acting exor. for executorial purposes, & the assent of the co-exor. in the first instance was a further justification for placing confidence in the acting exor. & in making further advances to him; (2) repayment should be decreed.—CHILD & CO. *v.* THORLEY (1880), 16 Ch. D. 151; 29 W. R. 417.

797. Loan to promoters of railway company—Non-existing company—Subsequent adoption by company—Liability of promoters.]—Defts., the promoters & directors of a railway co., obtained an advance of £500 from a bank, upon terms expressed in a letter, by which the bank were requested to allow the directors of the railway co. to draw to the extent of £1,000, to be repaid out of the calls on shares. At that time the Act constituting the railway co. had not been passed, & the £500 was borrowed to pay the fees necessary to its passing. The Act contained a clause providing for the payment by the co. of its expenses. After the Act was passed there was a resolution of the directors confirming the loan of £500, & the bank debited the railway co. in their accounts with the loan, & brought an action for it against the co., in which judgment was obtained; but there being no property of the co. to satisfy such judgment, the bank sued defts. for the repayment of the loan. No shares in the co. had ever been allotted, nor any call made, though more than three years had elapsed since the passing of the Act:—*Held:* as the railway co. were not in existence when the money was advanced, the £500 was advanced on the personal liability of defts., &

defts. had not been exonerated from such liability by what had been done after the passing of the Act, or by the fact that no call had been made. —SCOTT *v.* EBURY (LORD) (1867), L. R. 2 C. P. 255; 36 L. J. C. P. 161; 15 L. T. 506; 15 W. R. 517.

Annotations:—**Distd.** Coutts *v.* Irish Exhibition, London (1890), 63 L. T. 489. **Mentd.** Blyth *v.* Fladgate, Morgan *v.* Blyth, Smith *v.* Blyth, [1891] 1 Ch. 337.

See, further, COMPANIES.

798. Overdraft by bookmaker—To pay lost bet—Gaming Act, 1892 (c. 9).]—*Semble*: granting an overdraft to a bookmaker to enable him to pay a lost bet is not within the above Act.—*Re* O'SHEA, *Ex p.* LANCASTER, [1911] 2 K. B. 981; 81 L. J. K. B. 70; 18 Mans. 349, C. A.

See, further, GAMING & WAGERING.

799. Overdraft by exhibition promoters—Subsequent incorporation of exhibition—Personal liability of promoters—Novation.]—In Apr., 1888, six persons formed themselves into an executive council for the purpose of promoting an exhibition in London, & opened an account with pltfs. in the name of "The Irish Exhibition," on the understanding that cheques might be drawn by any two of the council & countersigned by the honorary secretary, & that they should be allowed to overdraw to the amount of £10,000 for the purpose of the exhibition. Afterwards the Irish Exhibition was incorporated by the name of "The Irish Exhibition," & pltfs. received notice of the fact. No alteration was made in the heading of the account, which was then overdrawn, & cheques continued to be drawn as before. The exhibition failed & was wound up:—*Held*: the six promoters were liable, & the liability had not been transferred to the co. after its incorporation.—COUTTS & CO. *v.* IRISH EXHIBITION IN LONDON (1891), 7 T. L. R. 313, C. A.

800. Security for overdraft—New credit given under usurious agreement—Sum credited taken into account.]—Deft., being indebted to pltfs., his bankers, in nearly £30,000, about £21,000 of which was secured by bonds (a considerable part of which was advanced by them when stocks were below £50), agreed with them that they should place £25,000 to his credit in account, for which he was to purchase £50,000 stock (then at 51¼) in their names, & account to them for the dividends upon such stock as from the last dividend day. After this agreement pltfs., acting upon the basis of it, though deft. never purchased the stock so agreed upon, entered in their books the sum of £25,000, to the credit of deft., & continued to honour his drafts from time to time, crediting him also with other sums actually paid by him, & wrote off the amount of his bonds to his credit, & delivered them up to him:—*Held*: this agreement to repay the new credit of £25,000 by the purchase of stock as at £50, when in fact it was more at the time of the agreement made, though it had been less when a considerable part of the money was actually advanced upon his general credit, was usurious & void, but the sum of £25,000, credited under that agreement by pltfs. to deft. in his banking account, was to be reckoned against them upon balancing the account of debtor & creditor between them.—BOLDERO *v.* JACKSON (1809), 11 East, 612; 103 E. R. 1143.

801. —— Promise to hypothecate goods—Enforcement of promise—Consideration.]—A banker required security from his customer for an overdrawn account. The customer, by letter, promised to hypothecate certain goods, but upon being asked for the delivery warrants, he refused to carry out his promise. Upon bill filed to enforce the promise:—*Held*: from the nature of the transaction, some forbearance to sue on the part of the creditor must be assumed to have taken place, & this was sufficient to prevent the promise to hypothecate from being *nudum pactum*.—ALLIANCE BANK, LTD. *v.* BROOM (1864), 2 Drew. & Sm. 289; 5 New Rep. 69; 34 L. J. Ch. 256; 11 L. T. 332; 10 Jur. N. S. 1121; 13 W. R. 127; 62 E. R. 631.

Annotations:—**Consd.** Miles *v.* New Zealand Alford Estate Co. (1886), 32 Ch. D. 266, C. A.; Fullerton *v.* Provincial Bank of Ireland, [1903] A. C. 309, H. L.; Wigan *v.* English & Scottish Law Life Assce. Assocn., [1909] 1 Ch. 291; Glegg *v.* Bromley, [1912] 3 K. B. 474, C. A. **Refd.** Reichel *v.* Oxford (1887), 35 Ch. D. 48, C. A.; Barber *v.* Mackrell (1892), 67 L. T. 108. **Mentd.** Leask *v.* Scott (1877), 2 Q. B. D. 376, C. A.

802. Loan by partner of bank—From partnership funds—Right of firm to sue.]—A. applied to B., a member of a banking establishment, for a loan of money, which B. advanced out of the partnership funds, the amount being placed to the credit of a joint stock co., which had an account with the firm, for the purpose of paying calls on shares held by A.:—*Held*: the firm might sue A. for money lent. —ALEXANDER *v.* BARKER (1831), 2 Cr. & J. 133; 2 Tyr. 140; 1 L. J. Ex. 40; 149 E. R. 56.

Annotations:—**Mentd.** Simpson *v.* Clayton (1836), 2 Bing. N. C. 467; Sweet *v.* Lee (1841), 4 Scott, N. R. 77.

803. Joint loan—Several liability.]—Every joint loan, whether contracted in relation to mercantile transactions or not, is in equity to be deemed joint & several.

Four persons opened a joint account with certain bankers, who had advanced to them money on such joint account. Upon the decease of one of the joint contractors:—*Held*: the bankers had a right in equity to immediate relief out of his assets, without claiming any relief against the surviving joint contractors, or showing that the latter were unable to pay by reason of their insolvency.—THORPE *v.* JACKSON (1837), 2 Y. & C. Ex. 553; 160 E. R. 515.

Annotations:—**Dbtd.** Jones *v.* Beach (1852), 2 De G. M. & G. 886, L.JJ. **Mentd.** Slater *v.* Wheeler (1838), 2 Jur. 887; Lyth *v.* Ault & Wood (1852), 7 Exch. 669; Other *v.* Iveson (1855), 3 Drew. 177; Beresford *v.* Browning. Browning *v.* Beresford (1875), L. R. 20 Eq. 564.

804. —— —— Husband & wife.]—A husband, at the time of his marriage in Dec., 1902, had an account at a bank in S., which was transferred to the joint names of himself & his wife, & drawn on by both husband & wife. On May 18, 1903, when the husband was absent, the wife deposited with the bank the deeds of a house belonging to her, & charged them for the debt then or thereafter to become due to the bank from her either solely or jointly with any other person, & agreed to execute a legal mtge. containing a covenant for payment & a power of sale & other proper clauses. The wife died on Aug. 27, 1904, leaving furniture worth £300 to the husband absolutely, & the house she had mtged. to the bank, worth about £1,400, to her husband for life, with remainder to her next of kin. The overdraft on May 18, 1903, was £107, & at the date of her death it was £414. The wife had paid in about £100 into the account:—*Held*: the inference was that the husband & wife agreed to provide jointly for current household expenses, & each of them ought to pay one moiety of the overdraft.—*Re* SHAW, SHAW *v.* JONES (1906), 94 L. T. 93.

See, generally, HUSBAND & WIFE.

805. Unauthorised overdraft by directors of building society—Winding up of company—Rights of bank.]—A benefit building society which had never been incorporated & had no power to borrow money was allowed by its bankers to make large overdrafts, & the directors of the society signed a memorandum giving the bankers a lien upon all the society's deeds to secure all moneys which from time to time might be owing by the society to the bankers on the balance of the banking account. Annual balance-sheets showing the amounts due to the bankers were sent to all the members of the

Sect. 20.—*Advances by bankers : Sub-sects.* 1 & 2.]

society & adopted at the annual meetings. The society was afterwards ordered to be wound up & as the overdrafts were *ultra vires*, being a borrowing unauthorised by the rules, the official liquidator brought an action against the bankers to recover all moneys which had been paid to them by the society & applied by the bankers in discharge of their loan to the society :—*Held :* (1) it was no answer to such action that the moneys had been so applied by the order of the directors of the society under a mistake of law as to their power to borrow, since the acts of the directors both in borrowing & in directing the application of the moneys were unauthorised & not binding on the society ; (2) there had been no ratification of such acts of the directors by all the members of the society ; (3) the bankers should stand in the place of withdrawing members of the society, who had been paid on notice of withdrawal out of moneys so advanced by the bankers, & receive the amounts which would be payable to such members if they had not been paid off, & should have the benefit of securities obtained by the society by means of overdrafts allowed by the bankers & the benefit of such securities according to their order of priority without being postponed until after other securities granted to the society.—BLACKBURN & DISTRICT BENEFIT BUILDING SOCIETY *v.* CUNLIFFE, BROOKS & CO. (1885), 29 Ch. D. 902 ; 54 L. J. Ch. 1091 ; 53 L. T. 741 ; 1 T. L. R. 504, C. A.

Annotations :—**Apld.** Redman *v.* Rymer (1888), 60 L. T. 385 ; *Re* Sheffield Permanent Bldg. Soc., *Ex p.* Watson (1888), 59 L. T. 401. **Expld.** *Ex p.* Watson (1888), 52 J. P. 742. **Apld.** Neath Bldg. Society *v.* Luce (1889), 43 Ch. D. 158. **Distd.** *Re* Wrexham, Mold & Connah's Quay Ry. Co., [1899] 1 Ch. 440, C. A. **Consd.** *Re* Birkbeck Permanent Benefit Bldg. Soc., [1912] 2 Ch. 183, C. A. **Dbtd.** Sinclair *v.* Brougham (1914), 83 L. J. Ch. 465, H. L.

806. Notice forbidding overdraft—Dishonour of cheque—Special course of dealing.]—C., a merchant who received consignments of goods from abroad, was accustomed to deliver to a bank, where he kept an account, the bills of exchange drawn on him against such consignments, together with the bills of lading. The bank paid the bills of exchange & placed the amount to C.'s account, & they handed over the bills of lading to a broker on receiving his undertaking to repay the amount of the bills of exchange out of the proceeds of the goods when sold. On these occasions, if the sum so placed to C.'s debit was taken as an actual debit, his account was overdrawn, but if that sum was not regarded, there was a balance in his favour. C. was, nevertheless, allowed to draw against his cash account as if the amount advanced had not been placed to his debit. At length, some goods remaining unsold, & the market price having gone down, the bank refused to pay a cheque drawn by C., whereupon he brought an action :—*Held :* it was properly left to the jury to say whether the course of dealing between C. & the bank was on the footing that he was to be allowed to draw against the cash part of his account, & that the sums guaranteed by the broker were not to be taken into account against him, unless the goods failed to satisfy them, or whether the bank was merely in the habit of indulging him by allowing him to overdraw his account, & they were properly directed that if the former, C. was entitled to a reasonable notice that the bank declined to continue that course of dealing.—CUMMING *v.* SHAND (1860), 5 H. & N. 95 ; 29 L. J. Ex. 129 ; 1 L. T. 300 ; 8 W. R. 182 ; 157 E. R. 1114.

Annotation :—**Distd.** Garnett *v.* M'Kewan (1872), L. R. 8 Exch. 10.

807. Security to cover overdraft—Disturbance of security by customer—Withdrawal of right to overdraw—Closing of account.]—Pltf. opened a current account with a branch bank at B., depositing with them title deeds of his as a security for any balance due on his account. On Oct. 21, 1887, pltf. conveyed the property to another party as security, & next day the bank had notice of it. There was then due from pltf. on his banking account the sum of £365 9*s.*, & the bank, upon receiving the notice, "ruled off" his account & calculated interest thereon up to that date, & of this the bank alleged pltf., their customer, had notice, & they told him, as he admitted, that "the security was disturbed & that to continue the overdraft they must have other security." No further cheques were paid in or drawn on the account until Dec., 1888, when he paid in a cheque for £70, which was simply received without any remark as to his account. Next day he drew a cheque for £70. On the 6th he paid in £30, & later on the same day his cheque for £70 was presented, & refused, for which an action was brought. The defence set up was that by the conveyance of Oct., 1887, the security was destroyed as to any future advances, because by reason of the notice the bank would be postponed in favour of the legal owner to whom the property had been conveyed, &, further, that pltf. had notice from the manager at the time the £30 cheque was paid in that he could not draw against those sums, as they would be applied in payment of the balance due. As to this the evidence was contradictory. Before the trial the balance had been paid off. The trial judge ruled that notice was necessary to the customer that his credit was stopped, even assuming that the security was destroyed as to future advances, & that without such notice it was not to be assumed that, if the security was taken as limited to a specific past advance, all sums paid in must be taken as paid in reduction of the balance due, & it was not material that the bank had lost their security, & closing the account in their books was nothing without notice to their customer. On application for a new trial, on the ground that notice was not necessary, as the security was destroyed, & that, even if it was necessary, there was such strong evidence of it that the verdict was against the evidence :—*Held :* judgment should be given for defts., & it was unnecessary to direct a new trial.—PARKINSON *v.* WAKEFIELD & CO. (1889), 5 T. L. R. 562, 646, C. A.

808. Evidence of loan—Cheque drawn by two persons.]—A cheque drawn by two persons upon a banker to secure the amount of a loan from the banker is evidence of a loan to both persons, though one alone should in the first instance have applied for the loan, & have had, throughout, the use of the money.—COBB *v.* SNOWDON (1849), 13 L. T. O. S. 233.

809. Discharge of overdraft—Payments into current account — Appropriation of payments.]—Where a customer has a current account & a loan account with a bank, under an arrangement that the two accounts must be kept distinct, the effect of the arrangement is that payments to the credit of the current account are appropriated to that account & cannot be taken in reduction of the loan account.

The sums paid into the current account are appropriated by the customer to that account, & cannot be used by the bank in discharge of the loan account without the consent of the customer. No customer could otherwise have any security in drawing a cheque on his current account, if he had a loan account greater than his credit balance or current account (SCRUTTON, L.J.).—BRADFORD OLD BANK, LTD. *v.* SUTCLIFFE, [1918] 2 K. B. 833 ; 34 T. L. R. 619 ; 62 Sol. Jo. 753 ; 24 Com. Cas. 27, C. A.

810. —— —— —— Effect of moratorium.]—Defts., on Feb. 11, 1914, agreed to allow pltf., a customer of the bank, an overdraft for a period of

six months. On Aug. 6, 1914, when pltf.'s account was overdrawn, a moratorium was proclaimed. On Aug. 28 pltf., without making any express appropriation, paid a sum of money into his account, & defts. applied a part of it in discharge of the overdraft. On the following day pltf. drew a cheque upon the bank, but in consequence of the discharge of the overdraft his balance was not sufficient to meet it, & the cheque was dishonoured & returned to the holder marked "R. D." :—*Held :* the effect of the moratorium was to postpone the date of payment of the overdraft for a month, & defts. were not entitled in the circumstances to refuse payment of pltf.'s cheque.—ALLEN *v.* LONDON COUNTY & WESTMINSTER BANK, LTD. (1915), 84 L. J. K. B. 1286 ; 112 L. T. 989 ; 31 T. L. R. 210.

SUB-SECT. 2.—INTEREST.

811. Whether chargeable—No agreement to pay.]—Interest does not accrue on a sum of money lent, unless there be an express contract to pay it or an implied one can be raised, either by the usage of the trade or from the transactions of the party.—SHAW *v.* PICTON (1825), 4 B. & C. 715 ; 7 Dow. & Ry. K. B. 201 ; 4 L. J. O. S. K. B. 29 ; 107 E. R. 1226.

Annotations :—**Mentd.** Shaw *v.* Dartnall (1826), 6 B. & C. 56 ; Hume *v.* Bolland (1832), 1 Cr. & M. 130 ; Pierce *v.* Evans (1835), 1 Gale, 265 ; Bate *v.* Lawrence (1844), 7 Man. & G. 405 ; Townsend *v.* Crowdy (1860), 8 C. B. N. S. 477 ; Swan *v.* North British Australasian Co. (1862), 7 H. & N. 603 ; Cave *v.* Mills (1862), 7 H. & N. 913.

812. —— Advances for maintenance of lunatic's estate.]—A customer of a bank became of unsound mind. His son arranged with the bank to continue the lunatic's banking account & to draw upon it on behalf of the lunatic for the maintenance of the lunatic's household & for the necessary outgoings of his estate. At the death of the lunatic the banking account was overdrawn. In a creditors' action to administer the real & personal estate of the lunatic the bank claimed to prove as creditors for the amount of the overdraft, which included usual bank charges for interest & commission :—*Held :* the bank were not entitled to prove for interest & commission on the overdraft.—*Re* BEAVAN, DAVIES, BANKS & CO. *v.* BEAVAN, [1912] 1 Ch. 196 ; 81 L. J. Ch. 113 ; 105 L. T. 784.

Annotations :—**Mentd.** *Re* Harris, Davis *v.* Harris, [1914] 2 Ch. 395 ; Lloyd *v.* Coote & Ball, [1915] 1 K. B. 242, C. A.

813. —— Usage of bank.] — The ct. allowed interest upon advances by bankers, who had been in the habit of charging it.—GWYN *v.* GODBY (1812), 4 Taunt. 346 ; 128 E. R. 363, Ex. Ch.

Annotation :—**Apld.** Ibbotson *v.* Ibbotson (1897), 13 T. L. R. 589.

814. —— ——.]—In an action by bankers for money lent, the ct. allowed interest upon proof that pltfs. had been in the habit of charging deft. with interest on the sums advanced, & that it was their custom to charge interest at a certain rate.—HARWOOD *v.* UNDERHILL (1820), 8 Price, 516 ; 146 E. R. 1281.

815. Compound or simple interest — Knowledge of customer.]—In an action by bankers for money lent & interest :—*Held :* it was not sufficient to show that it was the general custom of the house to charge interest calculated upon half-yearly rests, without also showing that deft. knew that such was the practice.—MOORE *v.* VOUGHTON (1816), 1 Stark. 487.

816. —— Fiduciary position of bank—Loans to trust account.]—By an assignment for benefit of creditors, full powers of borrowing money at interest from any bankers or other persons were conferred upon the trustees of the deed. Two of the trustees carried on business as bankers in partnership with other persons, & the third was a clerk in the bank. An account was opened by the trustees with the bank, & advances were made upon this account, in respect of which the banking firm claimed to make annual rests & to charge interest on the balances according to their usual practice as bankers :—*Held :* having regard to the fiduciary position of the trustee partners, only simple interest could be allowed.—CROSSKILL *v.* BOWER, BOWER *v.* TURNER (1863), 32 Beav. 86 ; 1 New Rep. 379 ; 32 L. J. Ch. 540 ; 8 L. T. 135 ; 9 Jur. N. S. 267 ; 11 W. R. 411 ; 55 E. R. 34, L.C.

Annotations :—**Apld.** Barfield *v.* Loughborough (1872), 8 Ch. App. 1, L.C. **Refd.** Yourell *v.* Hibernian Bank, [1918] A. C. 372, H. L.

817. —— Balance struck at stated times & interest charged on balance.]—Pltfs., bankers, sued to recover an overdraft. In making up the account pltfs. had struck a balance at stated times, & charged interest upon the sums found to be due :—*Held :* pltfs. could only recover simple interest.—DAWES *v.* PINNER (1801), 2 Camp. 486, n., N. P.

818. —— Mortgage to secure fixed sum.]—Where bankers hold a mtge. security for a specific advance & not for the general balance of the general banking account, they will only be allowed simple interest as mtgees.—LONDON CHARTERED BANK OF AUSTRALIA *v.* WHITE (1879), 4 App. Cas. 413 ; 48 L. J. P. C. 75, P. C.

PART II. SECT. 20, SUB-SECT. 2.

811 i. *Whether chargeable — Debit balance at one branch—Credit balance at another.*]—A bank has a right to charge interest on a debit balance due by a customer at one branch of the bank while he has a credit balance at another branch ; & it is not incumbent upon the bank, before suing for the interest, to blend the two accounts, crediting the amount which has been from time to time charged as interest on the overdrawn account by reference to the account which has been at the same time in credit.—NATIONAL BANK OF NEW ZEALAND *v.* GRACE (1890), 8 N. Z. L. R. 706. —**N.Z.**

811 ii. —— *Mortgage—Bank not bound to pay off mortgage from customer's current account.*]—In the absence of special direction to that effect a banker is not bound to pay off a mtge. which he has against his customer from the latter's current account, & interest is properly charged upon it, until the customer directs that the principal shall be paid off.—THAKUR JAWAHIR SINGH *v.* LACHMAN DAS (1905), 9 C. W. N. 745.—**IND.**

811 iii. —— *Death of customer.*]—Testator of defts. had, previous to his decease, obtained a large overdraft with pltfs. on the security of the deposit by way of equitable mtge. of certain deeds. Nothing was said about interest at the time, but he had obtained overdrafts previously on which he had paid interest, & he had been charged with interest on that particular overdraft, which he had never objected to. After his decease pltfs. filed a bill for sale under such equitable mtge., &, on taking the account, the master allowed to pltfs. interest on the overdraft which accrued due between the period of the death of testator & the reference to the master :—*Held :* pltfs. entitled to such interest without any express contract.—SOUTH AUSTRALIAN BANKING CO. *v.* HORNER (1868), 2 S. A. L. R. 109.—**AUS.**

811 iv. —— —— *Course of dealing.*]—Interest allowed at the rate of 6 per cent. from the death of a customer of a bank, upon the balance of the banking account of the customer who, during his lifetime, had been in the habit of paying interest to the bank at that rate, according to the usage of the bank, it appearing to the ct. from this course of dealing between them, with other circumstances, that there had been what amounted to a contract for payment of interest at that rate.—M'CARTHY *v.* ROCHE (1876), 10 I. L. T. 141.—**IR.**

815 i. *Compound or simple interest.*]—In an action to recover an overdrawn account, compound interest at 6½ per cent. per annum with monthly rests was disallowed.—STANDARD BANK *v.* BRODRECHT (1913), 25 O. W. R. 78 ; 5 O. W. N. 142.—**CAN.**

817 i. —— *Balance struck at stated times & interest charged on balance.*]—CLANCARTY *v.* LATOUCHE (1810), 1 Ball & B. 429.—**IR.**

q. —— *Insolvency of bank — Insolvency of customer.*]—Compound interest can only be charged whilst the relation of banker & customer exists ; this relation ceases on the happening of insolvency. A customer of an insolvent bank is liable for simple interest to the trustees or liquidators of the bank up to the date of the vesting order of insolvency of the customer.—BAINE, JOHNSTON & CO.'S TRUSTEES *v.* UNION BANK RECEIVERS (1898), 8 Nfld. L. R. 116.—**NFLD.**

Sect. 20.—*Advances by bankers : Sub-sect.* 2. *Sect.* 21: *Sub-Sect.* 1.]

819. —— ——.]—If bankers take a mtge. security from a customer for a fixed sum owing to them by the latter, the relation of banker & customer ceases thenceforth as to that sum, and it cannot be included in the customer's banking account so as to entitle the bankers to charge compound interest thereon ; & in reference to the sum so secured the mutual rights & obligations are thenceforth those of mtgees. & mtgor.

Bankers took a mtge. security for a fixed sum owing to them by a customer, & subsequently continued the mtge. debt as part of the general account between them, which embraced various dealings & transactions, making rests & charging compound interest. The ct. directed the usual accounts to be taken of what was due in respect of the mtge. security, & a separate account of the other dealings & transactions, reserving the question as to the mode in which the latter account should be taken & more particularly whether with rests or not) for consideration in chambers.—MOSSE *v.* SALT (1863), 32 Beav. 269 ; 32 L. J. Ch. 756 ; 55 E. R. 106.

Annotations :—**Refd.** Spencer *v.* Wakefield (1887), 4 T. L. R. 194. **Mentd.** Goslings & Sharpe *v.* Blake (1888), 22 Q. B. D. 153 ; *Re* Cooper, [1911] 2 K. B. 550, C. A.

820. —— **Mortgage to secure overdrawn account.**]—Where a mtge. of land is made, by way of collateral security, for such balance as may eventually be due from the customer to his banker, it is no objection to charging the land with such balance that it has been partly composed of interest turned into principal by rests, & interest on that interest, according to the course of dealing between a banker & his customers.—RUFFORD *v.* BISHOP (1829), 5 Russ. 346 ; 7 L. J. O. S. Ch. 108 ; 38 E. R. 1058.

Annotations :—**Consd.** Thomas *v.* Cooper (1854), 2 Eq. Rep. 1185. **Expld. & Distd.** Crosskill *v.* Bower (1863), 32 Beav. 86. **Consd.** Mosse *v.* Salt (1863), 32 Beav. 269. **Mentd.** *Re* Maberley, *Ex p.* Belcher (1835), 4 Deac. & Ch. 703 ; *Re* Barclay, *Ex p.* Gawan (1855), 25 L. J. Bcy. 1, C. A. ; *Re* Gawan, *Ex p.* Barclay (1855), 5 De G. M. & G. 403, L.C. & L.JJ.

821. —— ——.]—*Semble :* a banker is entitled to charge compound interest with half-yearly rests on a mtge. debt, where that debt is the balance of a current banking account kept in that way.—NATIONAL BANK OF AUSTRALASIA *v.* UNITED HAND IN HAND BAND OF HOPE CO. (1879), 4 App. Cas. 391 ; 48 L. J. P. C. 50 ; 40 L. T. 697 ; 27 W. R. 889, P. C.

822. —— **Death of customer.**]—A bank charged its customer with interest with annual rests upon his overdrawn account, & after the death of the customer made a claim against his estate for further interest upon the same basis :—*Held :* from the customer's death only simple interest at 5 per cent. should be allowed upon the ascertained balance.—WILLIAMSON *v.* WILLIAMSON (1869), L. R. 7 Eq. 542 ; 20 L. T. 389 ; 17 W. R. 607.

Annotation :—**Apld.** Barfield *v.* Loughborough (1872), 8 Ch. App. 1, L.C.

823. —— ——.]—A firm of two bankers were accustomed to keep the accounts both of the customers & of the partners at compound interest. One

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820 i. —— *Mortgage to secure advances & "usual banker's charges."*]—A mtge. to a bank to secure advances & "usual banker's charges" entitles the bank to charge interest on an overdrawn account taken with rests.—MCLEOD *v.* NATIONAL BANK OF NEW ZEALAND (1887), 6 N. Z. L. R. 3.—**N.Z.**

822 i. —— *Death of customer.*] —According to the custom of banks only simple interest is payable on a customer's debt after death, unless there was an express contract for the payment of compound interest after death.—LORDEN *v.* BABINGTON (1897), 31 I. L. T. Jo. 477.—**IR.**

822 ii. —— ——.] — An action was brought by a banking co. against deft., as exor., to recover principal & interest on his testator's overdraft of his current account. For several years testator was in the habit of overdrawing his account. Testator's account, as furnished to him from time to time during his lifetime, charged him with compound interest on his overdrafts, with half-yearly rests in Mar. & Sept. He died on Dec. 3, 1880. At his death the period for capitalising the interest current from the last statement of accounts had not arrived :—*Held :* the bank entitled to six years' simple interest on the amount due at the customer's death until paid.—PROVINCIAL BANK OF IRELAND *v.* O'REILLY (1890), 26 L. R. Ir. 313.—**IR.**

822 iii. ——— *Express contract binding executors.*]—S. opened an account with the N. Bank, & was allowed to overdraw same to the amount of £1,500, having signed the following agreement :—"In the event of my account being overdrawn at any time during the continuance of my dealings with the N. Banking Co., it is understood that the account is to be subject to all charges & interest which may be charged by the bank from time to time on such accounts, & in the event of my death such interest & charges are to continue until the account be paid off" :—*Held :* (1) there was an express contract that compound interest at the rate charged by the bank & paid by S. during his lifetime should be paid by his exors. on the balance due at his death ; (2) as accounts were regularly stated & settled by S. with full means of knowledge of his rights, it would be inequitable to allow the exors. of S. to open up the settled transactions.

When a deed is given as a security for a fixed & definite sum, at a fixed rate of interest, & not for the general balance of a banking account, it is not open to the bank in the absence of express contract, contained in the deed itself or in some instrument of equal degree, to charge compound interest upon this sum or include it in the general banking account.—STEWART *v.* STEWART (1891), 27 L. R. Ir. 351.—**IR.**

r. *Advances on preferable lien given to bank—Whether interest payable before security realised.*]—L. gave the bank the following lien on wool :—"In consideration of £140 received in money, I give the bank a preferable lien to the extent of the advance & all other sums of money which I may obtain, &, further, the bank may sell the wool &, out of the proceeds, retain the sum of £140 & interest thereon, to be charged at the rate & in the manner usually charged on the like advances" :—*Held :* the £140 became pltf.'s own money, & the bank not entitled to payment of interest until after sale of the wool.—LENANE *v.* BANK OF NEW SOUTH WALES (1881), 2 N. S. W. L. R. 284.—**AUS.**

s. *Bank Act — Interest at more than seven per cent.—Recovery of excess.*]—The provisions of s. 80 do not prevent a bank from entering into a contract to be paid a higher rate of interest than 7 per cent., & if, under such contract, interest is paid in excess of that rate, it cannot be recovered back.—WILLIAMS *v.* CANADIAN BANK OF COMMERCE (1907), 13 B. C. R. 70.—**CAN.**

t. —— —— ——.]—Interest at a rate beyond that permitted by the Act, if paid voluntarily, cannot be recovered by the customer, but, if simply charged by the bank to the customer, can be reduced upon taking the account.—CANADIAN BANK OF COMMERCE *v.* MCDONALD, 3 W. L. R. 90.—**CAN.**

u. —— —— —— *Interest accruing after January 31st,* 1902.]—Deft. borrowed large sums of money from pltf. bank, by way of overdraft & on promissory notes. Having agreed to pay interest, first at 24 per cent. & afterwards at 18 per cent. per annum, deft. from time to time gave the bank cheques on his current account to pay the interest at those rates respectively up to Jan. 31, 1902 :—*Held :* (1) such cheques should be deemed to have been payment of the interest & deft. could not recover back such interest or any part of it, although in excess of the 7 per cent. rate ; (2) under ss. 80 & 81 the bank was not entitled to sue for & recover interest accruing after Jan. 31, 1902, at 7 per cent. per annum, but could only recover interest at the legal rate of 5 per cent. per annum from that date on the principal then due.—BANK OF BRITISH NORTH AMERICA *v.* BOSSUYT (1903), 23 C. L. T. Occ. N. 338 ; 15 Man. L. R. 266.—**CAN.**

w. —— —— *Contract invalid for excess.*]—In an action to recover principal & interest on certain promissory notes, bearing interest at 12 per cent. "as well after as before maturity" :—*Held :* reading ss. 80 & 81 together, such a contract between the bank & the customer was merely invalid in so far as it stipulated for more than 7 per cent.—BANK OF MONTREAL *v.* HARTMAN (1905), 12 B. C. R. 375 ; 2 W. L. R. 57.—**CAN.**

y. —— —— ——.]—A bank stipulated in a mtge. deed for interest at the rate of 8 per cent. :—*Held :* the provision in the deed being void under Bank Act, 1906, s. 91, they were entitled to interest at the rate of 5 per cent. only, that being the legal rate of interest, where no special rate was fixed, under Interest Act, 1906.—MCHUGH (FELIX) *v.* UNION BANK OF CANADA, MCHUGH (THOMAS) *v.* UNION BANK OF CANADA (1913), 108 L. T. 273, P. C.—**CAN.**

a. —— 1867 (*c.* 11), *s.* 17—*Interest at more than seven per cent.*]—BARSS *v.* STRONG (1869), 7 N. S. R. 450.—**CAN.**

b. —— 29 & 30 *Vict. c.* 10, *s.* 5—*Not retrospective.*]—COMMERCIAL BANK OF CANADA *v.* HARRIS (1867), 26 U. C. R. 594.—**CAN.**

partner died :—*Held :* in the absence of any special agreement, it was not proper to continue the accounts as between the surviving partner & the estate of deceased partner at compound interest.—BATE *v.* ROBINS (1863), 32 Beav. 73 ; 55 E. R. 28.

824. —— Usurious interest.]—*Semble :* a customer who had given a mtge. to secure the balance to become due on his overdrawn account was not entitled, before the repeal of the Usury Acts, to object to charges for interest & commission as usurious, & if the contract was that he should pay what was due on a banker's account, he must pay what was due according to the account as usually kept between banker & customer.—THOMAS *v.* COOPER (1855), 3 Eq. Rep. 417 ; 24 L. T. O. S. 330 ; 3 W. R. 295, L.JJ.

See, further, MONEY & MONEY-LENDING.

825. Computation of interest—Cheque paid by banker—Date of payment or date of cheque.]—Interest on the amount of a cheque paid by a banker must be computed from the date when it was actually paid & not from the date of the cheque.—GOODBODY *v.* FOSTER (1831), cited in Byles on Bills, 17th ed., p. 31.

826. Closing account—Effect of.]—*Semble :* a banking account is closed, &, in the absence of any special agreement, ceases to carry interest, as soon as the relation of banker & customer is determined.—CROSKILL *v.* BOWER, BOWER *v.* TURNER (1863), 32 Beav. 86 ; 1 New Rep. 379 ; 32 L. J. Ch. 540 ; 8 L. T. 135 ; 9 Jur. N. S. 267 ; 11 W. R. 411 ; 55 E. R. 34, L.C.

Annotations :—**Refd.** Yourell *v.* Hibernian Bank, [1918] A. C. 372, H. L. **Mentd.** Barfield *v.* Loughborough (1872), 8 Ch. App. 1, L.C. ; Daniell *v.* Sinclair (1881), 6 App. Cas. 181, P.C.

827. Foreign rate of interest—Usage of Indian bankers—Death of customer.]—Testator, an indigo planter who died in England, was indebted to an Indian banker for money due on a current account of advances for plantation purposes. Testator died in 1861, & an administration decree was made in 1865. In 1870 a claim was made by the banker which included interest at the rate of 12 per cent., the usual rate borne by such debts in India. The ct. allowed interest at the rate of 4 per cent. only from the date of the death.—FINCH *v.* FINCH (1876), 45 L. J. Ch. 816 ; 35 L. T. 235.

828. Appropriation of payments—Interest converted into principal.]—The rule with regard to the appropriation of payments, by which interest is presumed to be paid before principal, is not applicable in the case of interest on an overdrawn account, which, according to the practice of bankers, has been from time to time converted into principal.—PARR'S BANKING CO., LTD. *v.* YATES, [1898] 2 Q. B. 460 ; 67 L. J. Q. B. 851 ; 79 L. T. 321 ; 47 W. R. 42, C. A.

Annotation :—**Refd.** Ascherson *v.* Tredegar Dry Docks & Wharf Co., [1909] 2 Ch. 401.

829. —— Omission to debit interest—Uncommunicated entries.]—LONDON & WESTMINSTER BANK *v.* BUTTON, No. 1008, *post.*

830. Debiting bills advised for payment—Non-payment of bills—Interest charged on overdraft—Custom.]—Deft. was in the habit of accepting bills payable in London, & once a month advised his bank as to such bills so that they might provide for their payment. The bank advised their London agents, debiting deft.'s account with the amount advised, & being debited by their agents with the amount of the bills presented & paid. Some of the bills so advised were never presented or paid, & after the lapse of many months the bank cancelled the instructions for payment, but did not advise deft. of the non-presentment of the bills. Some of the unpaid bills had stood to deft.'s debit for nearly twenty years, & as deft. was charged with interest on overdrafts, part of the interest so charged was interest or compound interest on the amounts of unpaid bills. It was alleged to be the custom of country bankers to debit their customer's account with the amount of bills so advised for payment without giving notice to the customer that any such bills had not been presented for payment, & to continue to charge interest on any overdraft which included the debits, until the customer himself cancelled the advice :—*Semble :* the alleged custom was unreasonable & unjust.—WEST OF ENGLAND & SOUTH WALES DISTRICT BANK *v.* EVANS (1881), Journal of Institute of Bankers, Vol. II., p. 397.

831. Interest payable on overdrawn account—Insolvency of bank—Right of assignees to subsequent interest.]—Where interest is payable on an overdrawn banking account at the time of the bkpcy. of the bankers, their assignees may recover interest accruing subsequently to the bkpcy.—POTT *v.* BEAVAN (1844), 7 Man. & G. 604 ; 8 Scott, N. R. 318 ; 13 L. J. C. P. 187 ; 3 L. T. O. S. 181 ; 8 Jur. 560 ; 135 E. R. 243.

SECT. 21.—SECURITIES FOR ADVANCES.

SUB-SECT. 1.—LEGAL MORTGAGE.

See MORTGAGE.

PART II. SECT. 21, SUB-SECT. 1.

See, generally, MORTGAGE.

c. *Whether mortgage of land, etc., valid under Bank Acts.*]—*Held :* a mtge. with power of foreclosure might be legally taken by the bank as collateral security.—BANK OF NEW SOUTH WALES *v.* CAMPBELL (1886), 11 App. Cas. 192 ; 55 L. J. P. C. 31 ; 54 L. T. 340, P. C.—**AUS.**

d. ——.]—A., being indebted to deft. bank to the extent of £723 12*s.* 10*d.*, conveyed to them absolutely certain land in satisfaction of £400 of that sum, on the same date writing the following letter, dictated by the bank :—" In consideration of the bank refraining to enforce payment of the sum of £723 13*s.* 10*d.* now owing by me to the bank, & of the bank taking a conveyance of . . . land . . . in part payment of the debt, I hereby engage, in the event of my means improving & my estate realising better than I anticipate, to pay the bank the difference between my debt & the value of the land referred to." The bank was incorporated by Act of Parliament, which prohibited the bank from holding land, except for the purpose of business premises ; & " to take & hold for the purpose of reimbursements only, & not for profit " :—*Held :* (1) the transaction was not a mtge , but an absolute conveyance ; (2) there was nothing in its incorporating Acts which took away from the bank the power to hold land absolutely.—BARTON *v.* BANK OF NEW SOUTH WALES (1888), 9 N. S. W. Eq. 78.—**AUS.**

e. —— 6 *Vict. c.* 27, *s.* 19—*Mortgage on ships.*]—*Held :* the bank could not hold vessels for any purpose as security. *Semble :* they might take mtges. upon real estate to secure debts previously contracted.—MCDONELL *v.* BANK OF UPPER CANADA (1850), 7 U. C. R. 252.—**CAN.**

f. —— —— ——.]—*Held :* the bank were incapacitated by the above sect. from holding ships as mtgees.—LYMAN *v.* BANK OF UPPER CANADA (1851), 8 U. C. R. 354.—**CAN.**

g. —— —— *Advance & security contemporaneous acts.*]—*Held :* (1) the bank might take mtges. upon real estate as collateral security, for sums advanced *bonâ fide* in the way of their business, & such debts need not have been contracted previously, but the advance & the security might be contemporaneous acts ; (2) all chartered banks had the same power.—COMMERCIAL BANK *v.* BANK OF UPPER CANADA (1859), 7 Gr. 250, 423.—**CAN.**

h. —— 34 *Vict. c.* 5, *s.* 40—*Security for contemporaneous loan.*]—B. transferred to the T. Bank by notarial deed a hypothec on real estate as collateral security for a note discounted by the bank & the proceeds placed at B.'s credit on the same day on which the transfer was made :—*Held :* the transfer was not given to secure a past debt, but to cover a contemporaneous loan, & was null & void.—BANK OF TORONTO *v.* PERKINS (1883), 8 S. C. R. 603.—**CAN.**

k. —— *R. S. C.* 1886 (*c.* 120), *s.* 45—*Assignment of mortgage to secure indorsements.*]—An assignment to a bank of a mtge. upon land, given to secure indorsements upon negotiable paper to be made by the mtgee. for the benefit of the mtgor., before the making of the indorsements, is not a violation of the above sect.—*Re* ESSEX LAND & TIMBER

Sect. 21.—*Securities for advances: Sub-sects.* 2 & 3.]

SUB-SECT. 2.—EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS.

See MORTGAGE.

SUB-SECT. 3.—BILLS OF EXCHANGE, CHEQUES, AND PROMISSORY NOTES.

832. Accommodation bills—Bankruptcy of drawer—Rights of bank against acceptor.]—The drawer of a bill accepted for his accommodation, indorsed it for value to his bankers, & before the bill became due, became bkpt.:—*Held:* the bankers, who knew that the bill was accepted for the accommodation of the drawer, could not recover from the acceptor more than the amount of their balance, as between them & the drawer at the time of his bkpcy.—JONES *v.* HIBBERT (1817), 2 Stark. 304.

Annotation:—**Mentd.** *Re* Bunyard, *Ex p.* Newton, *Ex p.* Griffin (1880), 16 Ch. D. 330, C. A.

833. ——— ——— ———.]—Bills of exchange amounting together to £523, drawn by A. & accepted for his accommodation by B., were deposited by A. with his bankers, as a security for any floating balance which might be due from him to them on his banking account. A. became bkpt., & his bankers proved a debt of £7,526 against his estate, exhibiting the bills of exchange as a security, but not proving on them specifically. The bankers afterwards re-

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Co., TROUT'S CASE (1891), 21 O. R. 367. —**CAN.**

l. ——— *Bank Act,* 1890 (*c.* 31), *s.* 64 —*Security for present advance.*]—*Held:* as the land mtged. was taken to secure a present advance it was illegal & void.—CANADIAN BANK OF COMMERCE *v.* WILSON (1908), 9 W. L. R. 359; *affd.* (1909), 11 W. L. R. 539.—**CAN.**

m. ——— *R. S. C.,* 1906 (*c.* 29)—*Security for debt & future advances.*]—S., a customer of a bank, was, in 1895, indebted to it in a large sum, & in 1895 & 1896 made three mtges. to a trustee for the bank, covering most of his real estate. The mtges. recited the indebtedness of the mtgor. to the bank for money advanced & promissory notes past due & unpaid, & his agreement to execute the mtges. as collateral security for payment of the past due indebtedness, "& also as collateral to any further or future advances which may from time to time be made by the bank to the mtgor. or which may be represented by bills of exchange or promissory notes made or indorsed by the mtgor. from time to time held by the bank or for any renewal or renewals thereof." The proviso for redemption followed the terms of the recital:—*Held:* the mtges. were not taken for the purpose of enabling the bank to make a loan upon real estate, but for the purpose of securing the indebtedness of S. to the bank, & were not made in pursuance of a colourable & collusive scheme to defeat the restriction imposed by the Act.—THOMSON *v.* STIKEMAN (1913), 29 O. L. R. 146; 4 O. W. N. 1546; 14 D. L. R. 97; *affd.,* 17 D. L. R. 205.—**CAN.**

n. ——— ——— *Bank obtaining mortgage more than year after agreed date.*]—Where a customer agrees to give a bank as collateral security a mtge. on real estate on or before a date named, there is nothing improper or illegal in the bank, in pursuance to such previous agreement, in insisting upon & obtaining the security on such real estate more than a year subsequent to that date.—CLARKSON *v.* DOMINION BANK (1916), 27 O. W. R. 1; *affd.,* 38 D. L. R. 232.—**CAN.**

Rights & liabilities of bank, mortgagor & third parties generally.]—*See, further,* MORTGAGE.

PART II. SECT. 21, SUB-SECT. 2.

See, generally, MORTGAGE.

o. *Whether equitable mortgage valid under Bank Acts.*]—A bank, which was precluded by its Act of incorporation from lending money upon the security of land, but was allowed to take & hold land until it could be sold for the purpose of reimbursement of a debt previously incurred without any expectation of such security, agreed to advance money to a customer, who a few days afterwards deposited deeds by way of security for such advance, in such a way as to make such deposit virtually a part of the same transaction:—*Held:* it was void under the Act.—BANK OF VICTORIA *v.* FORBES (1887), 13 V. L. R. 760.—**AUS.**

PART II. SECT. 21, SUB-SECT. 3.

p. *Collections deposited—Payment on collateral notes—Bank's duty to credit customer—Suspense account.*]—A bank gave a customer "a line of credit to $150,000, to be secured by collections deposited":—*Held:* the bank was bound to credit the customer with the payments made from time to time to the bank on collateral notes deposited with them by the customer in accordance with the terms of the memorandum, & could not hold the payments in a suspense account until the maturity of the customer's own paper given to the bank to cover the line of credit, & take judgment against the customer for the full amount of that paper.—MOLSONS BANK *v.* COOPER (1898), 26 O. R. 57; *affd.,* 26 S. C. R. 611, P. C.—**CAN.**

q. *Promissory note — Validity — Stamp.*]—Notes not properly stamped taken by a bank are invalid, if the bank does not attach double stamps & properly cancel the same when it first receives the notes, & will not support a chattel mtge.—ONTARIO BANK *v.* WILCOX (1878), 43 U. C. R. 460.—**CAN.**

r. ——— ——— *Excessive rates of interest.*]—To an action by pltfs., a banking corpn., against defts. on a promissory note, defts. in effect pleaded that the note was void under C. S. U. C., c. 58, s. 9, in consequence of the taking by pltfs. of more than 7 per cent. interest from defts.:—*Held:* the plea was bad, for the effect of 29 & 30 Vict. c. 10, s. 5, was not merely to relieve banking corpns. from the pecuniary penalty, but to save the security given for the moneys loaned from the forfeiture under that Act.—COMMERCIAL BANK OF CANADA *v.* COTTON (1867), 17 C. P. 447. —**CAN.**

s. ——— *Indorsed by customer for past advances—Customer credited on subsequent deposits—Imputation of payments.*]—A bank took a note indorsed by a customer as security for past advances amounting to about $10,000, & after the maturity of the note, deposits amounting to more than $10,000 were passed to his credit in the books of the bank:—*Held:* in the absence of any special imputation of payments or reserve as to the application of the subsequent deposits, those deposits were to be imputed in payment of the oldest debt, & the customer's liability at the maturity of the collateral security being more than paid by the subsequent deposits, the collateral was discharged, & the bank's action against the maker & first indorser of the note dismissed.—EXCHANGE BANK *v.* NEWELL (1887), M. L. R. 3 S. C. 129; 10 L. N. 274.—**CAN.**

t. ——— *Signed by husband for wife under power of attorney—Power of attorney not produced—Wife not liable.*]—A husband signed a note to the bank to secure an advance to the husband in his wife's name, under a power of attorney containing a clause permitting him to sign notes "in which I shall be interested or concerned which shall be requisite." The power of attorney was not produced to the bank at the time the note was given & the advance made:—*Held:* the signing of the note by the attorney put the bank on inquiry, &, there being no evidence that the wife was interested or concerned in the note, she was not liable on the note. —BANK OF NOVA SCOTIA *v.* HAWKINS (1915), 31 W. L. R. 505.—**CAN.**

u. ——— *Assignment of deed — Collateral security or satisfaction.*]—*Held:* the deed in question showed clearly an intention on the part of the bank to take it as collateral security, & not as an assignment in satisfaction of the notes sued on.—BANK OF BRITISH NORTH AMERICA *v.* SHERWOOD (1850), 6 U. C. R. 552.—**CAN.**

w. ——— *Borrower holding collateral security—Rights of bank.*]—*Held:* where a co. transferred certain notes held by it to a bank, the latter was also entitled to an assignment of any collateral security, such as mtges., that was given with such notes by debtor.—*Re* CANADIAN GAS POWER & LAUNCHES, *Re* RIDGE'S CLAIM (1913), 25 O. W. R. 51; 5 O. W. N. 43.—**CAN.**

a. ——— *As collateral security — Release by bank manager—Liability of bank.*]—Pltfs., a banking corpn., held defts.' promissory note for $9,000. As collateral security for the payment of the note, pltfs. held two promissory notes of C., aggregating the same amount. By a private arrangement between pltfs.' manager & C. the manager returned to C. his promissory notes, undertaking with C. to be liable to pltfs. for what C. would have to pay. In an action by pltfs. upon defts.' note, defts. disputed liability on the ground that pltfs. were not in a position to return to them C.'s notes, which were their property & pledged by them as collateral security for the payment of the note sued on:—*Held:* a good ground for counterclaim.—HOCHELAGA BANK *v.* LARUE (1910), 13 W. L. R. 114. —**CAN.**

b. ——— *Accounts showing balance due to bank—No mention of notes in accounts—Priority of payment.*]—Notes sued on were indorsed by M. in blank & given to pltfs. to be held by them as security for advances. Accounts showed advances amounting to $95,000, & a balance of $18,000 due by M. to pltfs. The notes were not mentioned in the accounts at all:—*Held:* the equitable doctrine as to priority of payments did not apply so as to discharge the notes as elder obligations.—MERCHANTS BANK *v.* STIRLING (1880), 1 R. & G. 439.—**CAN.**

c. ——— *Advance to purchase raw material—Bank receiving proceeds on sale of goods.*]—Two promissory notes were given by deft. to secure advances made by pltfs. to I. Co., of which he had been manager. The co. required money to purchase sulphite in order that they might turn a large quantity of pulp into paper. Pltfs. agreed to make the necessary advances, receiving from deft. the promissory notes, a lien on the sulphite purchased, & an under-

ceived a dividend of 2*s.* in the pound on the whole debt. B. subsequently paid the amount of the bills :—*Held :* B. was entitled to have the dividend of 2*s.* in the pound on the value of the bills refunded by the bankers, as well as to receive the future dividends on the same amount.—*Re* GARNER, *Ex p.* HOLMES (1839), Mont. & Ch. 301, 312 ; 9 L. J. Ch. 33 ; 3 Jur. 1023, L.C.

Annotations :—**Consd.** Ellis *v.* Emmanuel (1876), 1 Ex. D. 157, C. A. **Refd.** Bower *v.* Marris (1841), Cr. & Ph. 351, L.C. ; *Re* Clark, *Ex p.* Stokes & Goodman (1848), De G. 618 ; Midland Banking Co. *v.* Chambers (1868), L. R. 7 Eq. 179. **Mentd.** *Re* Fernandes, *Ex p.* Hope (1844), 8 Jur. 1128 ; Hobson *v.* Bass (1871), 6 Ch. App. 792, L.C.

834. Unauthorised discounting of deposited bills by bank—Bankruptcy of bank—Customer entitled to proceeds.]—A customer deposited with a banker two bills for £1,000 indorsed by him for the amount of which it was agreed he should draw, the banker refusing to discount them. The customer only drew for £65, & the banker employed a broker to discount the bills, & became bkpt. in less than three weeks after they were originally deposited with him by the customer :—*Held :* the customer was entitled to the proceeds of the bills.—*Re* WISE, *Ex p.* EDWARDS (1842), 2 Mont. & De G. 625 ; 11 L. J. Bcy. 36 ; 6 Jur. 877, Ct. of R.

835. Advance to agent—Upon bills drawn on principal—Failure of principal—Liability of agent.]—A banking co., whose chief office was in London, but who had offices & carried on business in Australia, made advances at the request of M. & R. to C., the agent of M. & R. in Australia, upon bills of exchange drawn by him upon M. & R. These bills were dishonoured by M. & R., who had entered into a deed of composition with their creditors, which was executed on behalf of the banking co. Dividends had been received under this deed by the banking co. who had brought an action in Australia against C. for the amount of their advances upon the bills, & damages for their non-acceptance. An injunction was granted restraining the banking co. from proceeding in the action, they having been distinctly informed that the bills were drawn by C. as agent for M. & R., whom they had relieved by executing the deed, & taking a dividend thereunder.—WALKER *v.* BROOKS (1856), 4 W. R. 347.

836. Advance to company—On bills remitted to cover acceptances—Winding up of company—Right of remitting bank to recover.]—The L. Bank established a credit agency with G. Co. in London, & agreed to send remittances within ninety days to cover drafts. G. Co., being in difficulties, obtained an advance of money from the P. Bank, to be repaid out of expected remittances from the L. Bank to cover bills then current, & the P. Bank employed as agents to receive & select from the expected securities the managing director of G. Co., & their own managing director, who had been, two years previously, the manager of G. Co., & was cognisant of & party to the arrangement with the L. Bank. The securities were selected by & handed over to the P. Bank upon their arrival, & the following day G. Co. stopped payment & was wound up :—*Held :* the L. Bank had no title to recover the securities from the P. Bank.—BANCO DE LIMA *v.* ANGLO-PERUVIAN BANK (1878), 8 Ch. D. 160 ; 38 L. T. 130.

Annotation :—**Mentd.** *Re* Gothenburg Commercial Co. (1880), 42 L. T. 174.

837. Promissory note—Bank parting with possession—Right to recover.]—A. deposited with B., a banker, a promissory note as security for advances :—*Held :* B. was entitled to recover on the note, although before it became due he parted with the possession to enable A. to procure payment from the maker, & although the note remained in A.'s hands till his bkpcy., & then came into the posses-

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taking to keep up the stock of sulphite from time to time. The sulphite was made into paper & sold, the proceeds being turned over to pltfs., on account of other advances made. Deft., in an action on the notes, contended that he should be credited with the value of the sulphite in the paper so sold, of which pltfs. received the proceeds, which amount would extinguish his liability on his promissory notes :—*Held :* pltfs. entitled to judgment for full amount.—QUEBEC BANK *v.* CRAIG (1912), 22 O. W. R. 874 ; 3 O. W. N. 1635 ; 6 D. L. R. 573.—**CAN.**

d. —— *Accommodation indorsement—Unauthorised pledge as collateral security—Bank holder in due course.*]—The bank having refused further loans to a trading co. until its current liability to the bank was reduced, a note by the co. in favour of its directors was specially indorsed to the bank by them & handed to the co.'s manager, who had charge of its financial affairs, with instructions to have the note discounted, but without authority to pledge it. Without informing the bank of his restricted power to deal with the note, the manager deposited it with the bank as collateral security for the co.'s current liability &, in consideration of the deposit, obtained fresh advances from the bank by discounts of the co.'s trade paper. At the maturity of the note, the trade paper had been retired & an overdraft on the co.'s account had been covered, but the general indebtedness of the co. for former loans still subsisted :—*Held :* the bank entitled to enforce payment of the note as holder in due course for valuable consideration & to recover thereon the amount of the co.'s general indebtedness remaining unsatisfied.—COX *v.* CANADIAN BANK OF COMMERCE (1912), 22 W. L. R. 226 ; 46 S. C. R. 564 ; 8 D. L. R. 30.—**CAN.**

e. —— —— *Bank taking security from maker—Discharge of indorser.*]—Action on a promissory note indorsed by deft., who pleaded that it was indorsed on the express understanding that he was not to be called upon to pay it, & that he was discharged by the bank subsequently taking security from the makers. The jury found that the bank, on taking security, had agreed that the note in suit should be paid out of the proceeds of collateral held by the bank, & gave a verdict in deft.'s favour :—*Held :* a new trial must be ordered, as the finding of the jury did not warrant the verdict for deft.—ST. STEPHEN'S BANK *v.* BONNESS (1895), 24 S. C. R. 710. —**CAN.**

f. —— *Defect in title of customer—Knowledge of bank.*]—*Qu. :* whether, in the absence of other evidence, the fact that a banker knew that a small percentage of many notes, made to a certain customer in respect of other transactions & pledged by him as collateral security, were tainted with fraud would reasonably lead the banker to suspect that all notes made to that customer were so tainted.—UNION INVESTMENTS CO. *v.* GRIMSON (1916), 33 W. L. R. 845 ; 9 W. W. R. 1430.—**CAN.**

g. *Rights of bank as bonâ fide holder in due course—Notes of third party as collateral security—Failure of consideration between maker & payer.*]—Deft. made a note in favour of S. for the amount of a bill of exchange. S. failed, & the bill was dishonoured. Before the note came due, & before the failure of S., it was deposited by him with a number of other notes with pltfs. as collateral security for the payment of certain bills of exchange, on which he was liable to pltfs., the agreement being, that if the bills were not paid, the proceeds of the notes were to be applied in payment of the amount, but if the bills were paid, pltfs. were to collect the notes & place the amount to the credit of S. The amount of notes deposited by S. with the bank as collateral security never exceeded his indebtedness, & at the time the note in question was indorsed to pltfs., & when S. failed, there was a considerable deficiency :—*Held :* pltfs. were *bonâ fide* holders for value, & were not affected by the failure of consideration between deft. & S.—COMMERCIAL BANK *v.* PAGE (1871), N. B. Dig. 113.—**CAN.**

h. —— —— *Defect in customer's title.*]—The mere existence of a liability of a customer to a bank on a promissory note not yet due is not a sufficient consideration, under Bills of Exchange Act, R. S. C., 1906 (c. 119), s. 53, for the transfer by the customer to the bank of the promissory note of a third party as collateral security, so as to constitute the bank the holder in due course of such promissory note or to give the bank a better title to it than the customer had as against the maker, unless there is evidence that such note was transferred pursuant to a previous agreement to give security.—BANK OF BRITISH NORTH AMERICA *v.* MCCOMB (1911), 21 Man. L. R. 58.—**CAN.**

k. "*Negotiation*"—*Renewal of note.*]—A renewal of a note is not a "negotiation" of it within Bank Act, 53 Vict. c. 31, s. 75, so as to support a security taken at the time of the renewal in substitu ion for a previously existing security.—BANK OF HAMILTON *v.* SHEPHERD (1884), 21 A. R. 156.—**CAN.**

l. —— *Person giving security not at liberty to draw against proceeds of bill or note.*]—A bill or note taken by a bank on acquiring a security in form C to Bank Act, 53 Vict. c. 31, ss. 74, 75, is not "negotiated" at the time of the acquisition thereof within the latter sect., when the person giving the security, & to whose account the proceeds of the bill or note are credited, is not at liberty to draw against them except on fulfilling certain other conditions.—BANK OF HAMILTON *v.* HALSTED (1897), 27 O. R. 435 ; 24 A. R. 152 ; 28 S. C. R. 235.—**CAN.**

sion of his assignees.—BRUCE *v.* HURLY (1815), 1 Stark. 23.

838. —— **Bankruptcy of customer—Liability of maker.**]—A. gave his promissory note to B., upon which B. by deposit thereof at his bank raised money, & paid same to A., being indebted to him. Accounts were subsequently settled between A. & B., but the note remained at the bank, the money being still due by B. to the bank. B. having become insolvent, the bank brought an action against A. for the note. A. insisted that the note had been discharged by B. in the course of his dealings with the bank. An injunction was granted to restrain the action at law, & inquiries were directed whether B. was a contracting party to the state of the accounts in the bank books, & whether the sums paid into the bank by B. were paid in with specific appropriations.—MOSTYN *v.* BURDEKIN (1839), 3 Jur. 52.

839. —— **Promise by clerk not to present—Liability of maker—Consideration.**]—A. having been in partnership with B., on the dissolution undertook to collect & pay the partnership debts. A. & B. during the partnership had kept a joint account with a certain branch bank, but after the dissolution there was only a single account of A. kept there. A. having greatly overdrawn that account, obtained a promissory note for £500 from B., his former partner, which he indorsed to the bank as a security for his debt, just previous to a quarterly inspection of the accounts of the branch, the clerk who managed the branch promising that it should not be presented. He, however, kept it, & it was found among the securities of the branch, in his portfolio, when he was discharged from his situation :—*Held :* the directors of the bank might recover the amount from B.

The £500 note was given for value, because it was given to reduce the balance, which balance was brought about by the payment of the partnership debts. With respect to the bank, there was clearly, from the state of the account, a consideration by them for the note (GURNEY, B.).—BOSANQUET *v.* FORSTER (1841), 9 C. & P. 659, N. P.

840. **Promissory note payable to bank—Change in firm—Continuing security — Appropriation.**]—A., wishing to obtain credit with his bankers, in 1817 prevailed upon three persons to join him in a promissory note, whereby they jointly & severally promised to pay the bankers or order £300. The bankers gave A. credit in his pass-book for £300 on account of the note, & charged him with interest for same yearly. Upon two of the partners retiring from the banking house a balance was struck between the old & new firm, & the promissory note was delivered to the new firm, but not indorsed to them. The same course was subsequently adopted on the death of a partner & the introduction of new partners. A. at one time had in the hands of his bankers a balance exceeding the amount of the note. He paid interest to the banking house annually :—*Held :* the note being payable to the five members of the banking house or order, & being evidently intended to be a continuing security, the makers were liable upon it, notwithstanding a change in the members of the banking house ; (2) an action on the note (same not having been indorsed) was properly brought in the name of the payees of the note ; (3) the note was not discharged by reason of A. at one time having in the hands of the banker a balance exceeding in amount the sum secured by the note.—PEASE *v.* HIRST (1829), 10 B. & C. 122 ; L. & Welsb. 81 ; 5 Man. & Ry. K. B. 88 ; 8 L. J. O. S. K. B. 94 ; 109 E. R. 396.

Annotations :—**Refd.** Dry *v.* Davy (1839), 10 Ad. & El. 30. **Mentd.** Henniker *v.* Wigg (1843), Dav. & Mer. 160.

841. **Accommodation cheque—Fraudulent agreement with bank agent—Customer credited—Liability of maker.**]—Deft. gave a cheque to C., & received from him a counter-cheque, on the understanding that neither should be presented, but that deft.'s cheque should be returned in a few days. C., having overdrawn his account with his bankers, made a fraudulent agreement with the bank agent, to which deft. was not privy, that the cheque in question should be paid into the bank, so as in appearance to reduce C.'s balance, but that it should be afterwards returned, & no action brought upon it. Before it was returned the bankers, pltfs., took possession of it & brought an action upon it against deft. :—*Held :* a plea of want of consideration for deft.'s giving the cheque to C., & for C.'s transferring it to pltfs., was disproved by the evidence & deft. was liable.—BOSANQUET *v.* CORSER (1841), 8 M. & W. 142 ; 10 L. J. Ex. 275 ; 5 Jur. 369 ; 151 E. R. 983.

842. **Bills & cheques as collateral security—Defect in title of customer—Bankruptcy of customer.**]—A., being in partnership with B., entered, without the knowledge of B., into partnership with C., an agent of the firm of A. & B., for the sale of timber. The firm of A. and C. employed R., F. & Co. as their bankers, & C. brought cheques & bills to the bank with the names of A. & B. attached to them, which the bank held as collateral security to cover C.'s overdrafts. Upon A.'s death C. failed, & B. became bkpt. :—*Held :* the bankers were not in a position to prove their collateral security against B.'s partnership estate, as they neglected to ascertain the extent of either A.'s or C.'s authority to pledge B.'s credit, &, no account being produced, it was impossible to distinguish any agency transactions from the general dealings of A. & C. with the bankers, whose title could not be higher than that of the parties with whom they dealt.—*Re* CROUDACE (1866), 15 L. T. 19.

SUB-SECT. 4.—BONDS, SCRIP, STOCKS, SHARES, ETC.

843. **Advances on security of shares—Validity—Realisation.**]—B. Co. was established in India to carry on the business of bankers in the most general terms. The articles of assocn. provided that the business should be regulated by such bye-laws as the directors might from time to time make, which should be entered in a book kept for the purpose, & signed by three of the directors. A bye-law made in the exercise of such power provided that the co. might accept shares in public cos. as security for a debt absolutely & *bonâ fide* previously due, but that shares in public cos. so accepted as security were not to be transferred to the co. The co. having taken as security for advances made by them the deposit of the certificates of a large number of shares in A. Co., a banking co., with blank transfers thereof, & powers of attorney to receive the dividends thereon, one of the Indian cts. decided in an analogous case that shares so deposited remained, in the event of the bkpcy. of the depositor, in his order & disposition. Thereupon a meeting of the directors of B. Co. was held, at which six directors were present, & a resolution was passed that any shares upon which loans were granted should be registered in the name of the manager or in the name of the co. The resolution was not entered in a book signed by three directors, but in pursuance of it the shares in A. Co. which were held as security for advances by B. Co. were registered in the name of B. Co. The transfers purported to be made to B. Co., "his exors., administrators & assigns," & were not

sealed with the corporate seal of the co., but purported to be accepted by the manager on their behalf. After the transfers B. Co. received dividends on all the shares so transferred & sold some of them, & received the purchase-money :—*Held :* it being within scope of the business of bankers to advance money on the security of shares, anything which the directors of B. Co., in the exercise of ordinary prudence, did to perfect the security which they had taken was within scope of their authority.

It is within the scope of an ordinary banking business to make the loans which have been made, & to take the deposit of shares as security, & when persons take a reasonable & *bonâ fide* course to realise those securities, they cannot turn round afterwards & say it was *ultra vires*, & was not justified by their articles of assocn. (GIFFARD, L.J.). —*Re* ASIATIC BANKING CORPN., ROYAL BANK OF INDIA'S CASE (1869), 4 Ch. App. 252 ; 19 L. T. 805 ; 17 W. R. 359, L.JJ.

Annotation :—**Distd.** Sheffield & South Yorkshire Permanent Bldg. Soc. *v.* Aizlewood (1889), 44 Ch. D. 412.

844. Advances to broker—Deposit of client's negotiable securities — Bankruptcy of broker — Rights of bank.]—Resp. deposited with a stockbroker, for safe custody, some bonds of a foreign co. payable to bearer, which passed by delivery on the Stock Exchange. The broker sold the bonds without authority, & repurchased others of the same kind, which he entered in his books as belonging to resp., & afterwards pledged them, together with securities belonging to other customers, *en bloc* to applts. to cover an advance to himself. The broker became insolvent, & resp. brought an action against applts. to recover the bonds or their value :—*Held :* applts. were *bonâ fide* holders for value of negotiable instruments, without notice, & resp. could not recover.—LONDON JOINT STOCK BANK *v.* SIMMONS, [1892] A. C. 201 ; 61 L. J. Ch. 732 ; 66 L. T. 625 ; 56 J. P. 644 ; 41 W. R. 108 ; 8 T. L. R. 478 ; 36 Sol. Jo. 394, H. L. ; *revsg.* S. C. *sub nom.* SIMMONS *v.* LONDON JOINT STOCK BANK, LITTLE *v.* LONDON JOINT STOCK BANK, [1891] 1 Ch. 270, C. A.

Annotations :—**Apprvd. but Distd.** Baker *v.* Nottingham & Nottinghamshire Banking Co. (1891), 60 L. J. Q. B. 542. **Consd.** Bentinck *v.* London Joint Stock Bank, [1893] 2 Ch. 120. **Apld.** Thomson *v.* Clydesdale Bank, [1893] A. C. 282, H. L. **Distd.** Smith *v.* Prosser, [1907] 2 K. B. 735, C. A. **Refd.** Manchester Trust *v.* Furness, [1895] 2 Q. B. 539, C. A. ; Redfern *v.* Rosenthal (1901), 85 L. T. 313, D. C. ; Fuller *v.* Glyn, Mills, Currie, [1914] 2 K. B. 168. **Mentd.** Venables *v.* Baring, [1892] 3 Ch. 527 ; Molyneux *v.* Hawtrey, [1903] 2 K. B. 487, C. A. ; Weiner *v.* Gill, Weiner *v.* Smith, [1905] 2 K. B. 172 ; Louth (Northern Division) Case (1911), 6 O'M. & H. 103.

845. —— —— —— ——.]—B.'s brokers, at the date of their bkpcy., held bonds & stocks of his as security for advances. The securities comprised bonds payable to bearer & securities transferable by written instrument & registration. The brokers deposited the securities with defts. as security for larger advances made to the brokers by defts. The registered securities had been transferred to & registered in the names of trustees for defts., in some cases the transfers being executed by B. for a nominal consideration, & in other cases by the brokers or other persons for full value expressed. The securities had been so deposited, together with securities of other persons, to secure an entire sum. B. admitted that the brokers had authority from him to transfer the benefit of their own security to the extent of their advances to him, but claimed to redeem on payment to defts. of what was due from him to the brokers. It was proved that by far the greater part of the business of the Stock Exchange was on the "contango" system. Defts. contended that they were entitled to assume, & did assume, without inquiry, that all the securities were the property of the brokers :—*Held :* (1) considering the prevalence of "contango" transactions, defts. were entitled to assume that the securities pledged to them were the property of the brokers ; (2) with regard to the securities transferred to the trustees by B. himself, B.'s exors. were estopped from denying the title of the bank ; (3) with regard to those transferred by the vendors, defts. were not bound to inquire as to the authority of the brokers.—BENTINCK *v.* LONDON JOINT STOCK BANK, [1893] 2 Ch. 120 ; 62 L. J. Ch. 358 ; 68 L. T. 315 ; 42 W. R. 140 ; 9 T. L. R. 262 ; 3 R. 120.

846. —— —— —— ——.]—Pltf. had bought through a firm of stockbrokers certain shares, of which H. was the registered holder. Upon the certificates for the shares was indorsed a form of transfer, which had been executed by H. Pltf. allowed the certificates to remain in the hands of the stockbrokers in such condition. The stockbrokers proposed, & pltf. agreed, that the shares should be registered in names other than his own name. Before this was done they deposited the certificates with defts., their bankers, as security for their account with defts., requesting defts. to have the shares registered & certificates made out in the names of two nominees of defts. This was done. The stockbrokers then became bkpt., owing a large sum to defts. Pltf. claimed the certificates. Defts. asserted the right to hold them as *bonâ fide* pledgees without notice of pltf.'s title :—*Held :* there was nothing to put defts. upon inquiry as to the extent of the stockbrokers' authority to pledge the certificates.—FULLER *v.* GLYN, MILLS, CURRIE & Co., [1914] 2 K. B. 168 ; 83 L. J. K. B. 764 ; 110 L. T. 318 ; 30 T. L. R. 162 ; 58 Sol. Jo. 235 ; 19 Com. Cas. 186.

847. —— —— **Notice to bank—Rights of bank.**] —Pltf. gave to B., a broker, certain bonds to be

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PART II. SECT. 21, SUB-SECT. 4.

844 i. *Advances to broker—Deposit of client's negotiable securities—Bankruptcy of broker — Rights of bank.*] — Stockbrokers, on the employment of a third party, purchased stock, which was paid for out of the funds of the employer, but was allowed for some time to remain untransferred in the names of the sellers, under control of the stockbrokers, who caused transferences to be executed by the original sellers, in favour of bankers, in security of the stockbrokers' promissory-note, discounted to them by the bankers. In a question between the bankers & the true owners of the stock, after the bkpcy. of the brokers :—*Held :* the bankers entitled to retain the stock in security of their advances.—ATTWOOD *v.* KINNEAR & SONS (1832), 10 Sh. (Ct. of Sess.), 817.—**SCOT.**

844 ii. —— —— —— —— *Limited to specific loans.*]—A stockbroker pledged with a bank stocks & shares belonging to clients as security for loans made to him in his own name. The bank's manager admitted that it was presumed that he was acting for clients & that he loans were being obtained for clients. The title of the bank to the securities was duly completed. On the stockbroker's sequestration, the securities were realised by the bank, who, after meeting the specific loans, had a balance in their hands. In an action of multiplepoinding, the bank competing with the stockbroker's clients in respect of an overdraft on the stockbroker's current account :—*Held :* the bank's right to the securities was not to be extended by inference so as to cover the overdraft on the stockbroker's current account.—NATIONAL BANK *v.* DICKIE'S TRUSTEE (1895) 3 S. L. T. 51.—**SCOT.**

847 i. —— —— *Notice to bank.*]—Pltf. employed P., a stock & share dealer, to sell some bonds & to purchase other bonds with the proceeds. The amount realised by the sale was sufficient to pay for the bonds purchased & commission. P. received the bonds purchased in due course, & entered them by their numbers to pltf. in his books, but did not deliver them to pltf., who objected to accounts of the transactions furnished to him by P. as inaccurate. Subsequently P., without the knowledge or authority of pltf., deposited with defts., who were aware that he was a stock & share dealer, the bonds so purchased, with other securities, to cover a balance due by him to defts. on a loan account then opened, & also to secure an overdraft on his current account & future advances :—*Held :* the circumstances were sufficient to put defts. on inquiry, & there were grounds for their suspecting that the securities pledged might not be the absolute property of P.—MULVILLE *v.* MUNSTER & LEINSTER BANK (1891), 27 L. R. Ir. 379.—**IR.**

847 ii. —— —— ——.]—Pltf., the duly registered owner of shares in the A.

Sect. 21.—Securities for advances : Sub-sect. 4.]

exchanged for certificates. These bonds, by the custom & usage of the Stock Exchange, passed from hand to hand by delivery without transfer. The broker deposited the bonds with defts., his bankers, in exchange for certain other securities for his private account, which had been overdrawn for some time. Defts.' manager was aware that B. was a broker, but was not aware that he was depositing his customer's securities. B. having failed to repay the overdraft on his account, the bank claimed to hold the securities, & refused to deliver them to pltf. In an action against the bank to recover the securities or their equivalent:—*Held :* pltf. was not entitled to recover as against the bank, inasmuch as the securities were negotiable instruments, & the bank were *bonâ fide* holders for value, & the mere fact that the bank manager knew that the pledgor of the securities was a broker was not enough to affect the bank with notice that the securities were not his own, or to cast on them the duty of making inquiry.—BAKER *v.* NOTTINGHAM & NOTTINGHAMSHIRE BANKING CO., LTD. (1891), 60 L. J. Q. B. 542 ; 7 T. L. R. 235.

848. —— —— Realisation of securities—Rights of clients.]—A firm of brokers kept two accounts with their bankers, a current account & a loan account. The brokers wrongfully deposited bonds of their clients to secure their general indebtedness to the bank, & also paid to the credit of their current account moneys of P. which they had received to pay for stock. The purchase of the stock was never completed. The brokers having been declared defaulters, the bank opened a new liquidation account, to which they transferred £1,362 then standing to the credit of the current account & £7,500, the amount standing to the debit of the loan account. The bank never, in fact, appropriated the £1,362 to meet the debit, but realised £7,500 by selling a sufficient part of the deposited bonds :—*Held :* as against any right in P. to follow the £1,362, the owners of the deposited bonds, in calculating the amount for which the bonds were a security, were entitled to have the £1,362 first applied in reduction of the debit.—MUTTON *v.* PEAT, [1900] 2 Ch. 79 ; 69 L. J. Ch. 484 ; 82 L. T. 440 ; 48 W. R. 486 ; 44 Sol. Jo. 427, C. A.

849. —— —— Fraudulent deposit—Liability of bank.]—G. purchased through his broker some Russian & some Hungarian scrip ; the undertaking in the scrip was to give to the bearer a bond for the money advanced payable with interest in the way there stated. G. left the scrip (to be exchanged for bonds or sold, as he should direct) in the hands of his broker, who fraudulently deposited it with a banker as security for a loan to himself :—*Held :* the scrip was a negotiable instrument transferable by mere delivery, & the banker, being a *bonâ fide* holder for value, was not liable to G., either in trover for the scrip itself or in *assumpsit*

Co., which he had deposited with the P. Bank as security for an overdraft of £900, instructed D., a stockbroker, to purchase for him shares in the B. Co., for which D. was to provide the purchase money, & advance to pltf. £950 to pay off the overdraft & release the A. shares, which pltf. agreed to transfer to D. as security, together with the B. shares, when purchased, for the amount so advanced & interest. The B. shares were not purchased by D. On Dec. 1, 1890, D. obtained a loan of £2,350 from defts. on the security of the A. shares, & transferred them to defts. At the time of the transfer the share certificates were not produced, & defts. accepted a certificate of D. that the certificates were with the co. The co. declined, when the transfers were forwarded, to register them, not having the certificates, &, defts. having called on D. for an explanation, he stated that he had been misinformed by his client (pltf.) that the certificates were with the co. Subsequently D. obtained an order from pltf. directing E., a stockbroker who held the certificates, to deliver them to him, & D. then forwarded the certificates to the co., who registered the transfers to defts. D., on Dec. 12, paid to defts. £3,300. which included the amount of the loan, &, having sold the shares to several purchasers for the account of Dec. 12, tendered to defts. transfers from defts. to the purchasers, which were duly executed & registered in the books of the co. :—*Held :* defts., having had the transfers perfected to them without any notice of fraud or illegal dealing on the part of D., were purchasers for valuable consideration, without notice of any defect in their title.—COLLIS *v.* HIBERNIAN BANK (1893), 31 L. R. Ir. 261.—**IR.**

847 iii. —— —— —— *Rights of bank.*]—On Apr. 18, 1887, J., a stockbroker, on the order of G., purchased shares through B., a stockbroker in London. The certificates of these shares had indorsed on them an assignment in blank & a power of attorney, & were treated as transferable from hand to hand by the mere delivery of the certificates. The shares were not taken up by J. from B. until Sept. 13, 1888, & during the entire of the time J. was employed by G., & was purchasing & selling stocks & shares for him. No deed of transfer was ever executed. On Sept. 25, 1888, J., without the knowledge of G., deposited the certificates with defts. as security for £550 advanced by them. On Sept. 16, 1889, defts. sold the shares :—*Held :* defts. had no notice, nor had reason to believe, that the shares were not the property of J., or that he had not authority to pledge them, & that as G. was not the registered owner, & as his name did not appear anywhere in connection with the shares, the shares were "in order" in the hands of J., & defts. were *bonâ fide* purchasers for valuable consideration without notice of any defect in the title.—HONE *v.* BOYLE, LOW, MURRAY & CO. (1891), 27 L. R. Ir. 137.—**IR.**

847 iv. —— —— —— ——.]—Pltfs., registered owners of railway shares, transferable in the books of the co., intrusted the share certificates, indorsed with transfers executed by them, with blanks for the names of the transferees, to D., a stockbroker, as "margin" to cover a loan, with which D. was to purchase shares in certain other cos. for pltfs. D. deposited the share certificates, with other securities, with defts., as security for loans of £2,600 & £4,000. D. did not purchase any shares for pltfs., but sent them contract notes, purporting to have done so. Pltfs. did not learn of D.'s fraud until Dec. 24, 1890. On Jan. 24, 1891, pltfs. gave notice to defts. that they were the owners of the shares. In May, 1891, defts., having filled up the transfers, were duly registered in the books of the co. Defts. claimed to hold the shares as security for the amount advanced by them to D. :—*Held :* pltfs., having delivered to D. share certificates with indorsed transfers signed by them, though in blank, were estopped from asserting their ownership against defts., who had taken them *bonâ fide* for value, without notice, express or implied of pltfs.' title.—WATERHOUSE *v.* BANK OF IRELAND (1892), 29 L. R. Ir. 384.—**IR.**

847 v. —— —— —— ——.] — The registered owners of shares in a co. gave to her brokers, for the purpose of selling the shares, the certificate of ownership, upon the face of which the shares were stated to be transferable on the books of the co. in person or by attorney upon surrender of the certificate, & upon which was indorsed a transfer & power of attorney, signed by her, & having a blank left for the name of the transferee. The brokers deposited the certificate as security for advances to them with a bank, who received it in the ordinary course of business without any notice of the owner's rights :—*Held :* the bank were entitled to hold the shares as against the owner.—SMITH *v.* ROGERS (1899), 30 O. R. 256.—**CAN.**

847 vi. —— —— *Equitable ownership—Negligence of bank.*]—A., a broker, deposited with a bank a blank transfer of railway stock, indorsed : "Transfer & certificate for stock in co.'s office.' A. afterwards received from the co. a certificate for the stock, & lodged it with B., together with a blank transfer. More than a year afterwards C., to whom B. had sold the stock, & the bank, apprehending the failure of A., filled up their respective transfers, & lodged them with the co. for registration. The co. refused to register either transfer. C. brought an action against the bank to establish his right to be registered as the owner of the stock :—*Held :* the bank were guilty of negligence in leaving the certificate outstanding, & by such negligence allowed A. to represent himself as the owner of the stock, & C. had a superior equity to the stock.—KELLY *v.* MUNSTER & LEINSTER BANK (1891), 29 L. R. Ir. 19.—**IR.**

m. *Advances to true owner—Stock registered in name of clerk—Liability for calls—Right to relief.*]—The real owner of railway shares, with consent of his clerk, caused the transfers to be taken & the stock to be registered in the clerk's name, & he afterwards deposited the stock certificates with a bank, in security of advances made by the bank to him. A call having been made by the railway co. on the clerk, as the registered owner of the shares, he demanded that the bank should either relieve him of that & all future calls, or give up the certificates to him, in order that, by selling the shares, he might free himself from liability for calls :—*Held :* the bank were bound to relieve him from that liability.—BARRON *v.* NATIONAL BANK OF SCOTLAND (1852), 14 Dunl. (Ct. of Sess.) 565. **SCOT.**

for the value received upon it.—GOODWIN *v.* ROBARTS (1876), 1 App. Cas. 476; 45 L. J. Q. B. 748; 35 L. T. 179; 24 W. R. 987, H. L.

Annotations:—**Consd.** Rumball *v.* Metropolitan Bank (1877), 2 Q. B. D. 194; Easton *v.* London Joint Stock Bank (1886), 34 Ch. D. 95, C. A. **Distd.** Fine Art Soc. *v.* Union Bank of London (1886), 17 Q. B. D. 705, C. A.; Colonial Bank *v.* Hepworth (1887), 36 Ch. D. 36; London & County Banking Co. *v.* London & River Plate Bank (1887), 20 Q. B. D. 232. **Consd.** Simmons *v.* London Joint Stock Bank, Little *v.* London Joint Stock Bank, [1891] 1 Ch. 270, C. A.; Bechuanaland Exploration Co. *v.* London Trading Bank, [1898] 2 Q. B. 658. **Refd.** Johnson *v.* Credit Lyonnais Co., Johnson *v.* Blumenthal (1877), 3 C. P. D. 32, C. A.; Sheffield *v.* London Joint Stock Bank (1888), 13 App. Cas. 333, H. L.; Colonial Bank *v.* Cady & Williams, London Chartered Bank of Australia *v.* Cady & Williams (1890), 15 App. Cas. 267, H. L.; Bentinck *v.* London Joint Stock Bank, [1893] 2 Ch. 120. **Mentd.** Willans *v.* Ayers (1877), 3 App. Cas. 133, P. C.; France *v.* Clark (1884), 26 Ch. D. 257, C. A.; Bickerton *v.* Walker (1885), 31 Ch. D. 151, C. A.; Picker *v.* London & County Banking Co. (1887), 18 Q. B. D. 515, C. A.; Williams *v.* Colonial Bank, Williams *v.* London Chartered Bank of Australia (1888), 38 Ch. D. 388, C. A.; Dashwood *v.* Magniac, [1891] 3 Ch. 306, C. A.; London Joint Stock Bank *v.* Simmons, [1892] A. C. 201, H. L.; Edelstein *v.* Schulder, [1902] 2 K. B. 144 Webb, Hale *v.* Alexandria Water Co. (1905), 93 L. T. 339, C. A.; Clayton *v.* Le Roy, [1911] 2 K. B. 1031, C. A.

850. ——————————.]—Scrip certificates, by which it was certified that, after the payment of certain instalments, the bearer thereof would be entitled to be registered as the holder of shares in a banking co., were issued to pltf. & by him deposited with a stockbroker for the purpose of paying the instalments remaining due, & dealing with such certificates as pltf. should direct. The broker, in fraud of pltf. & without his authority, deposited the scrip with defts. as security for an amount due from him, the broker, to defts. Defts. were not aware of the fraud. The usage among bankers, discounters, money dealers & on the Stock Exchange had been for many years to treat such scrip certificates as negotiable instruments transferable by mere delivery:—*Held:* defts. were entitled to the scrip certificates as against pltf. on the grounds (1) by reason of the usage the certificates had become negotiable instruments transferable by mere delivery; (2) pltf., by depositing with his broker instruments purporting to be transferable by delivery to a *bonâ fide* holder for value, was estopped from denying that they were so transferable.—RUMBALL *v.* METROPOLITAN BANK (1877), 2 Q. B. D. 194; 46 L. J. Q. B. 346; 36 L. T. 240; 25 W. R. 366.

Annotations:—**Apld.** Bechuanaland Exploration Co. *v.* London Trading Bank, [1898] 2 Q. B. 658; Webb, Hale *v.* Alexandria Water Co. (1905), 93 L. T. 339. **Mentd.** Simmons *v.* London Joint Stock Bank, Little *v.* London Joint Stock Bank, [1891] 1 Ch. 270, C. A.

851. —— —— —— ——.]—An American co. issued to the registered shareholders share certificates for ten shares each, on the back of which there was a blank form of transfer & a blank form of power of attorney to execute a surrender & cancellation of the certificate. When the shares were transferred, the transfer & power of attorney were signed by the registered shareholder; & a holder who desired to be registered filled in his name by himself or by some one on his behalf, & the certificate was left with the co., the certificate was cancelled, the transferee registered, & a new certificate issued in his name. A purchaser of such shares permitted the certificates to remain with his brokers for registration. The brokers dealt fraudulently with the certificates by depositing them with bankers, but the bankers having redelivered the certificates to the brokers for registration, the shares were registered in the purchaser's name:—*Held:* the purchaser's title must prevail over that of the bankers.—COLONIAL BANK *v.* HEPWORTH (1887), 36 Ch. D. 36; 56 L. J. Ch. 1089; 57 L. T. 148; 36 W. R. 259; 3 T. L. R. 650.

Annotations:—**Consd.** Williams *v.* Colonial Bank, Williams *v.* London Chartered Bank of Australia (1888), 38 Ch. D. 388, C. A. **Refd.** Fox *v.* Martin (1895), 64 L. J. Ch. 473.

852. —— **Client's mortgaged railway stock—Notice to bank—Negligence of client.**]—A. procured a loan from a co., & executed a transfer of railway stock to the co. by way of security. The co., at the request of C., the stockbroker of A., who was acting with A.'s authority, transferred the stock to defts., who advanced a sum larger than the original loan to C., the stockbroker. Defts. had no notice of the existence of A., or of the charge given by him to the co. C. sold the stock, & defts. executed transfers at his request to the purchasers. In an action by A. against the bank for redemption:—*Held:* in the circumstances no duty was imposed on defts. to inquire as to the title of A., & A., by his own negligence, was estopped from obtaining any relief from defts.—MARSHALL *v.* NATIONAL PROVINCIAL BANK OF ENGLAND (1892), 61 L. J. Ch. 465; 66 L. T. 525; 40 W. R. 328; 36 Sol. Jo. 294.

Annotation:—**Mentd.** Levi *v.* Taylor, [1903] W. N. 183.

853. —— **Deposit & sale in breach of trust—Authority to sell—Liability of bank.**]—G., a stockbroker & trustee, procured his two co-trustees, with a view to reinvestment, to execute a deed of transfer for nominal consideration of debenture stock to two persons who were trustees of deft. bank. G. then deposited the deed of transfer & the certificate with the bank to secure an advance made to him personally by the bank. Shortly afterwards G. repaid the bank the advance. Instead of retransferring the stock to the three trustees, on Feb. 15, 1882, the bank trustees transferred the stock, & handed the certificates by G.'s direction to purchasers from G., who received the purchase-money & invested it, in Apr. & May, 1882, in his own name alone, in railway preference stock. In Aug., 1883, G. sold the preference stock & appropriated the proceeds to his own use, but paid the interest for some time to the tenant for life under the trust. In 1885 he absconded, & was made bkpt.:—*Held:* (1) G. had no general authority to sell the stock & receive & give a discharge for the purchase-money; (2) his authority, being limited to transferring the stock to the purchasers by means of the transfer executed by him & his co-trustees, was determined by the improper transaction of loan; (3) the bank by omitting to retransfer to the three trustees when the mtge. was paid off, & allowing the purchase-money to get into the hands of one alone without any authority express or implied to receive it, had by their conduct caused the loss to the trust fund, & were liable to make it good, & were not released from this liability by any subsequent carelessness on the part of G.'s co-trustees.—MAGNUS *v.* QUEENSLAND NATIONAL BANK (1888), 37 Ch. D. 466; 57 L. J. Ch. 413; 58 L. T. 248; 36 W. R. 577; 4 T. L. R. 248, C. A.

Annotation:—**Mentd.** Thorne *v.* Heard, [1894] 1 Ch. 599, C. A.

854. Advances to money-dealer — Deposit of client's securities — Notice to bank — Duty to inquire.]—S. gave to E. certificates of railway stock with transfers thereof executed by him in blank, & bonds of foreign cos. (alleged to be negotiable securities), for the purpose of raising £26,000. E gave the securities to M., a money-dealer in London, to secure £26,000 advanced by M. to E. M. deposited the transfers & securities, together with other securities of his customers, with various banks, as security for large loan accounts running between him & them, the blanks in the transfers of stock being filled up with the names of nominees of the banks. The banks in so dealing either actually knew, or had reason to believe, that the securities did or might belong not to M. but to his customers. M. having become bkpt., the banks sold some of S.'s

Sect. 21.—Securities for advances: Sub-sect. 4.]

securities, & claimed to hold the proceeds & the unsold remainder as security for all the debt from M. to them:—*Held:* though the banks had the legal title to the securities, they were not purchasers for value without notice, but ought to have inquired into the extent of M.'s authority, & this whether the securities were negotiable or not, & upon payment to the banks of the money advanced by M. to E., S. was entitled to the value of such of the securities as had been sold by the banks, & to redeem the remainder.—SHEFFIELD (EARL) *v.* LONDON JOINT STOCK BANK, LTD. (1888), 13 App. Cas. 333; 57 L. J. Ch. 986; 58 L. T. 735; 37 W. R. 33; 4 T. L. R. 389, H. L.

Annotations:—**Consd.** Kaemena *v.* Central Bank of London (1888), 4 T. L. R. 657; Levy *v.* Richardson (1889), 5 T. L. R. 236: Simmons *v.* London Joint Stock Bank, Little *v.* London Joint Stock Bank [1891] 1 Ch. 270, C. A.; Venables *v.* Baring, [1892] 3 Ch. 527. **Distd.** London Joint Stock Bank *v.* Simmons, [1892] A. C. 201, H. L. **Refd.** Williams *v.* Colonial Bank, Williams *v.* London Chartered Bank of Australia (1888), 38 Ch. D. 388, C. A.: Redfern *v.* Rosenthal (1901), 85 L. T. 313, D. C.; Cuthbert *v.* Robarts Lubbock (1909), 78 L. J. Ch. 529, C. A.; Jameson *v.* Union Bank of Scotland (1913), 109 L. T. 850; Fuller *v.* Glyn Mills, Currie (1913), 19 Com. Cas. 186. **Mentd.** Bentinck *v.* London Joint Stock Bank, [1893] 2 Ch. 120.

855. Advances to agent—Stock of principal—Constructive notice.]—Bankers advanced to customers £300 to redeem some railway stock, which had been transferred to another firm as a security for that sum. The stock was thereupon transferred in blank to the bankers. Subsequently, the customers, in a letter to the bankers, stated that they had been requested by their "principal" to extend the term of the loan on the stock. The stock actually belonged to A., a third party:—*Held:* after the receipt of such letter, the bankers had constructive notice of A.'s right to the stock, & no subsequent advances made by the bankers to the customers could affect the stock.—LOCKE *v.* PRESCOTT (1863), 32 Beav. 261; 55 E. R. 103.

856. Advances to solicitor—Deposit of client's negotiable securities—Notice to bank—Duty to inquire.]—On Sept. 29, 1904, pltf. was a customer of the U. Bank, where she had a current account & a loan account. On the loan account £1,900 was advanced, & there were certain securities deposited to secure that amount. Pltf., being anxious to change her account for family reasons, consulted her solr., C., who had acted for her for many years. As a result, C. informed pltf. that he had arranged with defts. to grant the loan on the same terms as she had had with the U. Bank, & asked her to sign certain documents in connection with the transaction. The material document was on the common printed form of defts. & was as follows: "At the request of C. I have transferred or caused to be transferred"—then the shares were mentioned & the names of the manager & sub-manager of defts. —"or their nominees as trustees for you to be held as collateral security for your advance to C." With this document C. went to defts. after the securities were transferred, obtained an addition to the loan of £1,900, & effected the transfer of the securities in such a way as to make them available to secure his general indebtedness to defts., which amounted to some £16,000 which he had from time to time obtained upon other securities. In 1911 pltf. required the return of her securities from C., which he promised, but they were never in fact returned, as C. absconded. Pltf. then brought an action to have her securities delivered to her by defts. subject to her paying the £1,900 which she admitted having received. The general nature of the transactions between C. & defts. was that advances were made by defts. to C. upon securities which belonged to third parties, who were clients of C. in the ordinary sense, & this was known to defts., though in a number of cases it might be that the clients were clients in respect of a mere financial business carried on by C. independent of his solr.'s business. It was contended for pltf. (*inter alia*) that defts. had such notice of the fiduciary relationship of C. to pltf. as to prevent their acting on the document:—*Held:* there was sufficient notice of the relationship existing or that probably existed

855 i. *Advances to agent—Stock of principal—Notice.*]—S. sent money from England to R., to be invested in Canada for her, & R. subscribed for stock in a co. as "J. R. in trust," without naming for whom, & paid for it with S.'s money. Subsequently R. transferred to the manager of the M. Bank, as security for his indebtedness, shares of the co. which showed that he held the shares "in trust":—*Held:* there was sufficient notice to the bank that R. was acting as agent of S., & the bank, not having shown that R. had authority to sell or pledge the stock, S. was entitled to an account from the bank.—BANK OF MONTREAL *v.* SWEENEY (1887), 12 App. Cas. 617; 56 L. J. P. C. 79; 56 L. T. 897, P. C.—**CAN.**

n. *Shares of incorporated trading company—Right of bank to advance money on.*]—*Held:* the bank had power to advance money on the security of shares in an incorporated trading co., & action to restrain sale of such shares on default in repayment of the advances dismissed.—GEDDES *v.* BANQUE JACQUES CARTIER (1878), 24 L. C. J. 135.—**CAN.**

o. *Shares of another bank—Transfer to managing director of bank—Misappropriation by director—Liability to refund.*]—The E. Bank, in advancing money to F. on the security of M. Bank shares, caused the shares to be assigned to their managing director, & an entry to be made in their books that the managing director held the shares on behalf of the bank as security for the loan. The bank subsequently credited F. with the dividends accruing thereon. Afterwards the managing director pledged the shares to another bank for his own personal debt & absconded:—*Held:* (1) on repayment by F. of the loan made to him the E. Bank was bound to return the shares or pay their value; (2) the prohibition to advance upon security of shares of another bank contained in the amendment to the general Banking Act applied to the bank & not to the borrower; (3) the subsequent amendment of the general Banking Act did not alter the charter of the E. Bank, under which the E. Bank had power to take the shares in question in its corporate name as collateral security; (4) to take such security was not *ultra vires.*—EXCHANGE BANK *v.* FLETCHER (1891), 19 S. C. R. 278.—**CAN.**

p. —— *Sale by bank before default—Measure of damages.*]—Pltf. pledged with defts. shares of bank stock as security for a loan, under an agreement providing that he was to keep up a cash margin of not less than 10 per cent. above the market price of the stock, & authorising the bank, in the event of default, "to sell or dispose of the security without notice, & to apply the proceeds in liquidation of the advance." The stock was transferred backwards & forwards by defts. by way of loan, but was not sold until default made:—*Held:* (1) if the stock was sold before default made, such sale was tortious; (2) the loan of the stock was a sale; (3) pltf. might elect either to claim damages or to affirm the sale & claim the proceeds & profits made by the bank, one element of the measure of damages being the highest point of the stock market between the conversion & the next default; (4) if default was made, the bank was entitled to sell the stock without notice, but only for the purpose of liquidating the advance, & credit must be given for the proceeds at the current rates of the days on which the transfers were made, until the shares had been transferred.—CARNEGIE *v.* FEDERAL BANK OF CANADA (1885), 5 O. R. 418; 8 O. R. 75.—**CAN.**

q. *Land warrants—Sale by bank on default—Bank Act, ss. 77 (2), 78.*]—Action to recover twenty-five South African land warrants deposited with defts. by pltf. as security for advances made to pltf., which pltf. alleged were sold by defts. & converted to their own use, or in the alternative for damages for the conversion. Defts. pleaded default in payment of advances & that they had given pltf. notice that they would sell the warrants if payment were not forthcoming, & that pltf. paid no attention to defts.' notice until there was a rise in price of the warrants in the market:—*Held:* the above sects. applied, & defts., having complied therewith, were not liable.—HEALEY *v.* HOME BANK (1911), 18 O. W. R. 71; 2 O. W. N. 550.—**CAN.**

r. *Mining shares—Wrongful sale by bank—Measure of damages.*]—Pltf., having obtained advances from defts. on the security of land & mining shares, gave deft. a mtge., which provided that the mining scrip should not be sold without a demand being first made on him. In an action for damages for the improper sale of the shares without a demand having been first made, the shares having largely increased in value, & there being no suggestion against pltf. of lying by for an increase of value in the shares:—*Held:* the measure of damages to which pltf. was entitled was the value of the shares at the time the writ issued.—AMORETTY *v.* CITY OF MELBOURNE BANK (1887), 13 V. L. R. 431.—**AUS.**

between pltf. & C. to have put defts. upon inquiry, & they could not claim to be in a better position than they would have been if they had made inquiries, & pltf. was entitled to redeem the securities upon payment of £1,900.—JAMESON *v.* UNION BANK OF SCOTLAND (1913), 109 L. T. 850.

857. Stock deposited by customer—Defect in title—Rights of bank.]—Pltf. was induced by B. to sign a blank form of request & to send B. a certificate of stock, which B. fraudulently deposited with defts. Pltf. brought an action against defts. to recover the proceeds of the stock & denied that she gave B. any authority to fill up the blanks in the form or to deal with the certificate or stock except on her own behalf :—*Held :* defts. having obtained pltf.'s signature to the request, were not bound to make any further inquiry, or in any way to suspect B. of fraud, or to ascertain whether pltf. thoroughly understood what she had done, & they were *bonâ fide* purchasers for value without notice.—MURTON *v.* CITY BANK, LTD. (1891), 8 T. L. R. 86.

858. Bond of country customers — Acceptance of bills payable at London bank—Recovery of payments—Evidence.]—A bond given by country customers to bankers in London recited a request by the obligors to the obligees to pay from time to time bills of exchange, & bound the obligors to pay or remit cash to pay such bills at or before maturity, & from time to time to settle accounts & to pay such sums as upon the settling of such accounts should be found due to the obligees. In an action on the bond :—*Held :* the production by pltfs. of bills of exchange accepted by defts., payable at the banking house of pltfs., was sufficient *primâ facie* evidence of a balance due to them to that amount, & renderèd it incumbent on defts. to prove remittances in discharge of such balance or to show the actual state of the account.—LLOYD *v.* HEATHCOTE (1833), 2 L. J. Ex. 162.

859. Bond given to banking firm—Change in firm—Accounts combined by new firm—Appropriation of payments.]—A bond was given to the several persons constituting the firm of a banking-house, conditioned for the repayment of the balance of an account, & of such further sums as the bankers might advance to the obligor. One of the partners died & a new partner was taken into the firm, at that time a considerable balance being due from the obligor to the firm. Advances were afterwards made by the bankers, & payments made to them on account by the obligor, & the latter was credited by the new firm with the several payments, & charged with the original debt & subsequent advances as constituting items in one entire account, & the balance due at the time of the partner's death was considerably reduced. The reduced balance, by order of the obligor, was transferred by the bankers to the account of another customer, who, with his assent, was charged with the then debt of the obligor. The person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond :—*Held :* as they had not originally treated it as a distinct account, but had blended it in the general account with other transactions, they were not at liberty so to treat it at a subsequent period, & having received in different payments a sum more than sufficient to discharge the debt due upon the bond at the time of the death of the deceased partner, the bond was to be considered as paid. *Qu. :* whether the transfer of the balance due from the obligor to the account of another, with his assent, did not, in point of law, operate as payment.—BODENHAM

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857 i. *Scrip deposited by customer — Defect in title—Bank as bonâ fide purchasers for value.*]—B., a widow of intemperate habits, under the influence & control of K., a widower, with whom she lived for some time, was, by fraud & undue pressure, induced by K. to deliver to him certain scrip, to be lodged by K. with deft. bank as security for a loan by the bank to K. The bank manager, beyond being informed that B. was staying at K.'s house, knew nothing about the relations existing between B. & K., & made no inquiry, & never saw B., but employed K. to obtain B.'s signature to the blank transfers of the scrip & to promissory notes, signed by her as collateral security for the loan. In an action by B., by the committee of her estate, against the bank, asking for a declaration that the deposit of the scrip created no equitable mtge., that the blank transfers were invalid, & that pltf.'s estate was not liable on foot of the promissory notes :—*Held :* pltf. was entitled to the declaration sought, on the grounds : (1) the bank were, by the circumstances of the transaction, put on inquiry, &, not having made inquiry, were affected with notice of the invalidity of the transaction, & could not rely on the defence of purchase for value without notice ; (2) the bank made K. their agent for the purposes of the transaction & K.'s knowledge must be imputed to the bank, who must stand or fall with K.—BUNBURY *v.* HIBERNIAN BANK, [1908] 1 I. R. 261.—**IR.**

s. *Debenture bonds — Assignment for present & future advances—Assignment incomplete.*]—In the year 1886 the C. Bank by deeds assigned to the L. Bank, London, certain debenture bonds to the value of 144,100, as security against advances to be made on current account, to be held so long as any amount remained due to the L. Bank. The bonds so assigned were held by the assignors for the purpose of collecting the annual interest due on same. In 1892 the indebtedness of the C. Bank was completely paid off, but the bonds were not reassigned & further advances were made, &, on the suspension of the C. Bank in 1894, it was in debt to the L. Bank in excess of the value of the bonds assigned :—*Held :* (1) the registration law for deeds did not apply to such securities, & manual delivery of the bonds was not necessary to perfect their transfer ; (2) the bonds were assigned as security for all future advances.—LONDON & WESTM'NSTER BANK *v.* COMMERCIAL BANK TRUSTEES (1896), 7 Nfld. L. R. 854.—**NFLD.**

t. —— *Failure of company issuing & assigning—Right to interest.*]—A co. issued to a bank, as security for advances, six debentures of the co. for £1,000 each, bearing interest at 5 per cent., accompanied by a letter of charge. The bank charged interest on the overdraft of the co. The co. was afterwards wound up. At the date of the winding up the co. was indebted to the bank in a sum larger than the amount of the debentures, exclusive of interest thereon, which had not been paid :—*Held :* the bank were entitled to interest on the debentures.—*Re* VINT & SONS, [1905] 1 I. R. 112.—**IR.**

u. *Bonds deposited by directors of building society—Excess of borrowing powers—Rights of bank.*]—The directors of a building society, at a time when they were alleged to have exceeded their borrowing powers, pledged bonds to their bankers as a security for a further loan :—*Held :* the bankers entitled to the security of the bonds, at all events for such of their advances as had been applied in payment of the debts & liabilities of the society which were properly payable.—CAPE OF GOOD HOPE PERMANENT LAND, ETC., SOCIETY (IN LIQUIDATION) *v.* STANDARD BANK (1899), 16 S. C. 325 ; 9 C. T. R. 329.—**S. AF.**

See, generally. BUILDING SOCIETIES.

w. *Bonds secured by mortgage of real estate—Additional security for debt contracted in course of business—Validity.*]—Bonds secured by a mtge. of real estate were held by a bank as security for money advanced :—*Held :* within Banking Act, s. 48, the bonds having been taken as additional security for a debt contracted to the bank in the course of its ordinary business, & also within s. 60, which permitted banks to hold as collateral security for an advance the bonds or debentures of other corpns.—NOVA SCOTIA CENTRAL RY. CO. *v.* HALIFAX BANKING CO. (1891), 23 N. S. R. 172 ; *affd.*, 21 S. C. R. 536.—**CAN.**

y. *Bond to secure bank from loss on advances made — Construction — Misrepresentation.*]—M. executed a bond to pay money, in certain events, to the bank. By an agreement, bearing even date it was recited that, in consideration of a mtge., the bank had agreed to make further advances to joint obligors with M., parties to the agreement, & that the agreement was executed to secure the bank in case there should be any deficiency in the assets of the firm, or in the value of the property comprised in the mtge., & to secure the bank from ultimate loss, & that if the firm should pay, then the bond & agreement should become wholly void. In a suit brought upon the agreement against M., alleging a deficiency in the assets of the firm & indebtedness to the bank, M. pleaded that the agreement had been executed by him on representation made to him by one of his co-obligors that it was to secure the bank against loss arising by reason of non-registration of the mtge., or by reason of over-valuation of property in the mtge., & not otherwise. The bank made no representations whatever to defts. :—*Held :* M. was bound by the execution of the documents, & liable upon them according to their tenor & effect.—MOFFATT *v.* MERCHANTS BANK OF CANADA (1885), 11 S. C. R. 46.—**CAN.**

Sect. 21.—*Securities for advances: Sub-sects.* 4, 5 & 6.]

v. PURCHAS (1818), 2 B. & Ald. 39; 106 E. R. 281.

Annotations:—**Apld.** Smith *v.* Wigley & Tunnicliffe (1833), 3 Moo. & S. 174. **Consd.** Chitty *v.* Naish (1834), 2 Dowl. 511; Siebel *v.* Springfield (1863), 9 L. T. 324. **Apprvd.** City Discount Co. *v.* McLean (1874), L. R. 9 C. P. 692, Ex. Ch. **Refd.** Simson *v.* Cooke (1824), 1 Bing. 452; Pemberton *v.* Oakes (1827), 4 Russ. 154; Field *v.* Carr (1828), 5 Bing. 13; Mills *v.* Fowkes (1839), 8 L. J. C. P. 276; Bank of Scotland *v.* Christie (1841), 8 Cl. & Fin. 214, H. L.; Henniker *v.* Wigg (1843), 4 Q. B. 792; Allaway *v.* Bennett, Allaway *v.* Harris (1860), 2 L. T. 434; The Mecca, [1897] A. C. 286, H. L.; Deeley *v.* Lloyds Bank, [1912] A. C. 756, H. L. **Mentd.** Williams *v.* Rawlinson (1825), 3 Bing. 71; Maxwell *v.* Deare (1854), 23 L. T. O. S. 1, P. C.; Strong *v.* Foster (1855), 17 C. B. 201; Scott *v.* Beale & Bishop (1859), 6 Jur. N. S. 559; Hooper *v.* Keay (1875), 1 Q. B. D. 178; *Re* Sherry, London & County Banking Co. *v.* Terry (1884), 25 Ch. D. 692, C. A.

860. Stolen bonds—Bank acting bonâ fide.]—On May 1, 1873, bonds to bearer were issued in London by B. & Co., bankers, as agents for an American railroad co. In Nov., 1883, one hundred & five of the bonds in the custody of B. & Co. in London were stolen. B. & Co. advertised the loss of the bonds & the numbers as widely as possible. On Mar. 2, 1891, pltf., a banker carrying on business in London & Paris, advanced in Paris, by way of loan to a customer, the sum of £2,000 upon the security of a deposit by the customer with pltf. of twelve of the bonds. Ten of the bonds deposited with pltf. formed part of the one hundred & five bonds stolen in 1883. B. & Co. gave pltf. notice that the ten bonds were their property, & refused to pay the interest on them. Pltf. brought an action against B. & Co. & the railroad co.:—*Held:* pltf. had no notice of the theft, & had not by his conduct precluded himself from recovering from defts.—VENABLES *v.* BARING BROTHERS & CO., [1892] 3 Ch. 527; 61 L. J. Ch. 609; 67 L. T. 110; 40 W. R. 699; 36 Sol. Jo. 556.

861. Bearer bonds—Redelivery for cheque—Cheque dishonoured—Trust.]—Pltf. banks lent money on bearer bonds to a firm of bill brokers. They called in those loans, & in accordance with the general practice in such cases, the bill brokers on the morning that the loans were repayable went to pltfs., gave each of them a cheque for the amount of the call, & received in exchange the bonds that had been deposited as security. The cheques having been dishonoured, pltfs. sued defts., who had received in the course of the same day the bonds in question from the bill brokers, pltfs. alleging that by a practice or usage the bonds were impressed with a trust in their favour until the cheques were honoured:—*Held:* the bonds being negotiable & passing by delivery were not impressed with a trust in favour of pltfs.—LLOYDS BANK, LTD. *v.* SWISS BANKVEREIN, UNION OF LONDON & SMITHS BANK, LTD. *v.* SWISS BANKVEREIN (1913), 108 L. T. 143; 29 T. L. R. 219; 57 Sol. Jo. 243; 18 Com. Cas. 79, C. A.

862. Forged transfer of corporation stock to bank—Innocent registration of security—Liability to indemnify corporation.]—A banker in good faith sent to a corpn. a transfer of corpn. stock which he held as security for an advance & which purported to be executed by T. & H., the two registered holders of the stock, with a request to the corpn. to register the stock in the name of the banker. The corpn. in good faith acted upon this request & granted a fresh certificate to the banker, who transferred the stock to third parties, & they were registered as holders. Afterwards it was discovered that T. had forged H.'s signature, & H. recovered against the corpn. judgment whereby they were compelled to buy equivalent stock & register it in H.'s name, & to pay him the missing dividends with interest:—*Held:* both parties having acted *bonâ fide* & without negligence, the banker was bound to indemnify the corpn. against the liability to H., upon an implied contract that the transfer was genuine.—SHEFFFIELD CORPN. *v.* BARCLAY, [1905] A. C. 392; 74 L. J. K. B. 747; 93 L. T. 83; 69 J. P. 385; 54 W. R. 49; 21 T. L. R. 642; 49 Sol. Jo. 617; 3 L. G. R. 992; 10 Com. Cas. 287; 12 Mans. 248, H. L.

Annotations:—**Consd.** A.-G. *v.* Odell, [1906] 2 Ch. 47, C. A. **Distd.** Moel Tryvan Ship Co. *v.* Krüger, [1907] 1 K. B. 809, C. A. **Apld.** Bank of England *v.* Cutler, [1908] 2 K. B. 208, C. A. **Consd.** Bamfield *v.* Goole & Sheffield Transport Co., [1910] 2 K. B. 94, C. A.; Groves *v.* Webb & Kenward (1915), 31 T. L. R. 548. **Refd.** Ruben *v.* Great Fingall Consolidated Co., [1906] A. C. 439, H. L.; *Re* Auchmuty (1908), 99 L. T. 462, C. A. **Mentd.** Moel Tryvan Ship Co. *v.* Krüger, [1906] 2 K. B. 792; Krüger *v.* Moel Tryvan Ship Co. (1907), 13 Com. Cas. 1, H. L.; Kirby *v.* Chessum (1913), 30 T. L. R. 15; Morison *v.* London County & Westminster Bank, [1914] 3 K. B. 356, C. A.; Groves *v.* Webb & Kenward (1916), 85 L. J. K. B. 1533, C. A.; Guaranty Trust Co. of New York *v.* Hannay, [1918] 2 K. B. 623, C. A.

SUB-SECT. 5.—POLICIES OF LIFE ASSURANCE.

863. Securing current account—Failure of customer—Letter closing account—Realisation of security.]—A customer of a bank mtged. to the bank a policy of assurance on his life to secure the amount from time to time owing by him to the bank in account current. The mtge. provided that the statutory power of sale should be exercisable by the bank, if (among other events) default should be made in payment of the balance owing for the space of one calendar month after the account current had been closed. On Nov. 9, 1899, the customer wrote to the bank manager: "There was a meeting of creditors yesterday. They agreed to accept all the assets I had. I gave them to understand that I was insured, & that you held the policy as security for your account. There was a trustee appointed. Trusting every one will get 20s. in the pound" etc. On Dec. 18 the bank sold the policy under the power in the mtge.:—*Held:* the letter amounted to a closing of the account, & the bank were justified in realising their security.—BURY *v.* HALIFAX COMMERCIAL BANKING CO., LTD., [1901] 1 Ch. 188; 70 L. J. Ch. 85; 83 L. T. 665; 49 W. R. 164; 45 Sol. Jo. 98.

See, further, INSURANCE.

PART II. SECT. 21, SUB-SECT. 5.

863 i. *Securing current account—Equitable mortgage—Interest.*]—The deposit of a life policy with a bank, with intent to create a security for the balance of an account current, has the effect of an equitable mtge. giving a right to simple interest on the balance of the account owing on the termination of the relation of a banker & customer. — PUBLIC TRUSTEE *v.* BANK OF NEW ZEALAND, STAPLES, & YOUNG (1888), 6 N. Z. L. R. 680.—**N.Z.**

a. *As collateral security—Subsequent advances for compromise with creditors—Signature of bank to composition—Rights of bank.*]—A bank, which succeeds in securing from its debtor the transfer to itself of insurance policies, as collateral security, representing a larger sum than the amount of its indebtedness, & which advances money to its debtor to enable him to effect a compromise with his creditors, & itself consents to compromise a definite part of its own claim, does not thereby commit a fraudulent act, & it may retain possession of such collateral security, even when it has signed the composition without reserving its rights. The bank, even after signing the composition, has the right to have the ownership of such insurance policies transferred to it.—BANQUE DE ST. HYACINTHE *v.* PHILIE (1911), 17 R. L. 413.—**CAN.**

b. *Assignment for "value received"—Assignor's right to return on payment of debts.*]—An assignment of a life policy to a bank for "value received" is deemed an additional security for what the assignor owes the bank, & after that has been paid he has the right to recover his policy, & it is of no avail for the bank to plead the terms of the assignment, whereby it is given the right to "receive, collect, & recover from the insurance co., either upon the death of the transferor or at the maturity of the policy, the amount thereof, with

SUB-SECT. 6.—GOODS & DOCUMENTS OF TITLE TO GOODS.

864. Deposit of goods by surety—Loan repaid—Subsequent loan & repayment—Retention against surety.]—Goods were deposited with bankers on behalf of A., a customer, to secure an advance made by the bankers to B., on guarantee of A. This advance was made & repaid. Afterwards, & whilst the goods were still in the hands of the bankers, B. negotiated with them for another loan, to which A. was not proved to be privy, & a second loan was made by the bankers to B., which A. subsequently repaid. Trover being brought against the bankers, they pleaded A.'s lien :—*Held :* the second advance must be taken to have been made by defts. on A.'s credit, & the plea was supported by the proof.—O'CONNOR *v.* MAJORIBANKS (1843), 12 L. J. C. P. 161 ; 7 Jur. 834.

865. Goods pledged with power of sale—Authorised sale by pledgor—Title to proceeds.]—Applts., bankers, advanced resps. £5,000 on the security of phosphate rock, pledged by resps. to them under an agreement giving applts. an immediate power of sale, & authorising resps. to enter into contracts for the sale of the merchandise on applts.' behalf. Applts. handed resps. the bill of lading to obtain delivery & sell the merchandise on their behalf :—*Held :* applts.' security was not affected & they were entitled to the proceeds of the phosphate against the general creditors of resps.—NORTH WESTERN BANK, LTD. *v.* POYNTER,

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profits, & the amount so received to be credited upon any indebtedness then due by the insured."—AYOTTE *v.* QUEBEC BANK (1913), Q. R. 22 K. B. 547.—**CAN.**

c. *Assignor also agent of insurance company—Notice of assignment.*]—H., a trader, & local agent of an insurance co., of which the head office was in Dublin, effected with it upon his own life two policies, which he assigned to a banking firm, whose debtor he was. At the times of the respective assignments a formal notice thereof was given to him as agent of the co. :—*Held :* as between the banking firm & H.'s assignee in bkpcy. the notice was insufficient.—*Re* HENNESSY (1842), 5 I. Eq. R. 259 ; 2 Dr. & War. 555 ; 1 Con. & Law. 559.—**IR.**

d. *Fire policies on customer's property made payable to bank—Validity.*]—Where a co. is being wound up under N. B. Winding-up Act, a bank is entitled to an order for the payment to it of the proceeds of policies of fire insurance effected by the co. on their property, & made payable, in case of loss, to the bank, as interest may appear, under a verbal agreement between the bank & the co. that the policies should be so effected as security for advances which the bank from time to time might make, the bank having no interest in the property insured. Such a transaction is not prohibited by Bank Act, 1890, s. 64.—*Re* SHEDIAC BOOT & SHOE CO. (1905) 37 N. B. R. 98.—**CAN.**

PART II. SECT. 21, SUB-SECT. 6.

e. *Bills of lading—Signed in favour of bank—Equitable lien of bank.*]—A bank, under an agreement with a customer, advanced money to him to enable him to buy cattle, which, when purchased, were to be forwarded by rail by him to M., & shipped by steamship thence to L., the bank having no control over the cattle until they reached the vessel, when they were to be received by the steamship for the bank, & the customer's possession & control over them was to end, bills of lading therefor in favour of the bank being then signed :—*Held :* (1) apart from Bank Act, R. S. C., c. 120, by virtue of the agreement between the bank & its customer, the possession of a special property in the goods passed to the bank ; (2) under Bank Act, s. 53 (4), the bank had an equitable lien upon the cattle from the time of the making of the agreement ; (3) the bank "acquired" the bills of lading within Bank Act as soon as the cattle were received by the steamship, although it did not at that time actually "hold" the bills.—*Re* CENTRAL BANK, CANADA SHIPPING CO.'S CASE (1891), 21 O. R. 515.—**CAN.**

f. —— *Goods sold with consent of pledgor—Implied warranty of title.*]—A bank sold goods to pltfs. The bank were never in actual possession of the goods, but a bill of lading was indorsed to them as security for advances, & the bill of lading was indorsed & delivered by the bank directly to pltfs. The bank professed to sell with a good title, when in fact, they had not a good title, & pltfs. could not by any diligence have obtained the goods :—*Held :* the transaction must be regarded as a sale by the bank as pledgees with the concurrence of the pledgor, & not as a mere transfer of the interest of the bank under the bill of lading, & pltfs. entitled to recover the price as upon an implied warranty of title & failure of consideration. —PEUCHEN *v.* IMPERIAL BANK (1890), 20 O. R. 325.—**CAN.**

g. —— *Goods sold by debtor—Duty to take in account.*]—A bank, which receives a bill of lading as collateral security for payment of a debt incurred by it, under 34 Vict. c. 5, s. 46, & which does not obtain possession of the animals covered by the bill of lading which are sent to Europe by the bank's debtor & there sold by his representative, is not bound to account for the sale of those animals to its debtor, when seeking to recover the debt, but only to account for what it received as the produce of the sale from the person who sold the animals.—MERCHANTS BANK *v.* MCSHANE (1885), 16 R. L. 682.—**CAN.**

h. —— *Continuing security with power of sale—Customer's receipt signed after sale—Release of bank.*]—Pltf. obtained from defts. an advance upon a draft drawn upon a broker, to which draft were attached six bills of lading for thirty thousand bushels of oats shipped to the broker. This was accompanied by a memorandum of hypothecation, signed by pltf., which provided that the securities, renewals, substitutions, & the proceeds thereof, were to be held by defts. as a general & continuing collateral security for the payment of the present & future indebtedness & liability of pltf., & any ultimate unpaid balance thereof, & that same might be realised by defts. in such manner as might seem to them advisable, & without notice to pltf., in the event of default. Defts., without giving any written notice or otherwise complying with Bank Act, s. 89, sold the oats. Shortly afterwards the price rose. At the end of the month in which the sale was made, pltf. signed the usual customer's receipt, whereby he released the bank from all claims in connection with the charges & credits in the accounts & dealings up to the end of the month :—*Held :* the release was valid & given for a good consideration, & was sufficient to bar pltf.'s action for an account in respect of the oats.—GRAVES *v.* HOME BANK (1910), 14 W. L. R. 291.—**CAN.**

k. *Consignee obtaining advances — Goods sold to repay advances—Liability of bank.*]—Pltf. shipped grain from P., consigned to his agent at O., directing the consignee to hold it subject to defts.' order. The local agent of defts. at P. concurred therein, but no advance was made on account of the grain, nor any bill of lading indorsed to defts., nor other transfer of title made. The consignee obtained advances at O. on the grain, & it was sold to repay them :—*Held :* defts. were not liable for such sale to pltf., for there was no evidence to show the consignee was their agent, & they had acquired no control over the goods.—WILSON *v.* BANK OF MONTREAL (1870), 20 C. P. 411.—**CAN.**

l. *Delivery order as collateral security —Whether pledge or absolute transfer.*]—A. borrowed a sum of money from a bank on a bill of exchange, & as a collateral security, he agreed to give them a quantity of brandy in a bonded warehouse. This was done by a delivery order *ex facie* absolute, & the matter entered in the warehouse-keeper's books in similar terms. The delivery order was accompanied by a letter to the bank, stating that the brandy was to be held as a collateral security until the bill should be retired. Before the bill came to maturity the party borrowed an additional sum from the bank, without any reference being made to the brandy. The bill was retired when due, the other debt being still unpaid, & the brandy remaining in the name of the bank. Shortly after the bill had been retired the party became bkpt. The trustee claimed the brandy for behoof of the creditors, & raised an action for restitution of it :—*Held :* the contract was not one of pledge, but that the transference was absolute, conferring a real right upon the bank, qualified only by a latent obligation to restore upon certain conditions, & defenders assoilzied.—HAMILTON *v.* WESTERN BANK OF SCOTLAND (1856), 29 Sc. Jur. 77.—**SCOT.**

865 i. *Goods pledged—By agent for sale —Validity.*]—A co. doing business as agent in storing & selling wheat cannot pledge it as security for a running account with its bank.—*Re* FARMERS' & SETTLERS' CO-OPERATIVE SOCIETY, LTD., CITY BANK OF SYDNEY *v.* BARDEN, CITY BANK OF SYDNEY *v.* PENFOLD, CITY BANK OF SYDNEY *v.* MOLONEY (1908), 9 S. R. N. S. W. 41.—**AUS.**

865 ii. —— *By factor—Title of bank as against true owner.*]—A co. stored for consignees wheat, which was placed in one large stack, which also included wheat belonging to the co. The co. made advances to consignees upon the wheat received, borrowing the money from deft. bank & giving the bank, as security in respect of each advance, a certificate signed by their storeman, stating that the co. held a certain number of bags of wheat which they would deliver to the bank's order on return of the certificates, & these certificates were indorsed by the co. directing delivery to the order of the bank. Pltf. consigned seven thousand bags of wheat, which was dealt with by the co. as above stated. Before pltf. received any intimation from the co. that any of his wheat had been sold, he sold six thousand bags of it through a broker, informed the bank of the sale & that he had given the broker an order for the wheat, & asked the bank to indorse that order for delivery upon the broker paying all charges. The bank replied that they held warrants from the co. for wheat stored at various places which they had negotiated without knowledge of claims by third parties,

Sect. 21.—Securities for advances: Sub-sect. 6.]

SON & MACDONALDS, [1895] A. C. 56; 64 L. J. P. C. 27; 72 L. T. 93; 11 R. 125, H. L.

Annotation:—**Distd.** Inglis *v.* Robertson, [1898] A. C. 616, H. L.

866. Advance on indorsed bills of lading—Rights as against unpaid vendor.]—If the vendee of goods having received from the vendor an indorsed bill of lading, making the goods deliverable to order or assigns, indorses & delivers it to a banker as a security for past & future advances, the banker's claim upon the goods for all such advances will prevail against a claim of the unpaid vendor to stop the goods *in transitu.*

The vendors' agent, A., delivered to the vendees, a firm consisting of B. & C., a bill of lading for linseed cake indorsed by the vendors, making the goods deliverable to order or assigns, & took an acceptance for the price. Afterwards, at the same

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& that they could not recognise pltf.'s claim. Pltf. sued the bank on a count for conversion of his wheat, & on another count for knowingly & wrongfully inducing the co. to commit a breach of their contract with him:—*Held:* there was no evidence to support either count.—SHORT *v.* CITY BANK OF SYDNEY (1912), 15 C. L. R. 148.—**AUS.**

865 iii. —— *Subsequent sale by customer—Liability of purchaser.*]—C., obtaining advances from a bank to pay for goods to be used in manufacture, assigned such goods to the bank. A cargo having arrived, when the bank notified C. that further advances would be refused, he induced the manager, by promise of customers' paper as collateral, to give him the sum necessary to pay for it, & immediately after went to S., who had indorsed for him & was liable on a note for $2,800, & gave him a statement of his affairs & agreed to hand him the notes he would receive on selling the goods, which he did, & S. collected the notes. The bank sued S. for the amount so collected:—*Held:* S. had knowledge, or it would in law be imputed to him, of the bank's claim, & they could recover.—UNION BANK OF HALIFAX *v.* SPINNEY (1906), 27 C. L. T. 236; 38 S. C. R. 187.—**CAN.**

865 iv. —— *As additional security—Validity.*]—*Held:* a mtge. of goods to a bank, taken by way of additional security for a debt contracted to the bank in the course of its business, was valid.—MONTREAL BANK *v.* MCWHIRTER (1867), 17 C. P. 506.—**CAN.**

865 v. —— —— *Title of bank.*]—The pledge of goods to a bank by a trader, as collateral security, the goods being held at the time by the trade under commercial documents of title duly indorsed & transferred to him, & the pledge being in the course of the bank's regular business, is a commercial matter, & the bank receiving such pledge in good faith thereby acquires a valid title to the goods, & the right to dispose of the same for its benefit.—CANADIAN BANK OF COMMERCE *v.* STEVENSON (1892), Q. R. 1 Q. B. 371.—**CAN.**

m. *Shipping receipt—Customer's title incomplete—Receipt returned for sale & collection—Equitable title of bank.*]—C. & Son bought oats from persons, who shipped them to T. consigned to the sellers' own order, or to the order of some bank other than pltfs., sending the shipping receipt with draft for the price of the oats attached to C. & Son. The latter then took the shipping receipt to pltfs., who advanced the money thereon to pay the draft, returning the shipping receipt to C. & Son, for the purpose of obtaining the oats from the carriers, after taking from C. & Son a receipt in the following words:—"Received in trust from the D. Bank bill of lading for . . . bushels oats, & I hereby undertake to sell the property specified for the bank & collect proceeds of sale or sales thereof, & deposit same with the bank in T. to the credit of same, I hereby acknowledging myself to be bailee of the property for the bank." C. & Son received the oats from the carriers & warehoused them, taking warehouse receipts in their own name, which they indorsed to pltfs., who then gave up the bailee receipt:—*Held:* no property in the oats had passed to C. & Son when pltfs. made the advance, & the latter were entitled, at least as equitable owners, as against execution creditors of C. & Son.—DOMINION BANK *v.* DAVIDSON (1885), 12 A. R. 90.—**CAN.**

n. *Timber limits as collateral security—Bank liable for realising at grossly inadequate price.*]—PRENTICE *v.* CONSOLIDATED BANK (1886), 13 A. R. 69.—**CAN.**

o. *Warehouse receipts — Indorsed to foreign bank.*]—C. & Co., carrying on business in Chicago, in the State of Illinois, had machinery warehoused with M. & T. at W., Ontario. C. & Co., being pressed by pltfs., their bankers in Chicago, for collateral security for two notes, indorsed over to pltfs. the warehouse receipts. Afterwards the warehouse receipts were cancelled & new ones were made out direct to pltfs.:—*Held:* (1) the transfer must be governed by the law of the State of Illinois, according to which the transfer was valid & effectual; (2) even if dealt with as subject to the law of Ontario, there was a transfer of both property & possession in the goods to pltfs.; (3) the Act as to banks & banking, & warehouse receipts did not apply to pltfs., a foreign corpn.—COMMERCIAL NATIONAL BANK OF CHICAGO *v.* CORCORAM (1884), 6 O. R. 527.—**CAN.**

p. —— *Indorsed to bank discounting promissory notes—Negotiation of notes.*]—M. was a partner with G. in a commission & produce business carried on in the same building as a storage business in which G. was also engaged. F. was a partner in both businesses. The account of the commission & produce business was kept at pltfs.' bank. From time to time pltfs. discounted their promissory notes, the proceeds of which were placed to the credit of the account. The goods purchased by them were warehoused with the storage branch, & receipts signed in the name of "The O. Co." by G. were given to M. on behalf of the commission & produce business, & were from time to time indorsed over to & hypothecated with pltfs. as promissory notes were discounted:—*Held:* (1) there was a negotiation of a note & an actual advance at the time of the acquisition of each warehouse receipt, & although on most occasions when a discount was effected the account was overdrawn; (2) G., in signing the warehouse receipts on behalf of the storage business, was not giving receipts "as of his own property" within Bank Act, s. 2 (*d*).—ONTARIO BANK *v.* O'REILLY (1906), 12 O. L. R. 420; 8 O. W. R. 187.—**CAN.**

q. —— —— *Bank allowing makers to sell goods—Indorser discharged.*]—MOLSON'S BANK *v.* GIRDLESTONE (1879), 44 U. C. R. 54.—**CAN.**

r. —— *Indorsement in blank — Delivery with overdue notes — Goods not in specie.*]—T. gave warehouse receipts for wheat to pltfs., attached to notes made by him, payable to their order, to take up his overdue notes, which were secured by like receipts. The receipts were in the following form:—"Received in store in my warehouse or mill, from farmers, two thousand bushels of wheat, to be delivered to the order of myself, to be indorsed hereon. This is to be regarded as a receipt under 43 Vict. c. 22. The wheat is separate from & will be kept separate & distinguishable from other grain." The receipts were indorsed in blank. T. did not keep the wheat covered by the receipts distinct, but ground some of it into flour, & allowed the remainder to be mixed with wheat subsequently brought in by farmers & others, but he pointed out to pltfs. one car-load of flour made from the wheat covered by the receipts, & admitted that the wheat & flour in his mill were covered by the receipts, & the next day the bank took possession:—*Held:* (1) a special indorsement of the receipts to pltfs. was not essential, & the indorsement in blank of the receipts satisfied Banking Act, & the notes & receipts attached might be read together; (2) the mode of acquiring the receipts, viz., by delivering up the overdue notes with receipts, was unobjectionable; (3) T. having undertaken to keep "the grain separate & distinguishable from other grain," & having failed to do so, it became his duty to enable pltfs. to recover what the receipts called for or its equivalent, & having done that while able to dispose of his property, the warehouse receipts attached upon the property so indicated by him.—BANK OF HAMILTON *v.* JOHN T. NOYE MANUFACTURING CO. (1885), 9 O. R. 631.—**CAN.**

s. —— *Whether security for specific advance or continuing security—Improper sale.*]—Defts. advanced to A. & Co. $2,250 on a warehouse receipt for wheat. A. & Co. subsequently paid in $1,920, which they had obtained from pltfs., the real owners of the wheat, leaving a balance due of $330. Pltfs. notified the bank of their claim, but the bank, in disregard thereof, contending that the warehouse receipt was a continuing security for A. & Co.'s general balance, which at that time exceeded $2,250, shipped it off for sale, incurring wharfage fees thereby, & the whole of the wheat was sold:—*Held:* (1) the warehouse receipt was not a continuing security to $2,250, but only for the repayment of that specific sum; (2) the claim for wharfage could not be entertained; (3) the fact of there being some part of the $2,250 due at the time of the sale did not justify the sale of the whole of the wheat, it being capable of division, so that enough to satisfy the amount due need only have been sold.—GIBBS *v.* DOMINION BANK (1879), 30 C. P. 36.—**CAN.**

t. —— *Shortage of goods — Rights of bank.*]—A. stored in a railway co.'s warehouse cases of sardines & clams, for which he received negotiable warehouse receipts. A. hypothecated the receipts to the C. Bank to secure advances, & it was arranged that none of the goods covered should be shipped out without the release of the bank. The co., at the instance of A., allowed a large number of cases to be shipped out without the knowledge or release of the bank. In an action by the bank for the shortage of the goods warehoused:—*Held:* the co. entitled to claim against A. for contribution to the amount recovered by the bank against it for the value of any goods shipped out at the request of A. warehoused subject to the receipts indorsed to the bank by A.—CANADIAN PACIFIC RY. *v.* CANADIAN BANK OF COMMERCE (1916), 44 N. B. R. 130.—**CAN.**

u. —— —— ——.]—D., a customer of S. Bank, handed over to the U. Co. wool to be warehoused until it could be shipped, & G., a servant of the co., gave

interview, the vendees returned the bill of lading to A., to hold "as security against the acceptance, until the cakes are sold or the vessel arrives." Subsequently C., by falsely representing to A. that he had sold the goods to D., re-obtained from him possession of the bill of lading, & then indorsed it in the name of his firm to a bank as security for past or future advances. The bank took without notice of the fraud. They afterwards advanced to the firm a sum less than the value of the linseed cakes, but the total amount of their debt was greater :—*Held :* C.'s fraud did not vitiate his power to pass a good title to the bill of lading, & the claim of the bank upon the goods (for the whole of their debt) prevailed over the claim of the unpaid vendor to stop *in transitu.*—

a receipt, addressed to the bank, acknowledging that the co. had received a specified quantity of wool "under pledge to the bank for account of D., which the co. holds at the disposal of the bank until released by the bank." The usual course of dealing of D., as of the customers of the bank & of the co., was to obtain advances from the bank upon security of produce handed to the co. & to hand over the co.'s servant's receipts to the bank. D. fraudulently obtained from G. receipts for more wool than was actually delivered to the co., & induced him to part with wool for shipment for which no release had been given by the bank. Bills of exchange were drawn by D. upon the consignees for the value of the wool, those bills with bills of lading annexed were purchased by the bank, cheques were drawn by D. upon his general account with the bank, & the amount of such cheques was placed to the credit of his produce advance account :—*Held :* (1) there was sufficient recognition of G.'s authority to hold the wool at the bank's disposal, without proof of express authority having been given to him ; (2) the delivery of the receipts by D. to the bank for valuable consideration entitled the bank to the benefit of the undertaking embodied in the receipts.—STANDARD BANK *v.* UNION BOATING CO. (1890), 7 S. C. R. 257.—**S. AF.**

w. —— —— —— *To follow proceeds.*]—A miller gave a warehouse receipt to a bank on some wheat "& its product," stored in his mill, for advances made to him, & died insolvent about two months after. During that period wheat was constantly going out of, & fresh wheat coming into, the mill. Just before his death the bank took possession & found a large shortage in the wheat, which had commenced shortly after the receipt had been given & had continued to a greater or less degree all the time. During the period of shortage some of the wheat had been converted into flour, which had been sold, & the proceeds, which were less than the value of the shortage, paid to the administrator of the estate :—*Held :* the bank entitled to the purchase money of the flour.—*Re* GOODFALLOW, TRADERS' BANK *v.* GOODFALLOW (1890), 19 O. R. 299.—**CAN.**

y. —— *C. S. C. c. 54—Form of receipt—Present advance or antecedent debt.*]—M. & Co. being indebted to pltfs. on certain overdue notes, it was agreed that pltfs. should discount a further note for them, with the proceeds of which the overdue paper should be retired, & that M. & Co. should hand over to them certain warehouse receipts for wool stored in their warehouse as collateral security. The note was, on Jan. 23, discounted by pltfs., & the old notes duly retired, an agreement being signed by M. & Co., reciting that they had indorsed over the receipts as collateral security for the note, etc. The receipts were as follows :—"Warehouse Receipt.—Received in store in our warehouse at —— from sundry parties, 17,900 pounds batting to be delivered pursuant to the order of the A. Bank, to be indorsed hereon, etc." Neither M. & Co. nor the bank indorsed the receipts :—*Held :* they were not warehouse receipts, & the bank could not claim the property covered by them. *Semble :* the transaction of Jan. 23 was not, in substance, though in form, a present advance to M. & Co., but merely a mode adopted of paying off an already existing debt.—BANK OF BRITISH NORTH AMERICA *v.* CLARKSON (1869), 19 C. P. 182.—**CAN.**

a. —— —— —— ——.]—Pltfs. on Sept. 20 received a note for $5,800, payable to & indorsed by L., with L.'s warehouse receipt for wool attached, which they discounted on Oct. 4. On Oct. 21, $1,179 only remaining due, they took a note for that sum from M., the maker of the previous note, with his receipt for some wool, in addition to a receipt from L. for what remained of the wool covered by L.'s previous receipt. It was not discounted on that day, & on Dec. 5 M. made another note for the same sum, at ten days in place of it, which was discounted with the same two warehouse receipts attached. It was renewed on the 24th with the same receipts, &, not being paid, pltfs., in Apr., sold the wool, through a broker who was unable to get it ; & they thereupon replevied on May 9 :—*Held :* (1) the warehouse receipts being taken directly to the bank, & not by indorsement, were not within s. 8, & pltfs. could not recover ; (2) the transaction of Dec. 5 might be considered as a new one, & pltfs. had not held the wool more than six months so as to defeat their title under s. 9.—ROYAL CANADIAN BANK *v.* MILLER (1869), 28 U. C. R. 593 ; 29 U. C. R. 266.—**CAN.**

b. —— 34 *Vict. c. 5—Given by owner of goods — Sale within six months.*]—By s. 48, the owner of goods giving a warehouse receipt as warehouseman is put in the same position as any other warehouseman, & under s. 50 the bank does not forfeit its right of pledge by not selling the goods within six months. —MOLSON'S BANK *v.* LANAUD (1881), 5 L. N. 263 ; 2 Q. L. R. 182.—**CAN.**

c. —— —— —— *Whether indorsement to bank necessary.*]—Applts. discounted paper for a trading firm, on the understanding that a quantity of coal purchased by the firm should be consigned to them, & that they would transfer to the firm the bills of lading, & should receive from one of the members of the firm his receipt as a wharfinger & warehouseman for the coal as having been deposited by them. This was done, & the following receipt was given :—"Received in store in Big Coal House warehouse at T., from M. Bank in Canada, at T., fourteen hundred & fifty-eight tons stove coal, & two hundred & sixty-one tons chestnut coal *per* schooners . . . to be delivered to the order of the M. Bank, to be indorsed hereon. This is to be regarded as a receipt under 34 Vict. c. 5—value $7,000. The coal in sheds facing esplanade is separate from, & will be kept separate & distinguishable from, other coal. (Signed) W. S. Aug. 10, 1878." The partnership having become insolvent :—*Held :* it was not necessary to the validity of the claim of a bank under a warehouse receipt, given by an owner, who was a warehouseman & a wharfinger, & had the goods in his possession, that the receipt should reach the hands of the bank by indorsement, & the above receipt was a receipt within the above Act, & there was evidence that W. S. was a wharfinger & warehouseman.—MERCHANTS BANK OF CANADA *v.* SMITH (1884), 8 S. C. R. 512.—**CAN.**

d. —— —— *Antecedent debt.*]—The A. Co. did business with the R. Bank, & with its successors, the C. Bank, & obtained discounts to the amount of $23,000 on security of warehouse receipts given by B. on fourteen thousand car wheels, & three hundred & fifty tons of pig iron. When the receipts were given B. was not in possession of either the goods or the premises in which they were stored. At the instigation of the C. Bank, to enable pltf. to give warehouse receipts, a lease of the premises was made to him for a year, & he gave a warehouse receipt to the co. for fourteen thousand car wheels & three hundred & fifty tons of pig iron, receiving an indemnity from the bank that the property would be forthcoming when required. The receipt was indorsed over to the D. Bank by the car wheel co., under signature of its manager & president, & an advance obtained thereon of $23,000, which went to pay the C. Bank, who were aware of the co.'s insolvency :—*Held :* had the C. Bank been assignees of the receipt, they would have no title to the goods, as the receipt would not have been given, as required by the Act, to secure a present advance or debt, & the D. Bank could be in no better position, for the advance by them was not made as an original & independent transaction with the car wheel co., but at the request & for the comfort of the C. Bank, & upon its express or implied guarantee of indemnity. *Qu. :* whether the two banks were so identified that the transaction must be regarded as an attempt to secure an antecedent debt from the C. Bank by means of a warehouse receipt.—MILLOY *v.* KERR (1878), 43 U. C. R. 78 ; *affd.*, 3 A. R. 350 ; 8 S. C. R. 474.—**CAN.**

e. —— —— —— *Assignment to bank after arrival of goods.*]—The transfer to a bank of a bill of lading, or warehouse receipt, to secure an antecedent debt, is permitted by ss. 46, 47, where the understanding at the time of contracting such debt was that the bill of lading should be transferred as collateral security.

The bank agreed to make advances to S. & Co. to purchase coal & stone, to be secured by bills of lading & warehouse receipts for such coal & stone when received :—*Held :* the transfer of such receipts to the bank, after the arrival of the goods, was authorised, & no objection that the agreement was to give a receipt for goods of which, at the time, the person was not possessed.—ROYAL CANADIAN BANK *v.* ROSS (1877), 40 U. C. R. 466.—**CAN.**

f. —— —— —— *Compromise in the bank as to sale of goods.*]—B., being indebted to a bank, gave them a document purporting to be a warehouse receipt, and also a general transfer or bill of sale. The bank took possession of a portion of the goods covered by the documents & removed them, & was proceeding with the removal of others of the goods, when the removal was forbidden by one of B.'s clerks. Two actions of replevin, brought by the bank to recover possession of the remainder of the goods, were compromised by B., who agreed that the bank should take the goods & sell them, & credit him with the amount received : —*Held :* assuming that the security on the goods held by the bank was void not being for a present advance, but for a past due debt, & that the bank were not entitled to hold such security against the creditors of B., the bank were not obliged to rest their title on the document, & its defects, if any, would not affect the subsequent transaction by which the bank became the actual purchasers of the goods & dealt with them as their property.—ARMSTRONG *v.*

Sect. 21.—*Securities for advances: Sub-sect.* 6.]

THE MARIE JOSEPH (1866), L. R. 1 P. C. 219; Brown. & Lush. 449; 3 Moo. P. C. C. N. S. 556; 35 L. J. P. C. 66; 15 L. T. 6; 12 Jur. N. S. 677; 15 W. R. 201; 2 Mar. L. C. 394; 16 E. R. 210, P. C.

Annotations:—**Apld.** The Argentina (1867), L. R. 1 A. & E. 370. **Refd.** Cundy *v.* Lindsay (1878), 26 W. R. 406, H. L. **Mentd.** *Re* Overend, Gurney, *Ex p.* Oakes & Peek (1867), L. R. 3 Eq. 576.

867. Advance on delivery order—Memorandum in bank ledger—Bankruptcy of customer—Title of bank.]—A trader, whose banking account was largely overdrawn, & who required a further advance of £500, deposited with his bank the invoice of goods bought by him on credit & consigned to him by rail, & gave the bank a delivery order directed to the railway co. requiring the co. to hold the goods to the order of the bank. The invoice

BUCHANAN (1903), 35 N. S. R. 559.—**CAN.**

g. —— —— *Extension of time—Consent.*]—The consent required by s. 50, to extend the time for which the transfer of a warehouse receipt in security to a bank shall remain valid, may be given at any time after incurring the debt or liability to the bank. *Semble*: such consent need not be in writing.—MCCRAE *v.* MOLSON'S BANK (1878), 25 Gr. 519.—**CAN.**

h. —— 43 *Vict. c.* 22—*Validity—Realisation of security.*]—M. obtained advances from banks on the faith of warehouse receipts being valid securities, he representing to them that he had rented the cellar of his warehouse to H. as warehouseman, & that as such H. had sole charge of the cellar. Before the receipts matured, M. died. Before his death became known, H. & his solr. took possession of the cellar & the property covered by the receipts, & posted up in the cellar a notice stating that H. held the property therein as warehouseman of the banks, to whom he had granted receipts. Two days after taking possession, H. refused any longer to be responsible for the property, which was subsequently taken by the banks under their receipts, & as it was rapidly deteriorating was sold by them. H. had signed the receipts at M.'s request & as a matter of form, but he had not leased the cellar, nor had he any control over it nor the property contained in it:—*Held*: there being no creditor who had any *locus standi* when the banks sold under the receipts, they had the right to apply the proceeds to reduce their claim against M.'s estate.—*Re* MONTEITH, MERCHANTS BANK *v.* MONTEITH (1886), 10 O. R. 529.—**CAN.**

k. —— 46 *Vict. c.* 120—*Title of bank to goods secured.*]—A bank made advances to timber merchants upon warehouse receipts in respect of timber owned by such merchants & stored in their own yard. The warehouse receipts were signed by the merchants & indorsed to P., & were then indorsed on his behalf & delivered to the bank. The receipts stated that they were intended as warehouse receipts within Bank Act:—*Held*: the bank, as the holders of such receipts, acquired a good title to such timber.—TENNANT *v.* UNION BANK OF CANADA, [1894] A. C. 31; 63 L. J. P. C. 25; 69 L. T. 774; 10 T. L. R. 147; 6 R. 382, P. C.—**CAN.**

l. —— —— *Parol agreement to hold surplus after realisation in payment of other debts.*]—The M. Bank took from H. & Co. several warehouse receipts as collateral security for commercial paper discounted in the ordinary course of business, & having a surplus from the sale of the goods represented by the receipts, after paying the debts for which they were immediately pledged, claimed under a parol agreement to hold the surplus in payment of other debts due by H. & Co.:—*Held*: the parol agreement was not contrary to Bank Act, R. S. C. c. 120, & the money that remained could properly be applied by the bank under the terms of the parol agreement.—THOMPSON *v.* MOLSON'S BANK (1889), 16 S. C. R. 664.—**CAN.**

m. —— —— *As collateral security for renewal of notes.*]—The simple renewal of notes by a bank is not a "negotiation" within s. 53 (4), so as to validate a warehouse receipt taken as a collateral security therefor, no such new advance being made, & no such valuable consideration being given or surrendered contemporaneously by the bank as would represent the inception of a new transaction, & no change being wrought in the condition of the parties except the mere giving of time.—DOMINION BANK *v.* OLIVER (1889), 17 O. R. 402.—**CAN.**

n. —— 53 *Vict. c.* 31—*Whether present advance or to cover past indebtedness.*]—On Nov. 28, 1904, a letter was written by the T. Co., stating that a line of credit would be required from $10,000 to $12,000, secured by warehouse receipts on butter, & an account was opened & advances made by the bank. On Oct. 23, 1905, the account was overdrawn to the amount of $10,158.01, & there was an outstanding note of $1,700 due in Nov. On Oct. 23 the manager of the co. discounted a promissory note made under the trading name of the co. for $6,000 at three months & by the same name assigned to the bank as security therefor warehouse receipts of forty cases of butter, promising also other warehouse receipts to cover the indebtedness. After placing the $6,000 to the firm's credit, there remained a debt balance of $4,258.01, which was gradually reduced, & on Dec. 26, 1905, there were outstanding the $6,000 note, a $2,000 note discounted on Oct. 27, 1905, & an open debit balance of $200. The four hundred & one cases had been warehoused on Sept. 21 & 26 & Oct. 4, 10, & 20, while ninety-nine cases had been warehoused on Oct. 20 & 21, although no warehouse receipts had been obtained therefor, & there was nothing to show they had ever been assigned to the bank:—*Held*: (1) as to the four hundred & one cases the transaction was supportable, under s. 73, as there was a present advance & not a mere form to cover a past indebtedness, but the bank had no claim to the ninety-nine cases; (2) the bank were not entitled to hold the warehouse receipts, under the letter of Nov. 28, as not constituting an agreement to furnish security for advances thereafter to be made.—TORONTO CREAM & BUTTER CO., LTD. *v.* CROWN BANK OF CANADA (1908), 16 O. L. R. 400; 11 O. W. R. 776.—**CAN.**

o. —— *R. S. C.* 1906, *c.* 29—*Delivered by clerk as bailee.*]—A clerk in the employ of wholesale grocers to whom the possession of a part of their stock is committed, being set apart in premises leased to him by them at a nominal rental, is a "bailee in actual visible & continued possession" of the goods, within s. 2 (*g*), & a warehouse receipt of the goods delivered by him to a bank as security for advances to the owners, his employers, confers upon it the rights mentioned in s. 86.—BANQUE NATIONALE *v.* BOYER (1911), Q. R. 20 K. B. 341.—**CAN.**

p. *Whether valid under incorporating charter—Hypothecation of merchandise—Bank not authorised to lend money on merchandise.*]—A banking co. incorporated by Royal charter containing a clause declaring that it should not be lawful for the co. to advance money on the security of merchandise, advanced money on the faith of receiving as security a hypothecation of certain merchandise, & the hypothecation was afterwards made to the co. The owner of the merchandise afterwards disposed of it to his own use. The co. sued the owner for damages for the loss of the goods. Upon a plea of not guilty, & a plea denying the co.'s property in the merchandise:—*Held*: the action was maintainable.—AYER *v.* SOUTH AUSTRALIAN BANKING CO. (1871), 19 W. R. 860.—**AUS.**

q. *Whether valid under Bank Acts—Chattel mortgage as security for discounting note.*]—C. being indebted to B., gave his note for the amount, which B. discounted at a chartered bank. As security for the discount, G. executed a chattel mtge. to the bank:—*Held*: the mtge. was void.—BATHGATE *v.* MERCHANTS BANK (1888), 5 Man. L. R. 210.—**CAN.**

r. —— *Bill of sale of horses as additional security.*]—Under s. 68, security may be taken from the owner of horses for an existing debt by a bill of sale of the horses, which expressly states that it is taken only by way of additional security for the debt, & s. 64 does not prevent the bank from recovering on promissory notes made in its favour by a person who purchases the horses from the transferor.—BANK OF HAMILTON *v.* DONALDSON (1901), 13 Man. L. R. 378.—**CAN.**

s. —— 53 *Vict. c.* 31—*Assignment under Sched. C—Substitution of other goods—Assignment for value without notice.*]—A. obtained advances from defts. on the security of assignments of certain hog products in the form in Sched. C & agreed with the manager of the bank to ticket the goods so as to identify them, & not to sell the goods. He then set apart certain of the goods as belonging to defts., & placed tickets over them to indicate this, but afterwards he sold all the goods in the ordinary course of business & substituted other goods of a like character in their place, placing the same tickets upon them. Subsequently pltfs., as security for a then pre-existing debt due then from A., obtained an assignment of the same kind as defts. had taken, covering ten thousand lbs. of bacon, but no appropriation of any particular bacon as hypothecated to pltfs. was made until about seven weeks later, when A. set apart ten thousand lbs. of bacon out of the pile which had been appropriated to defts. in the manner above described, & this quantity was ticketed with the name of pltf. bank, defts.' tickets being removed. Shortly afterwards A. absconded, & defts. took possession of this ten thousand lbs. of bacon under their securities:—*Held*: (1) they were entitled to hold it against pltfs.; (2) notwithstanding s. 75, a bank might take securities of the kind provided for by s. 74, even for pre-existing debts.—BANQUE D'HOCHELAGA *v.* MERCHANTS BANK (1895), 10 Man. L. R. 361.—**CAN.**

t. —— —— —— *Description.*]—Where goods are hypothecated to a bank according to form "C" & particular warehouses are mentioned in which the goods are said to be, & the description covers all the goods, it is sufficient.—CLARKSON *v.* DOMINION BANK (1916), 27 O. W. R. 1; *affd.*, 58 S. C. R. 448.—**CAN.**

u. —— —— *Assignment in breach of trust—Notice to bank.*]—A trust deed to pltfs., to secure debentures of the A. Co., provided that the co. should not be entitled to mtge. or charge same in priority to or *pari passu* with the security thereby constituted. Subsequently deft. bank granted a loan upon security being given, under the terms of s. 74, upon the co.'s wood at different places:—*Held*: (1) so long as

showed that the goods were bought on credit. On arrival of the goods the co. sent the usual advice note to the bank, stating that they held the goods to the order of the bank. The £500 was then advanced, & a minute of the transaction, stating the rate of interest on the advance, the terms on which the goods were to be redeemed, etc., was entered in the bank ledger, & was signed by the trader & stamped. Eleven months afterwards the trader became bkpt. :—*Held :* the title of the bank was

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the money remained under control of the bank, the bank might cancel the loan upon discovering that credit was given under a misapprehension ; (2) the fact that the bank, in making the loan, relied upon the assignment under the above sect. could not prejudicially affect pltfs. when it was shown that the advance was made after notice of the restriction in the trust deed.—INDIAN & GENERAL INVESTMENT TRUSTS, LTD. *v.* UNION BANK (1908), 42 N. S. R. 353.—**CAN.**

w. —— —— *Assignment of contract for logs & money accruing thereunder—Title of bank.*]—A contractor applied to G. for a quantity of lumber for building purposes. G., being unable to purchase the logs, asked the M. Bank for an advance, &, in consideration of an advance, G. assigned the contractor's order to their book-keeper & agreed to cut the logs at a price fixed & deliver them to the book-keeper at the mill site. The latter then assigned to the bank all moneys to accrue in respect of the contract, which assignment was assented to by the contractor, & a day or two after also assigned to the bank three booms of logs by numbers in addition to one assigned previously. This purported to be done under s. 74. The greater part of the logs had been converted into lumber when H. seized them under a prior chattel mtge. :—*Held :* no property in the logs assigned to the bank had passed to G., & H. could not seize them under his mtge.—MERCHANTS BANK OF HALIFAX *v.* HOUSTON (1901), 7 B. C. R. 465 ; 31 S. C. R. 361.—**CAN.**

y. —— —— *Contemporaneous advances — Substitution of securities.*]—Pltf., a creditor of an insolvent, alleged that in regard to certain pledges made by the latter to a bank there had been no contemporaneous advances, & that the pledges were invalid under s. 75 :—*Held :* the words "invalid against creditors" should be treated as limited to transactions invalid against creditors *quâ* creditors, & not as extending to transactions declared invalid for reasons other than those designed to protect creditors.

The insolvent bought hops from time to time, & gave the bank his own warehouse receipts for the purpose of raising money to pay for them. At the request of the bank he constituted his book-keeper his warehouseman, & the latter issued warehouse receipts to the bank in substitution for the securities or receipts theretofore held, there being no further advances made when the new securities were given :—*Held :* this exchange of securities should be treated as authorised under s. 75 (2).—CONN *v.* SMITH (1897), 28 O. R. 629.—**CAN.**

a. —— *R. S. C. c.* 120—*Chattel mortgage as security for past debt.*]—*Held :* the bank had the right to take a chattel mtge. of personal property for a debt already incurred, & to carry out an arrangement for the sale & realisation of the property mtged. for payment of the debt.—*Re* RAINY LAKE LUMBER CO., STEWART *v.* UNION BANK OF LOWER CANADA (1888), 15 A. R. 749.—**CAN.**

b. —— —— *Mortgage of stock in trade.*]—Pltf.'s husband, who had been carrying on a mercantile business, got into difficulties. An arrangement was made for the purchase of the stock in trade by pltf., to whom the bank gave assistance in making the payments, on pltf. assuming the whole of the husband's indebtedness to the bank & giving mtges. therefor upon certain real estate & the stock in trade. The husband was thereby discharged & the wife accepted as the sole debtor. Subsequently the bank pressed for further security, & a new mtge. on the stock was taken, which contained a covenant on the part of the bank to pay "the commercial or trade indebtedness of the mtgor. & the expenses of running the business, etc., from & out of the proceeds of the sale of the goods, chattels, & stock in trade, & the proceeds of the collections of the book accounts & debts now being assigned to them, but so as that same shall not increase the present indebtedness due from the mtgor. to the mtgees. beyond the amount now due for principal under these presents & any interest due or accruing due thereon to the mtgees. as hereinbefore provided" :—*Held :* the securities taken were valid under s. 48.—GILLIES *v.* COMMERCIAL BANK OF MANITOBA (1895), 10 Man. L. R. 460.—**CAN.**

c. —— —— *Goods purchased by manufacturer for jobbing business.*]—While a bank has, under s. 88, the right to advance a wholesale manufacturer, upon the security of the goods, wares & merchandise manufactured by him, or procured for such manufacturer, still, it has no authority to take security on goods purchased by him from other manufacturers for the purpose of carrying on a jobbing business as a side line.—CLARKSON *v.* DOMINION BANK (1916), 27 O. W. R. 1 ; *affd.*, 58 S. C. R. 448.—**CAN.**

d. —— *R. S. C.*, 1906, *c.* 29—*Chattel mortgage to secure past debt—Securities taken over on purchase of banking business.*]—A chattel mtge. given to secure a past debt taken over amongst the securities, in pursuance of an agreement for the purchase of a banking business, is not a contravention of s. 76.—ROYAL BANK OF CANADA *v.* BALL (1914), 20 B. C. R. 242 ; 19 D. L. R. 875 ; 7 W. W. R. 174 ; *affd.*, 22 D. L. R. 647 ; *revsd.* on other grounds, 52 S. C. R. 254.—**CAN.**

e. —— —— *Security for contemporaneous loan.*]—Where security is given to a bank to cover a contemporaneous loan, it is a contravention of s. 76 (2) (3) & the security is void.—BATES *v.* KIRKPATRICK (1912), 21 W. L. R. 607 ; 2 W. W. R. 513 ; 4 D. L. R. 395 ; 22 Man. L. R. 672.—**CAN.**

f. —— —— *Whether security assignable by bank.*]—A security acquired under s. 88 is not legally assignable by the bank so as to transfer the special lien or security conferred by that Act to a third party. The purpose of the security is satisfied when the debt which it is given to secure is paid to the bank.—*Re* VICTOR VARNISH CO., CLARE'S CLAIM (1908), 16 O. L. R. 338 ; 11 O. W. R. 717.—**CAN.**

g. *S. P.* CHESLEY FURNITURE CO. *v.* KRUG (1914), 7 O. W. N. 144 ; 18 D. L. R. 486.—**CAN.**

h. —— —— *Substitution of goods.*]—It is only the owner of the goods who can give security under s. 88, & a bank which has taken such security on goods from the owner cannot, under that sect., substitute other goods afterwards coming into the possession of the giver of the security as agent for sale.—BARRY *v.* BANK OF OTTAWA (1908), 11 O. W. R. 1103 ; 12 O. W. R. 515 ; 17 O. L. R. 83.—**CAN.**

j. —— —— *New goods replacing old stock—Renewal of security.*]—Where a bank, from time to time, makes advances & takes security, under s. 88, on new goods which come into a customer's business to replace old stock sold out, & for each advance a separate note & security is taken, & at the same time a general security is taken which covers all outstanding notes for which a previous individual note has been taken, the security taken for the whole debt is only valid for the amount lent at the time it was acquired.—CLARKSON *v.* DOMINION BANK (1916), 58 S. C. R. 448.—**CAN.**

k. —— —— *Lien-note as continuing collateral security for present & future advances—Assignment of property covered by lien note.*]—S. borrowed from deft. bank $250 on his promissory note & at the same time assigned to the bank a lien-note, & signed an hypothecation, which declared that the lien-note was to be held by the bank as a general & continuing collateral security for payment of the present or any future liability to which it might seem expedient to the bank to apply it, whether of the pledgor incurred on his own behalf or on behalf of another :—*Held :* (1) commercial debts were not "goods, wares & merchandise," within s. 76, & the bank might lend upon the security of the debt represented by the lien-note, & the chattel property forming the subject-matter of the lien-note would *primâ facie* follow the debt represented by it, & in every case, not clearly a case of security subsequently given for a debt already contracted, the question of fact, whether the advances were made upon the security of the debt or of the accessory security would arise ; (2) the advance & the hypothecation & the assignment of the note & of the property mentioned in it were parts of the same transaction, & the assignment of the property was taken as security for the advance & was made at least partly on the strength of that security, & the transfer was null & void.—THEIN *v.* BANK OF BRITISH NORTH AMERICA (1912), 20 W. L. R. 192 ; 1 W. W. R. 795.—**CAN.**

l. —— —— *Sawn lumber—"Product of forest."*]—TOWNSEND *v.* NORTHERN CROWN BANK (1913), 28 O. L. R. 521 ; 4 O. W. N. 1165 ; 13 D. L. R. 300 ; *affd.*, 20 D. L. R. 77.—**CAN.**

m. —— —— *Timber—Vagueness of description.*]—Under s. 88 a bank can make a valid advance to a co. on the security of timber cut by it & described as "goods . . . now owned by us . . . & are in & on the banks of the S. river & tributaries, & are the following forty thousand cords of logs" ; for a mere difficulty in ascertaining all the things included in a general assignment will not affect the assignee's right in things capable of being ascertained & identified.—IMPERIAL PAPER MILLS OF CANADA *v.* QUEBEC BANK (1913), 83 L. J. P. C. 67 ; 110 L. T. 91, P. C.—**CAN.**

n. —— —— *Timber limits as security for overdue indebtedness.*]—A bank has no right or power to take "timber limits & the plant thereon" in pledge as security for overdue indebtedness.—KLOCK *v.* MOLSON'S BANK (1912), Q. R. 44 S. C. 193.—**CAN.**

o. —— —— *Timber purchased from licensees of timber limits—Right of licensees.*]—Pltfs., licensees of timber limits, agreed to sell their interest to M., the agreement providing that all logs, etc., should be deemed to be the property of pltfs. unless & until M. should have paid all arrears due under the agreement. M. assigned his interest to the M. co., which, as security for advances, executed in favour of defts. an instrument under s. 88 pledging all the logs upon their premises, including those cut from the limits of which pltfs. were licensees. Pltfs. alleged that the property in the logs never passed to the co. :—*Held :* the security given to defts. was a valid one, & prevailed against the claim of pltfs.—MUTCHENBACKER *v.* DOMINION BANK (1910), 13 W. L. R. 282.—**CAN.**

p. —— —— *Standing timber & timber licences.*]—Banks may lend money upon the security of standing timber, &

Sect. 21.—*Securities for advances : Sub-sects.* 6 & 7.]

good as against the trustee in bkpcy.—*Re* HALL, *Ex p.* CLOSE (1884), 14 Q. B. D. 386 ; 54 L. J. Q. B. 43 ; 51 L. T. 795 ; 33 W. R. 228.

Annotations :—**Expld.** *Re* Hardwick, *Ex p.* Hubbard (1886), 17 Q. B. D. 690, C. A. **Consd.** Dublin City Distillery *v.* Doherty, [1914] A. C. 823, H. L. **Mentd.** Attenborough's Case (1885), 28 Ch. D. 682 ; *Re* Townsend, *Ex p.* Clark (1885), 53 L. T. 771, D. C. ; *Re* Townsend, *Ex p.* Parsons (1886), 16 Q. B. D. 532, C. A. ; Grigg *v.* National Guardian Assce., [1891] 3 Ch. 206 ; *Re* Standard Manufacturing Co. (1891), 60 L. J. Ch. 292, C. A. ; London & Yorkshire Bank *v.* White (1895), 11 T. L. R. 570 ; Withers *v.* Berry (1895), 39 Sol. Jo. 559.

SUB-SECT. 7.—CHARGES, ASSIGNMENTS, AND SPECIAL PAYMENTS OF MONEY.

868. Land charged with payment of overdrawn accounts—Whether security for future advances.]—A deed-poll was executed by a customer of a bank in favour of the bank, whereby, after reciting that there was a considerable balance due from him to the bank on three accounts which he kept there (one a private account, the other two accounts conjointly with other persons), & that he had agreed to charge certain lands to secure the balance of such accounts, not exceeding £3,000, "as thereafter mentioned," he charged the estate with the payment of "the three several sums of money which shall or may be found due on the balance of the several accounts, for principal, interest, commission, etc., not exceeding £3,000" :—*Held :* the security was not intended to cover, & was not a security for, future advances.—*Re* MEDEWE'S TRUST (1859), 26 Beav. 588 ; 53 E. R. 1025 ; *sub nom. Re* MEADOWS, 28 L. J. Ch. 891 ; 5 Jur. N. S. 421 ; *sub nom. Re* DE MEDEWE, 33 L. T. O. S. 253 ; 7 W. R. 319.

869. Charge by agent on principal's property—Power of attorney—Duty to inquire.]—During pltf.'s absence from England, & again after his return, X. & Y., without his knowledge & purporting to act under a power, which empowered them to borrow money on mtge., borrowed money from a bank upon the security of charges on pltf.'s property, which money they afterwards misappropriated. Upon the occasion of the first advance the power was produced to the bankers & registered by their clerk, but it was not examined by them. Pltf. went abroad a second time, & before going away

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the rights or licences held by persons to cut or remove such timber, & those transactions are not within s. 84 but are under s. 80, although not in form of mtge.—MCPHERSON *v.* TEMISKAMING LUMBER CO. (1911), 18 O. W. R. 319 ; 2 O. W. N. 553 ; 18 O. W. R. 811 ; 2 O. W. N. 854 ; *affd.* on other grounds, [1913] A. C. 145, P. C.—**CAN.**

q. —— —— *Agreement to cut & deliver timber to trustee—Repayment by trustee.*]—A bank made advances to a lumber operator upon the security of an agreement between him & a trustee that he should sell & deliver a specified quantity of logs to be cut by him to the trustee, who should have the property therein as from the stump, & who should upon delivery pay for same by (*inter alia*) paying the bank the amount of its loans :—*Held :* security void under s. 76.—RANDOLPH *v.* RANDOLPH (1907), 4 E. L. R. 17 ; 3 N. B. Eq. Rep. 576.—**CAN.**

r. —— —— *Liability for wages of debtor's employees.*]—The provisions of s. 88 (7), as amended in 1913, mean that the salary & wages of employees shall, to a limited extent, be protected in the event of a bank taking from the employer a security under s. 88 & attempting to realise thereunder. The enactment is remedial, & should be liberally construed.—EDBORG *v.* IMPERIAL TIMBER & TRADING CO. & ROYAL BANK OF CANADA (1914), 27 W. L. R. 680.—**CAN.**

s. —— —— *Whether rancher "wholesale dealer in live stock"—Description of security.*]—A rancher, whose business is raising cattle, is not, no matter how large his transactions may be, "a wholesale purchaser or shipper of or dealer in live stock," within s. 88. The description in a security in the form in Sched. C of that Act must be sufficient to identify the property.—HATFIELD *v.* IMPERIAL BANK (1907), 6 Terr. L. R. 296.—**CAN.**

PART II. SECT. 21, SUB-SECT. 7.

t. *Agreement to mortgage land as collateral security—Present & future advances—Separate accounts.*]—H. entered into an agreement with the bank, by which it was agreed that he would, upon the bank requiring collateral security for the due payment of any moneys for the time being due to the bank in respect of the discount of bills of exchange & promissory notes, overdrafts, or advances, or otherwise upon the working of the account, execute a mtge. to the bank of lands to secure payment by him on demand of such moneys & interest. The circumstances showed that the agreement was intended as a security for an existing debt, as well as for future advances :—*Held :* the words of the agreement were sufficient to enable effect to be given to this intention.

There being several separate accounts between the parties, but the separation having been made at the instance of the bank, & for the convenience of bookkeeping only :—*Held :* these separate accounts formed in law but one account, to the whole of which the agreement applied.—HORTON *v.* BANK OF NEW ZEALAND (1889), 7 N. Z. L. R. 582.—**N.Z.**

868 i. *Land charged to secure floating balance due on overdrawn account.*]—K., working on an overdraft allowed to him by a bank on the security of certain properties of which the bank held the documents of title, seeing an opportunity of borrowing from others portion of the amount at a lower rate of interest, provided that certain conditional purchases were converted into freeholds, wrote to the bank, undertaking to give it full security when called upon over certain lands in the event of the bank paying the money necessary to make certain conditional purchases freehold, if the proposed loan should fall through, & he further undertook to give the bank security over certain lands "for the balance, which will be due then to the bank if the loan is completed." The loan was completed & the amount paid into the bank, thereby reducing the overdraft from £36,000 to £9,000. The account was subsequently operated on as before up to the date of the sequestration of the estate of K. The account was always overdrawn, but the payments in since the loan was completed amounted to more than £9,000 :—*Held :* the words "balance which will be due" meant the "floating balance which will be due from time to time," & the bank was entitled to a charge on the lands for the amount of the debt due at the date of the sequestration.—*Re* KING, *Ex p.* AUSTRALIAN JOINT STOCK BANK, LTD. (OFFICIAL ASSIGNEE) (1895), 16 N. S. W. B. 86.—**AUS.**

a. *Assignments of debts due — Title to drafts drawn against goods consigned—Claim for price of goods.*]—The A. Co. shipped goods to a Toronto house. Drafts were drawn for the price of such goods & discounted by the M. Bank. As security for those advances, not only the title to the drafts was transferred to the bank, but also the claim against the Toronto house for the price of the goods shipped, & whose value the drafts represented :—*Held :* the above transactions were valid & within the legal powers of the bank.—MERCHANTS BANK OF CANADA *v.* DARVEAU ES-QUALITÉ (1898), Q. R. 15 S. C. 325.—**CAN.**

b. —— *Subsequent assignment for benefit of creditors—Bank acting bonâ fide.*]—B. made a general assignment of all moneys due to him to defts. as security for an advance, & subsequently made a specific assignment of all moneys due to him by a school district. Later, being still indebted to the bank in large sums, he conveyed to the bank a house & lot. A further specific assignment of a debt due by a town to B. was given at a later date, & within sixty days of such assignment B. made an assignment for the benefit of his creditors. Advances were made on the security of all assignments to the bank except that last mentioned :—*Held :* (1) the various assignments were valid, &, even if the advances upon such security were not authorised, B. could not, having received good consideration, assail the pledge ; (2) all the assignments save the last were valid ; (3) as no advance had been made on the security of the last assignment, the assignment was void.—NORTON *v.* CANADIAN BANK OF COMMERCE (1908), 1 Sask. L. R. 448 ; 8 W. L. R. 910 ; 9 W. L. R. 331.—**CAN.**

c. *Assignment of book debts — No notice of claim of third party—Rights of bank.*]—A mtge. to a co. covered the stock in trade, fixtures, & all book debts. The assignment of the debts was not notified as required by Jud. Act, s. 58 (5). The mtgor. later assigned the book debts to a bank as collateral security for the advance :—*Held :* the bank had taken their assignment without notice of the co.'s claim &, having collected the debts, were entitled to retain the proceeds.—THOMAS, LTD. *v.* STANDARD BANK, STANDARD BANK *v.* THOMAS, LTD. (1910), 15 O. W. R. 188 ; 1 O. W. N. 379 ; *affd.*, 1 O. W. N. 548.—**CAN.**

d. —— *Subsequent assignment to & collection by creditor—Notice—Right of bank to recover.*]—T., a trader, being indebted to pltfs., in Aug., 1907, executed to them as security an assignment of his bills receivable & book debts. It was arranged between pltfs. & T., that he should continue to carry on business & collect all moneys & deposit them with pltfs. in a current account, against which he was permitted to draw cheques & make payments to his various creditors as he saw fit, pltfs. to be furnished with a monthly statement showing the details of his accounts receivable ; & these were furnished by

gave a fresh power to X. & Y. by which, after referring to the former power & reciting that he had been in England for a short time & was returning abroad, he appointed X. & Y. his attorneys, giving them power to borrow money for him with or without giving security. During his second absence, & without his knowledge, X. & Y., who themselves had an overdrawn account with the bankers, borrowed from them further moneys, alleging that it was to enable them to make payments for pltf., & under the second power of attorney they charged pltf.'s property as a security for the loan, applying the borrowed money in reduction of their own debt to the bank. Upon this occasion the second power was produced to the solr. of the bank, but he was unacquainted with the former transactions, & neither the bankers nor any of their clerks were aware that pltf. had been in England:—*Held:* in order to make out that the bank were so put upon inquiry as to validate the transactions, pltfs. must show that the recitals in the second power were seen by some agent of theirs, who knew of the previous transactions, & would by those recitals have been rendered suspicious of the good faith of X. & Y., & there having been no such notice or knowledge on the part of the bank, wilful blindness could not be imputed to them, & the last-mentioned charge was valid.—DANBY *v.* COUTTS & Co. (1885), 29 Ch. D. 500; 54 L. J. Ch. 577; 52 L. T. 401; 33 W. R. 559; 1 T. L. R. 313.

870. Charge on partnership account—Advances to third party—Title to balance.]—A. & B., a firm of merchants, had an account at a bank. A. agreed that if the bank would advance C. a sum of money he would not draw his account under the amount of the advance until it was paid. A. & B. brought an action against the bank for the balance of account:—*Held:* they could not recover.—BROWNRIGG, MILLER & BROWN *v.* RAE (1850), 5 Exch. 489; 15 L. T. O. S. 233; 155 E. R. 214.

871. Equitable assignment of partnership share—Enforcement of security.]—L., a retiring partner of the firm of B. & Co., applied to pltfs., bankers, for a loan of £20,000 on the security of his share in the partnership, & informed them by letter that the amount of his share might be taken at about £25,000, & that he was informed by B., his former partner, that part of the balance at credit with C. & Co., of which L. was a member, on account of B. & Co., would be appropriated towards payment thereof, & that he would authorise B. to pay the amount to pltfs., & he thereby bound himself to give pltfs. a full & perfect lien thereon. Afterwards B. wrote to pltfs., through L., stating that they had instructed C. & Co. to transfer to them £5,000, the surplus partnership assets of B. & Co., in their hands, & engaging to pay the remaining balance of L.'s capital. L. sent to pltfs. a promissory note payable to the order of C. & Co., with the letter of B., as a collateral security, & the £20,000 was advanced. The firm of C. & Co. became insolvent & the promissory note when due was presented & dishonoured. Pltfs. filed a bill against the surviving members of the firm of B. & Co., & the representatives of a deceased partner, who claimed to be allowed to deduct the £5,000 in the hands of C. & Co., referred to in the letter:—*Held:* pltfs. were equitable assignees of L.'s share, & were entitled to recover the whole amount without deducting the £5,000 alleged to be in the hands of C. & Co.—GLYN *v.* HOOD (1860), 1 De G. F. & J. 334; 29 L. J. Ch. 24; 1 L. T. 353; 6 Jur. N. S. 153; 8 W. R. 248; 45 E. R. 388, L.JJ.

872. Charge on administration deposits—Overdraft of administratrix—Letter of instruction—Lien of bank.]—A., the administratrix of her deceased husband, who had died intestate, & entitled to dower as to his real estate, & to a third of his personal estate, being about to contract a second marriage, executed with her intended husband a settlement whereby she settled the estate she was so possessed of & entitled to to her sole & separate use, with power of appointment by deed or will, & with his consent gave a letter instructing her bankers to keep separate accounts, & to consider any private overdraft by her on her own account secured by the administrative deposits in their hands. At this time two sums of £6,000 & £8,000 were in deposit on such account, & subsequently various other sums were, from time to time, paid in by her to the same account, & placed at interest with the bank, who allowed her to overdraw her private account on the strength of the arrangement so made. By her will she executed the power of appointment reserved to her by the settlement, & having at the time of her death overdrawn her private account to a considerable amount, the bankers claimed, as against the parties interested under the will, to retain the sums

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T. from time to time. Pltfs. did not notify any of T.'s debtors, neither did they do anything towards perfecting the assignment other than to receive the monthly statements. At the time of such assignment T. owed a large sum to defts., wholesale dealers, who were not aware of the assignment. Subsequently pltfs. took a further assignment from T., identical in terms with the first. About that time defts. pressed T. for payment, & T. agreed to pay them all the moneys collected by him from his customers. Pursuant to such arrangement, certain moneys & promissory notes were received by defts., which pltfs. claimed under their assignment:—*Held:* no duty was thrown upon pltfs. to notify the general creditors of the assignment, so as to create an estoppel.—BANK OF BRITISH NORTH AMERICA *v.* WOOD (1910), 14 W. L. R. 34.—**CAN.**

e. *Assignment of interest in contract—Bank of Upper Canada.*]—P. having agreed to build cars for the G. Ry. Co., it was stipulated in the contract that the payments were to be made to the satisfaction of the U. Bank, who were to act as receivers. The bank & the railway co. entered into an agreement, reciting the contract, & that the bank had made large advances on account of it, & had agreed to advance the necessary sum to complete it & acquire the title to the cars. The co. then assigned all their interest in the agreement & cars to the bank, & the bank leased them back to the co. for three years at a rent named, with a proviso that, on payment of their debt to the bank, the cars should revert to the co. After this P. received moneys from the bank on account of the contract:—*Held:* the bank were not precluded by their charter from so acting.—BANK OF UPPER CANADA *v.* KILLALY (1861), 21 U. C. R. 9.—**CAN.**

f. *Assignment of choses in action—Money arising out of contract—Rights of bank.*]—A firm of contractors agreed with S. that, if he would indorse their notes to the M. Bank to the amount of $10,000, they would give an assignment to the bank of all moneys to be payable to them from a railway co. on contracts made & to be made by them with the co. They also agreed with the bank that, in consideration of an advance to them of the money upon their notes indorsed by S., they would assign to the bank the money, & gave to M., the bank manager, a power of attorney authorising him to collect from the railway co. the moneys. S. indorsed the notes, & the moneys were advanced:—*Held:* (1) the transaction amounted to an equitable assignment to the bank of the moneys in question; (2) money arising out of future contracts could be assigned; (3) it was within the powers of incorporated banks to make advances upon the security of any choses in action, except in so far as Banking Act expressly excluded such transactions.—MOLSON'S BANK *v.* CARSCADEN (1892), 8 Man. L. R. 451.—**CAN.**

g. —— —— *Notice of subsequent assignment to third party.*]—FRASER *v.* IMPERIAL BANK OF CANADA (1912), 47 S. C. R. 315; 23 W. L. R. 445; 10 D. L. R. 232; 3 W. W. R. 649.—**CAN.**

h. *Agreement by company to assign debenture obtained from third party—Insolvency of company before assignment—Rights of bank.*]—A co., which was indebted to a bank, entered into an arrangement with the bank whereby it was agreed that, on the bank surrendering certain movables belonging to the co. which the bank held in security, the co. should obtain from J., who was indebted to them, a debenture over his assets, & should assign the debenture to the bank in lieu of the surrendered security. The movables were surrendered & the debenture was obtained from J., but before it had been assigned to the bank the co. went into liquidation:—*Held:* the co. did not hold the debenture for the bank, but had, at most, come under a contractual obligation to assign it, & they were the parties beneficially interested in it at the date of the liquidation.—BANK OF SCOTLAND *v.* HUTCHISON, MAIN & CO., LTD. (LIQUIDATORS), [1913] S. C. 255.—**SCOT.**

Sect. 21.—*Securities for advances: Sub-sects.* 7 & 8. *Sect.* 22: *Sub-sect.* 1, *A.*]

so paid into their hands on account of the administrative account, & especially the sums of £6,000 & £8,000 so deposited with them in payment of the sums due to them on account of the overdrafts made by her on her private account, & brought a suit to enforce such lien:—*Held:* whether or not the bankers had notice of the settlement (which fact was uncertain), the letter of instruction to them by A. was a valid execution of the right reserved by her, as regarded the two sums of £6,000 & £8,000 then in their hands, & in the absence of fraud gave the bankers a lien on those sums for any future overdraft that might be made in accordance with the terms of such letter.—LONDON CHARTERED BANK OF AUSTRALIA *v.* LEMPRIÈRE (1873), L. R. 4 P. C. 572; 9 Moo. P. C. C. N. S. 426; 42 L. J. P. C. 49; 29 L. T. 186; 21 W. R. 513; 17 E. R. 574, P. C.

Annotations:—**Refd.** National Bank of Australasia *v.* United Hand-in-Hand & Band of Hope Co. (1879), 4 App. Cas. 391, P. C. **Mentd.** Adamson *v.* Hammond (1873), L. R. 3 P. & D. 141; Wainford *v.* Heyl (1875), L. R. 20 Eq. 321; Outram *v.* Hyde (1875), 24 W. R. 268; Mayd *v.* Field (1876), 3 Ch. D. 587; *Re* Grissell, *Ex p.* Jones (1879), 12 Ch. D. 484, C. A.; *Re* Harvey's Estate, Godfrey *v.* Harben (1879), 13 Ch. D. 216; Pike *v.* Fitzgibbon, Martin *v.* Fitzgibbon (1881), 17 Ch. D. 454, C. A.; Paul *v.* Paul (1882), 51 L. J. Ch. 839, C. A.; *Re* Hastings, Hallett *v.* Hastings (1887), 35 Ch. D. 94, C. A.; *Re* Roper, Roper *v.* Doncaster (1888), 39 Ch. D. 482; *Re* Wheeler's Settlmt. Trusts, Briggs *v.* Ryan, [1899] 2 Ch. 717.

873. Assignment of partnership moneys in hands of bank—Debt of individual partner—Rights of bank.]—By a registered deed one of resps. was declared to be liable in the books of applt. bank in a sum of money, & the firm of which he was a member were indebted in another sum, & he, "as to his indebtedness," & the firm, "as to their indebtedness," assigned certain moneys in the hands of the bank:—*Held:* there being no surplus to distribute, the bank were entitled to repay themselves the debt of the individual partner without ascertaining the value of his share in the partnership.—NATIONAL BANK OF AUSTRALASIA *v.* FALKINGHAM & SONS, [1902] A. C. 585; 71 L. J. P. C. 105; 87 L. T. 90; 18 T. L. R. 737, P. C.

874. Deposit of policy on cargo—Enforcement of security—Lien.]—An account was opened with a bank on the agreement that the customer might overdraw to a stated amount, but that if he overdrew beyond he should find security. The account was overdrawn beyond the agreed amount, & the bank required security, whereupon the customer wrote a letter to the manager, stating that the arrival of a particular ship would put him in funds to enable him to adjust the account, & he enclosed a policy on the cargo of that ship for £5,000 indorsed payable to the manager in case of loss. The bank filed a bill for the purpose of having the bills of lading of the ship delivered up, & to have their lien or charge realised by a sale of the cargo. Defts. demurred to the bill for want of equity:—*Held:* there was not such a specific appropriation of the cargo as gave the bank a lien on it in preference to the other creditors of the customer, for to create a lien on property there must be a clear agreement for the specific appropriation of it.—JONES *v.* STARKEY (1852), 19 L. T. O. S. 281; 16 Jur. 510.

875. Wrongful pledge of remittances due—Notice to pledgee bank—Specific appropriation.]—Pltf. was in the habit of consigning goods for sale to T. & Co., a foreign firm, with instructions to remit the proceeds to S. & Co., the agents of T. & Co. in Scotland. S. & Co. agreed (with the privity of T. & Co.) to make advances to pltf. against the consignments & that "the proceeds of sales above the advances" should go to the liquidation of an old claim of S. & Co. against pltf. S. & Co. made advances against shipments by drawing bills on pltf. which he accepted. S. & Co. discounted these bills & remitted the proceeds to pltf. Afterwards S. & Co., being in want of money, directed T. & Co. to remit, not to themselves, but to a firm of bankers (having a common partner with themselves), as a security for advances made by the bankers to S. & Co. S. & Co. stopped payment, & pltf. & the holder of the bills immediately claimed the remittances held by the bankers as applicable to meet pltf.'s acceptances:—*Held:* (1) the bankers had notice of the arrangement between pltf. & S. & Co., through the fact of the common partner; (2) the remittances in their hands were appropriated in equity, first to the payment of pltf.'s acceptances, & subject thereto to the discharge of the old claim.—STEELE *v.* STUART (1866), L. R. 2 Eq. 84; 14 L. T. 620.

876. Mortgage of remittances due—Approved remittances for acceptances—Continuing security—Contingent liability.]—A. arranged with a banking co. that all his acceptances should be made payable at the bank, he providing the bank with approved remittances prior to the maturity of such acceptances. A. then handed to the bank certain bills drawn by him on & accepted by a third party. Before the bills arrived at maturity A. mtged. to the bank all remittances in cash, bills, or produce then on their way to him from Barbadoes, & it was agreed that such remittances should be held by the bank as a security to it as long as any debt should be due or growing due from A. to the bank under the existing or any future arrangement. The bills were dishonoured:—*Held:* the contingent liability of A. in respect of the bills was a debt growing due within the security.—MERCHANTS BANK OF LONDON *v.* MAUD (1871), 19 W. R. 657, L.C.

877. Assignment of lien & purchase-money due on sale of premises—Right to hold securities.]—The L. Bank & S. P. & Co., bankers, respectively advanced £60,000 & £40,000 to E. Dock Co. The loans were *ultra vires* of the dock co.'s powers, but the money was applied in payment of the dock co.'s just debts, & ultimately the banks recovered judgment for the amounts. Before judgment recovered the dock co. assigned to the bankers the purchase-money due on a sale of part of its premises & the benefit of a lien for payment thereof, & also deposited title deeds in respect of the indebtedness:—*Held:* the banks were entitled to hold the securities.—*Re* EAST & WEST INDIA DOCK CO. (1891), 7 T L. R. 623.

Lien on securities for advances, *see* Nos. 889 *et seq.*, *post.*

SUB-SECT. 8.—MISCELLANEOUS.

See cases, *infra.*

PART II. SECT. 21, SUB-SECT. 8.

k. *Taking securities for future advances—Must be pleaded & proved.*]—An infringment of Banking Act, *e.g.*, taking security for future advances, though a matter affecting public policy, will not support a contestation of the bank's claim, unless pleaded & legally proved.—McCAFFREY & BANQUE DU PEUPLE *v.* LETOURNEUX (1894), Q. R. 5 S. C. 135.—**CAN.**

l. *Money received on collateral securities—Bank's duty to account.*]—UNION BANK *v.* ELLIOTT (1902), 22 C. L. T. Occ. N. 331; 14 Man. L. R. 187.—**CAN.**

m. *Realisation of collateral security—Negligence of bank—Fiduciary relationship.*]—BARRETTE *v.* CANADIAN BANK OF COMMERCE & SYNDICAT LYONNAIS DU KLONDIKE (1908), 7 W. L. R. 659; 8 W. L. R. 927.—**CAN.**

SECT. 22.—THE BANKER'S LIEN AND SET-OFF OR COUNTERCLAIM.

SUB-SECT. 1.—LIEN.

A. In General.

878. General lien—Securities deposited—Part of law merchant.]—Bankers have a general lien on all securities deposited with them as bankers by a customer, unless there be an express contract or circumstances that show an implied contract inconsistent with lien. The general lien of bankers is part of the law merchant to be judicially noticed.—BRANDAO *v.* BARNETT (1846), 3 C. B. 519; 12 Cl. & Fin. 787; 7 L. T. O. S. 525; 136 E. R. 207, H. L.; *revsg.* S. C. *sub nom.* BARNETT *v.* BRANDAO (1843), 6 Man. & G. 630, Ex. Ch.; *restg.* BRANDAO *v.* BARNETT (1840), 1 Man. & G. 908.

Annotations:—**Consd.** Jones *v.* Peppercorne (1858), John. 430; Bock *v.* Gorrissen (1860), 2 De G. F. & J. 434, L.C. **Distd.** Frith *v.* Forbes (1862), 31 L. J. Ch. 793. **Consd.** Wylde *v.* Radford (1863), 33 L. J. Ch. 51. **Distd.** Leese *v.* Martin (1873), 43 L. J. Ch. 193. **Apprvd.** Misa *v.* Currie (1876), 1 App. Cas. 554, H. L. **Folld.** London Chartered Bank of Australia *v.* White (1879), 4 App. Cas. 413, P. C. **Refd.** Smart *v.* Sandars (1846), 3 C. B. 380; Bank of Australasia *v.* Breillat (1847), 6 Moo. P. C. C. 152, P. C.; Foley *v.* Hill (1848), 2 H. L. Cas. 28, H. L.; Gibson *v.* Small (1853), 1 C. L. R. 363, H. L.; Hare *v.* Henty (1861), 10 C. B. N. S. 65; Thayer *v.* Lister (1861), 30 L. J. Ch. 427; Jeffryes *v.* Agra & Masterman's Bank (1866), L. R. 2 Eq. 674; Webb *v.* Whinney (1868), 18 L. T. 523; Goodwin *v.* Robarts (1875), L. R. 10 Exch. 337, Ex. Ch.; Stumore *v.* Campbell, [1892] 1 Q. B. 314, C. A.; Bechuanaland Exploration Co. *v.* London Trading Bank, [1898] 2 Q. B. 658; *Re* London & Globe Finance Corpn., [1902] 2 Ch. 416; Biddel *v.* E. Clemens. Horst Co., [1911] 1 K. B. 934, C. A.; Hope *v.* Glendinning, [1911], A. C. 419, H. L. **Mentd.** Ireland *v.* Armstrong & Armstrong (1843), 1 L. T. O. S. 12, N. P.; Cooper *v.* Shepherd (1846), 7 L. T. O. S. 282; Reynell *v.* Lewis, Wyld *v.* Hopkins (1846), 4 Ry. & Can. Cas. 351; Brinsmead *v.* Harrison (1871), L. R. 6 C. P. 584; Crouch *v.* Credit Foncier of England (1873), L. R. 8 Q. B. 374.

879. —— Negotiable securities with banker for any purpose—Banker discounting or accepting bills for customer.]—*Semble:* a banker who has discounted bills for a customer, or accepted bills for his accommodation, has, while such bills remain unpaid, a lien on any negotiable securities of that customer, which may come to his hands, for any purpose, & may put same in suit.—BOLLAND *v.* BYGRAVE (1825), Ry. & M. 271, N.P.

Annotations:—**Consd.** Jones *v.* Peppercorne (1858), 28 L. J. Ch. 158. **Distd.** Bower *v.* Foreign & Colonial Gas Co. (1874), 22 W. R. 740. **Refd.** Barnett *v.* Brandao (1843), 6 Man. & G. 630, Ex. Ch. **Mentd.** Burdon *v.* Benton (1847), 9 Q. B. 843.

880. —— Conveyance of land—Whether "security" within custom.]—*Semble:* a conveyance of land is not a "security" within the custom which gives to bankers a general lien on securities deposited by their customers.—WYLDE *v.* RADFORD (1863), 33 L. J. Ch. 51; 9 L. T. 471; 9 Jur. N. S. 1169; 12 W. R. 38.

Annotations:—**Folld.** *Re* Bowes, Strathmore *v.* Vane (1886), 33 Ch. D. 586. **Expld.** *Re* London & Globe Finance Corpn. [1902] 2 Ch. 416.

881. —— Lease left with bank—After refusal to make advances.]—A banker has no lien on muniments casually left in his shop after he has refused to advance money on them as a security.

D. applied to defts., bankers, requesting them to advance him money on the security of a lease, which they declined to do. D. left the lease with defts. without making any declaration of the purpose for which same was so left, & the lease remained in the possession of defts., loose & uninclosed in any cover, for some months:—*Held:* the bankers had no lien on the lease.—LUCAS *v.* DORRIEN (1817), 1 Moore, C. P. 29; 7 Taunt. 278; 129 E. R. 112.

Annotations:—**Refd.** Barnett *v.* Brandao (1843), 6 Man. & G. 630, Ex. Ch. **Mentd.** Lackington *v.* Atherton (1844), 7 Man. & G. 360; Farina *v.* Home (1846), 8 L. T. O. S. 277; Kingsford *v.* Merry (1856), 26 L. J. Ex. 83, Ex. Ch.

882. Discounting bills for customer—Lien on customer's cash balance during currency of bills.]—A banker who has discounted bills for a customer can have no implied lien on that customer's cash balance during the currency of the bills. *Semble:* a custom to have such a lien might be good.—BOWER *v.* FOREIGN & COLONIAL GAS CO., LTD., METROPOLITAN BANK, GARNISHEES (1874), 22 W. R. 740.

PART II. SECT. 22, SUB-SECT. 1.—A.

878 i. *General lien — Securities deposited.*]—A bank has a lien on all moneys, funds, & securities deposited for the general balance of a customer's account. — *Re* WILLIAMS (1902), 24 C. L. T. Occ. N. 91; 7 O. L. R. 156; 1 O. W. R. 534; 2 O. W. R. 47; 3 O. W. R. 251.—**CAN.**

878 ii. —— ——.]—A banker has a general lien upon all securities in his hands belonging to any customer of the bank which have been lodged with him as security, & that lien extends to any general balance that may be due, unless there is evidence to show that the security was received under special circumstances that took it out of the general rule.—*Re* WILLIAMS (1869), I. R. 3 Eq. 346.—**IR.**

n. —— *Money on deposit.*]—The bank sued B. for an overdraft & interest. Deft. counterclaimed in respect of money of his, which the bank had held on deposit receipt, & appropriated in satisfaction of statute-barred bills & interest. The bank pleaded lien & the usage of bankers as defence to the counterclaim:—*Held:* a good defence. — NATI NAL BANK *v.* BRODERICK (1891), 31 I. L. T. 65, n.—**IR.**

879 i. —— *Negotiable securities with banker for any purpose—Exclusion by agreement.*]—A bank has a right to retain all negotiable instruments belonging to a customer & in its possession, for the purpose of securing a debtor balance on general account, but this right may be excluded by agreement, express or implied.

Bonds were deposited from time to time with a bank by a customer, the receipts by the former bearing that they were held "for safe keeping on your account & subject to your order":—*Held:* the terms of the receipts did not instruct any special agreement of parties such as would exclude the right of retention which the custody of the bonds gave to the bank, especially when supported as it was by the actings of parties.—ROBERTSON'S TRUSTEE *v.* ROYAL BANK OF SCOTLAND (1890) 18 R. (Ct. of Sess.) 12.—**SCOT.**

o. —— *Bankruptcy of customer — No notice to bank.*]—The suit of a bank to be put into possession of goods, upon which it claims a lien, cannot be resisted on the ground that such lien was obtained by fraudulent practices, to the detriment of other creditors of the co. which ceded such lien to the bank, unless proof is made of the bkpcy. of such co. & that the bank was aware of it.—VALENTINE *v.* BANK OF B. N. A. (1915), Q. R. 25 K. B. 47.—**CAN.**

p. —— *For immatured bill.*] — A bank has no right to appropriate a credit balance of a customer's account in payment of the customer's immatured bill in favour of the bank.—MCCREADY CO. *v.* ALBERTA CLOTHING CO. (1910), 3 Alta. L. R. 67; 13 W. L. R. 680.—**CAN.**

882 i. *Discounting bill—Secured by customer—Lien on deposit for overdue bill & interest—Statute of Limitations.*]—A., having money on deposit at a bank, went security for C. & D. on a bill of exchange, which was discounted by the bank, but not met on maturity. Thirteen years afterwards, when A. came to withdraw his deposit, the amount of the bill & thirteen years' interest were deducted by the bank:—*Held:* the bank had a lien on the deposit money for the amount of the overdue bill & interest, & were entitled to deduct same, notwithstanding the bill was barred by Stat. Limitations.—M'DONAGH *v.* NATIONAL BANK (1896), 31 I. L. T. 64.—**IR.**

882 ii. —— *Drawn by trader on consignee of goods—Lien on goods or proceeds.*]—A bank discounted bills drawn by a trader on his consignee, who refused to accept them. The consigned goods were subsequently sold:—*Held:* the bank had not a lien on the goods, nor a claim on the proceeds of their sale.—*Re* M'KEAN (1862), 8 Ir. Jur. 16.—**IR.**

a. *Refusal to discount bill—No right to retain.*]—A bill of exchange was transmitted, indorsed, to a bank for discount. The bank declined to discount it, but did not return the bill:—*Held:* they could not retain it in security of any claims for which they could not specially instruct that it was agreed to be allowed to be so.—BORTHWICK *v.* BREMNER (1833), 12 Sh. (Ct. of Sess.) 121.—**SCOT.**

b. *Broker remitting clients' securities for discount—Notice to bank—No right to retain against broker's indebtedness.*]—A bill broker at Liverpool transmitted a bill accepted by a party at Glasgow to a bank at Glasgow in the following letter:—"The enclosed has been sent me from Huddersfield, to send to Glasgow for discount, & if you can do it for moderate terms, it will oblige. I have not indorsed it, but I will guarantee my liability the same as if

Sect. 22.—The banker's lien and set-off or counter-claim: Sub-sect. 1, A. & B.]

883. Lien or set-off—Cash received for customer—Charge in favour of third party.]—Where cash is received by a banker for his customer which is subject to a charge in favour of a third party, in the absence of notice to the banker of such charge at the time of the receipt of the money, he may retain it by way of lien or set-off in satisfaction of an overdraft.

In 1868, K., an officer in the army, mtged. to R., to secure £5,000, all moneys which should be realised by sale of his commission. In Dec., 1877, K. obtained leave to retire from the army, & his commission was valued at £3,000, which on Dec. 6, 1877, was paid by the Paymaster-General to C. & Co., the army agents of the regiment, & was carried to the deposit account kept by C. & Co. with the Army Purchase Comrs., there to remain till K.'s retirement was gazetted. K. kept an account current with C. & Co. as his bankers, which was overdrawn to the amount of £647. K.'s retirement was gazetted on the evening of Dec. 18, & as soon as C. & Co.'s office opened on the 19th, R. gave them notice of his security. R. having claimed payment of the £3,000, C. & Co. claimed to retain out of it the £647. On appeal:—*Held:* (1) as soon as K.'s retirement was gazetted the £3,000 became money had & received by C. & Co. for his use, & for which he could have brought an action at law, & they had a right to set off the balance due to them against this demand; (2) this set-off was equally available against R., of whose security C. & Co. had no notice until after their right to set off had arisen, &, independently of any question of banker's lien, C. & Co. were entitled to retain the £647.—ROXBURGHE *v.* COX (1881), 17 Ch. D. 520; 50 L. J. Ch. 772; 45 L. T. 225; 30 W. R. 74, C. A.

Annotations:—**Mentd.** Johnstone *v.* Cox (1881), 19 Ch. D. 17, C. A.; Webb *v.* Smith (1885), 30 Ch. D. 192, C. A.; *Re* Gregson, Christison *v.* Bolam (1887), 36 Ch. D. 223; *Re* Dallas, [1904] 2 Ch. 385, C. A.

884. Securities deposited by broker as agent—Notice to bank of ownership—Overdraft on loan account.]—Pltf. sent to her broker a certificate of shares which she held, together with a transfer thereof executed by her in blank, to enable him to raise money with which to purchase for her other shares. She also signed a general letter of authority in his favour "to borrow money upon" her shares. The broker deposited the certificate, transfer, & letter with defts., who thus had notice that the shares did not belong to him. He carried the purchase of the other shares over, & borrowed from defts. the money which had become payable for differences, defts. opening a loan account with him. The purchase of the shares was never completed. Defts. allowed the broker largely to overdraw his account, & the broker having been declared a defaulter on the Stock Exchange & afterwards adjudicated bkpt., defts. claimed to retain the shares deposited with them as security in respect of the broker's overdraft:—*Held:* the transaction between defts. & the broker not being a deposit to secure a balance from time to time due on his account, the deposited authority being only "to borrow money upon" pltf.'s shares, the claim of defts. was not maintainable.—CUTHBERT *v.* ROBARTS, LUBBOCK & Co., [1909] 2 Ch. 226; 78 L. J. Ch. 529; 100 L. T. 796; 25 T. L. R. 583; 53 Sol. Jo. 559, C. A.

885. Overdraft by cestui que trust—Agreement to give lien on trust moneys—Bankruptcy of cestui que trust—Revocation of lien.]—A *cestui que trust*, entitled to moneys payable out of a fund in the hands of trustees, was indebted to his bankers in a large amount, by which his account was overdrawn, & in consideration of not being pressed to reduce this amount, he agreed to give the bankers a lien on the moneys coming to him out of the trust fund. He thereupon addressed a note to one of the trustees, requesting & authorising the trustee to pay to the credit of the account of the *cestui que trust* at the bank the moneys payable to him out of the trust fund. The trustee was apprised of the arrangement between the parties. The *cestui que trust* became bkpt.:—*Held:* the bank had a good lien, & the authority given by the note was not countermandable. — *Re* BLAKE, *Ex p.* STEWARD (1843), 3 Mont. D. & De G. 265; 7 Jur. 116, Ct. of R.

Annotation:—**Refd.** *Re* Burris (1851), 18 L. T. O. S. 292.

886. Balance due from bank on current account—Customer indebted on sum secured by mortgage of estates—Devise of all estate to pay debts.]—A testator gave to a charity all such portions of his estate as were by law applicable for charitable purposes, & which had not already been given by his will, & declared that the portions of his estate included in that gift should be exonerated from the payment of his debts, etc., & legacies, with the payment whereof he exclusively charged his residuary estate thereinafter disposed of. Testator gave the residue of his real & personal estate in trust to pay debts, etc., including debts secured upon any of the devised estates & in exoneration of such estates. He died indebted to his bankers in a sum secured by mtge. of estates comprised in the will, & possessed of a smaller sum to his credit upon his current account: —*Held:* the balance on the current account was, for the purposes of the will, included in the charitable gift, notwithstanding any lien of the bankers.—HALSE *v.* RUMFORD (1878), 47 L. J. Ch. 559.

887. Deposit by company not entitled to commence business—Commissions due to bank.]—A co., which

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I had put my name to it":—*Held:* the letter sufficiently advised the bank that the bill was transmitted to them by the broker as broker for behoof of the last indorser, & the bank were not entitled to retain the bill in satisfaction of a debt due to them by the broker.—FARRAR & ROOTH *v.* NORTH BRITISH BANK (1850), 12 Dunl. (Ct. of Sess.) 1190.—**SCOT.**

c. *Misappropriation of bank funds by incoming partners—No notice to original partners—Lien over partnership assets.*]—Three persons, occupying a fiduciary position towards a bank, became partners in a firm, agreeing to pay for their interest a sum of money in liquidation of creditors' claims. They paid this sum out of the moneys of the bank wrongfully appropriated by them. Subsequently the firm was formed into a joint stock co., & the assets of the partnership were assigned to the co. The co. failed:—*Held:* the original partners were not affected with constructive notice of the means by which the incoming partners obtained the money brought in, &, no actual notice to them or to the co. being shown, the bank had no lien on the original assets.—*Re* HERR PIANO CO. (1890), 17 A. R. 333.—**CAN.**

d. *Note attached to draft—Surrender of note conditional on payment of draft—Lien on note.*]—A draft for $150 had on its face, embodying the terms on which it was negotiated, & stamped by an official of the bank when it was negotiated, the words, "Surrender documents attached on payment of draft only." The only document attached was a $250 note:—*Held:* the bank had no general banker's lien on the note, & was not entitled to collect from deft. & retain a sum which it had paid for costs in respect of other commercial paper given to it by the customer, even if there had been evidence that the customer was liable for those costs or had acknowledged or promised to pay them.—STERLING BANK OF CANADA *v.* ZUBER (1914), 32 O. L. R. 123: 7 O. W. N. 189.—**CAN.**

e. *Payment on countermanded cheque—Lien on funds of drawer.*]—A., having an account in the H. Bank at S., drew a cheque on the bank in favour of B., who indorsed & cashed it at a branch of the bank at L. On the day after payment the branch at S. received, before banking hours, both the cheque forwarded from L., & a written order from A. to stop payment of the cheque:—*Held:* A., the drawer, was the principal debtor, & the bank had a lien upon A.'s funds at S. for the amount paid on the cheque.—HIBERNIAN BANKING CO. *v.* MAGUIRE (1892), 26 I. L. T. 659.—**IR.**

had invited the public to subscribe for shares, paid the moneys received into a bank. The co. was alleged to be indebted to the bank for commissions. The co. never became entitled to commence business under Cos. Act, 1900 (c. 48), s. 6 (3):—*Held:* the bank had no lien on any of the moneys deposited for the commissions alleged to be due to them.—NEW DRUCE-PORTLAND CO., LTD. *v.* BLAKISTON (1908), 24 T. L. R. 583.

888. Abandonment of lien—Waiver by conduct.]—A debenture for a tontine annuity was deposited by an intestate with his bankers, one of whom received the dividends & placed them to the credit of testator's account. The intestate died in 1801, & the bankers became bkpt. in 1810. Notwithstanding this the same partner continued to receive the dividends, & pay them to the intestate's widow, up to the period of his own death in 1822. Some time afterwards the assignees of the bankers claimed a lien on the debenture for a debt due from the intestate to the banking house:—*Held:* after so long an abandonment of any claim of lien, the assignees could not support such claim.—*Re* NOBLE, *Ex p.* DOUGLAS (1833), 3 Deac. & Ch. 310, Ct. of R.

B. On Securities for Advances.

889. Contract inconsistent with lien—Securities deposited to cover specific advances—Lien beyond amount of specific advances.]—V. kept an account with M. & Co. as bankers, & on Aug. 18, 1778, he borrowed £1,000 (having then £400 in the hands of the house), & gave a promissory note & deposited several bonds & other securities as a pledge for the repayment thereof. These securities were frequently changed by V., & as one was taken away, another of equal value was deposited in its room. In 1784, V. owing the above £1,000, & about £400 on his banking account, M. & Co. acquired an assignment of the securities & V., being an attorney, prepared a bond & deed poll for securing £1,000, although £1,400 was then due. V. overdrew his account, after the execution thereof, & was at his death indebted to M. & Co. in the sum of £541 over & above the £1,000:—*Held:* V.'s extrix. might redeem on payment of £1,000 & interest only.—VANDERZEE *v.* WILLIS (1789), 3 Bro. C. C. 21; 29 E. R. 385, L.C.

Annotations:—**Consd.** Adams *v.* Clayton (1801), 6 Ves. 226. **Refd.** *Re* Bentley, *Ex p.* Vere (1835), 4 Deac. & Ch. 295; Brandao *v.* Barnett (1840), 1 Man. & G. 908. **Mentd.** Jones *v.* Smith (1794), 2 Ves. 372.

890. —— —— ——.]—G. & Co., to secure a permanent loan of £20,000 from their bankers, V. & Co., agreed to deposit their joint note for that amount, & as collateral security £10,000 in bills "not to be moved," & £10,000 in bills to be with G. & Co. during the day, & also to leave a standing balance on the account every night of £4,000. Accordingly, G. & Co. every evening delivered to V. & Co. bills of various amounts, but not less than £10,000 on any occasion, unless their cash balance exceeded £4,000; & every morning they received those bills back again from V. & Co.,

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PART II. SECT. 22, SUB-SECT. 1.—B.

889 i. *Contract inconsistent with lien—Securities deposited to cover specific advances—Lien beyond amount of specific advances.*]—A stockbroker obtained three loans from a bank, upon the security in each case of particular stocks or shares belonging to his clients, which he pledged with the bank. In two cases the loans were obtained by the broker for his clients, in the third case on his own account. In all cases the loans were made to the broker in his own name, no other name appeared in the bank books, & the bank dealt throughout with him alone, but it was the belief of the bank officials that he was acting for clients. The broker was sequestrated, in addition to the amount of the loans, being then indebted to the bank in a considerable overdraft on his current account:—*Held:* the bank only entitled to retain the securities for payment of the specific loans for which they had been unpledged, & not entitled to hold them for payment of the overdraft on the broker's current account, in respect that they had not been deposited as a general security for current advances.—NATIONAL BANK *v.* DICKIE'S TRUSTEE (1895), 32 Sc. L. R. 562.—**SCOT.**

889 ii. —— —— ——.]—Pltf. deposited jewels with deft. bank to secure certain debts. Afterwards he paid the secured debts, & demanded the return of the jewels, being then otherwise indebted to the bank:—*Held:* pltf. not entitled to recover the jewels without discharging the other debts, unless he proved that defts. had agreed to give up their general lien.—KUNHAN MAYAN *v.* BANK OF MADRAS (1895), I. L. R. 19 Mad. 234.—**IND.**

889 iii. —— —— ——.]—To secure advances made by a bank a co-operative dairy co. gave the bank a debenture charging all its assets, & the co.'s overdraft was also guaranteed by deft. & others. A credit had been established with the bank by the co.'s London brokers. The bank received the bills of lading for shipments, &, on receipt of invoices signed by the co., treated them as drafts by the co. on the brokers & discounted them:—*Held:* the bank having received a bill of lading for a special purpose, viz., to secure an advance to be made to the co. under its brokers' credit, could not claim a general lien upon the bill of lading.—BRUCE *v.* GOOD, GOOD *v.* BRUCE (1917), N. Z. L. R. 515.—**N. Z.**

f. *Advances to company on guarantee of directors—Agreement as to lien over calls—Payment of calls after winding up.*]—The directors of a limited co., having resolved to make a call upon the shareholders to meet certain liabilities of the co., applied to a bank for an advance, & the bank agreed to grant the advance upon the guarantee of certain of the directors "with a lien over the call to be made." A call letter was issued making the call payable to the bank. No assignation or mtge. of the call was executed. Shortly thereafter a winding-up order was pronounced, & an official liquidator appointed. Subsequent to the presentation of the petition certain sums were paid into the bank in respect of the call:—*Held:* the bank had no lien over the sums so paid.—MILLAR (PROPERTY INVESTMENT CO. OF SCOTLAND, LTD. (LIQUIDATORS)) *v.* NATIONAL BANK OF SCOTLAND, LTD. (1891), 28 Sc. L. R. 884.—**SCOT.**

g. *Advances to partnership—Deposit of securities for specific loan—Right to retain for whole balance due.*]—A bank in 1881 agreed to allow to a firm credit on a cash account to the extent of £10,000. By the cash-credit bond, which was executed by the firm, & by the individual partners, the bank were entitled at any time to place to the debit of the cash account any sum or debt owing by the firm to them. On the death of one of the partners in 1884 it was agreed that the credit should be restricted to £5,000, & in security A., one of the partners, deposited with the bank securities of the value of £6,000. The firm was sequestrated on Aug. 31, 1891, at which date the balance due to the bank on the cash-credit account was £4,884, & for bills discounted £3,200. A. was also sequestrated. In an action raised by the trustee in A.'s sequestration against the bank for delivery of the securities deposited by A. on payment of the sum due on the cash-credit account alone:—*Held:* the bank were entitled to hold the securities against the whole sum due to them by the firm.—MUIR (ALSTON'S TRUSTEE) *v.* ROYAL BANK OF SCOTLAND (1893), 20 R. (Ct. of Sess.) 887.—**SCOT.**

h. *Deposit of warehouse receipts—Insolvency of customer—Unjust preference.*]—A., a manufacturer, applied to C., a bank agent, for assistance, & proposed that he should warehouse his goods as manufactured, & pledge the receipts of the warehouseman to the bank for advances to be made to him, & advances were made, for which receipts were deposited with C.:—*Held:* (1) the bank entitled to hold their lien on such of the receipts as were so deposited more than thirty days before A.'s assignment in insolvency, but in respect of such of them as were deposited within the thirty days the bank could not claim any lien or priority; (2) a promise to keep C. well supplied with collaterals was of too vague & general a character to entitle the bank to retain any lien; (3) an agreement that advances should be made on goods manufactured remaining unsold (without specifying any quantity), & C. should judge of the amount of the advance to be made, was not so vague or uncertain as to prevent the bank obtaining security for advances.—SUTER *v.* MERCHANTS BANK (1876), 24 Gr. 365.—**CAN.**

k. *Deposit of mortgage—Return of mortgage or reduction of indebtedness—Effect.*]—A mtgee. deposited with his bank as collateral security a chattel mtge. in his favour. Some time afterwards, when the indebtedness had been very much reduced, the mtge. was handed back to the mtgee. by the bank. There was no evidence as to the reason for this:—*Held:* the *onus* was on the bank to prove their claim as lien-holders or equitable mtgees., &, in the absence of evidence, the presumption was that the bank had relinquished their claim, & not that they had merely returned the mtge. to the mtgee. to enable him to enforce it for the bank's benefit.—DOMINION BANK *v.* MARKHAM (C. C.) CO., LTD. (1914), 28 W. L. R. 145.—**CAN.**

l. *Title deed lodged to cover overdraft—Lien as against customer's assignees in bankruptcy.*]—An indorsement on a title deed "lodged to cover overdraft," & signed by the customer, gives a right of lien to the banker as against the

Sect. 22.—The banker's lien and set-off or counter-claim: Sub-sect. 1, B.]

which were either returned, or others of equal amount substituted every evening. On the last day of dealing between the parties G. & Co. informed V. & Co. that as they had drawn out the cash balance, which they ought to have left in their hands, they had given additional security to V. & Co. by lodging bills with them to a larger amount. The amount of the sum so overdrawn was £3,000, & the amount of the bills then deposited was £22,666, including a note of B. & Co. for £10,000, for which B. & Co. had only received a partial consideration from G. & Co.; but V. & Co. had no notice of such want of consideration attaching to this note.

At the closing of the account between G. & Co. & V. & Co. a balance was due to V. & Co. of £35,386, for which they held the deposit of the bills & note to the amount of £22,666 besides the note of G. & Co. for £20,000. G. & Co. stopped payments & B. & Co. became bkpt:—*Held:* (1) the securities were expressly deposited for a specific portion only of a general balance then due, & the inference that they were intended to secure the whole of the balance was excluded; (2) the bankers having no lien for any sum beyond £23,000 & interest, the proceeds of the securities must be applied to the liquidation of that debt, & the bankers could not recover against the estate of B. & Co. (who were in the position of sureties) more than the balance left unsatisfied.—*Re* BENTLEY, *Ex p.* VERE (1835), 4 Deac. & Ch. 295; 2 Mont. & A. 123; 4 L. J. Bcy. 34, Ct. of R.

891. —— —— Change of ownership of securities.]—M. & L., a partnership firm, had a joint account with a banking co., with whom M. had also a separate account. M. having certain railway shares, which the bank knew to be his separate property, deposited them with the bank, accompanied with a written memorandum that they were to be held as a collateral security for a promissory note of his own which had been discounted by the bank, or for any other sums in which he was then or thereafter might become indebted to them. The firm of M. & L. subsequently became bkpt., being indebted to the bank on their joint account in a large sum which was unsecured. Before the bkpcy. the shares had become the property of the firm:—*Held:* in the circumstances the bank were not entitled to hold the shares as a security for the debt due to them from the firm, & the claim upon the general lien of bankers was answered by the fact that there was a written contract between the parties, by which the extent of the lien was expressly defined & limited.—*Re* LAURENCE, *Ex p.* M'KENNA, CITY BANK CASE (1861), 3 De G. F. & J. 629; 45 E. R. 1022; *sub nom. Re* STREATFEILD, LAWRENCE & CO., *Ex p.* MACKENNA, CITY BANK CASE, 4 L. T. 164; *sub nom. Re* MORTIMORE, *Ex p.* M'KENNA, 7 Jur. N. S. 588; 9 W. R. 490, L.C. & L.JJ.

Annotation:—**Mentd.** *Re* Bentham Mills Spinning Co. (1879), 11 Ch. D. 900, C. A.

892. —— —— Deposit of lease by partner to secure repayment of particular sum by firm.]—A partnership firm had an account with bankers, & A., the senior partner of the firm, had also a private account with the same bankers. The two accounts were treated as separate accounts by the bankers. Both the accounts had been considerably overdrawn, & certain deeds had been deposited with the bankers by A. as security for the two accounts. An extension of credit to the amount of £500 being required by the partnership firm for a short period, A., in the name of his firm, deposited the lease of his house as security for the temporary accommodation. Some time later, the firm's account being above the limit agreed upon, it was closed. The lease of the house was then sold, & the proceeds were handed to the bankers. Subsequently A. was adjudicated bkpt., & his trustees in bkpcy. brought an action against the bankers to recover the surplus of the proceeds of the sale after settlement of the overdraft on A.'s private account. The bankers alleged that the lease was deposited with them by A. in order to secure advances made to him upon the two banking accounts, & they claimed to retain the proceeds of the sale of the lease for the purpose of repaying both such advances:—*Held:* the lease was deposited by A. with the bankers merely for the purpose of securing to them repayment of the particular overdraft of £500, & the bankers had no such general lien on the proceeds of sale so as to entitle them to retain the surplus of such proceeds in respect of the firm's overdrawn account, & same must be refunded.—WOLSTENHOLM *v.* SHEFFIELD UNION BANKING CO., LTD. (1886), 54 L. T. 746; *sub nom.* WOSTENHOLM *v.* SHEFFIELD UNION BANKING CO., LTD., 2 T. L. R. 472, C. A.

893. —— —— Conveyance including two properties deposited—One property only pledged.]—A customer deposited with his bankers a deed of conveyance, including two distinct properties, giving to them at the same time a memorandum, pledging one of the properties, as security for a specific sum

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customer's assignees in bkpcy., as well for overdue bills charged to the customer's account as for money drawn out by cheques.—*Re* WILLIAMS (1869), I. R. 3 Eq. 346.—**IR.**

m. *Lien on timber—Pledged for previous indebtedness.*]—Banks cannot acquire a lien on logs under 34 Vict. c. 5, ss. 46 & 47 (1) if the pledge of the logs was made for a previous indebtedness, or if they were not held by virtue of a transfer of a receipt by a cove-keeper, or by the keeper of any wharf, yard, harbour, or any other place in Canada within the above Act.—ROSS *v.* MOLSON'S BANK (1881), 2 Q. L. R. 82.—**CAN.**

n. —— ——.]—A bank cannot, under Bank Act, s. 74, obtain a lien upon the products of the forest for a pre-existing debt.—MOLSON'S BANK *v.* BEAUDRY (1901), Q. R. 11 K. B. 212.—**CAN.**

a. —— *Validity of lien contested for want of sufficient description.*]—MAGANN *v.* GRAND TRUNK RY. CO. (1902), Cout. 266.—**CAN.**

b. *Advances to purchase cattle—Agreement as to possession by bank—Equitable lien.*]—A bank advanced money to a customer to enable him to buy cattle, which were to be forwarded by rail by him to Montreal, & to be shipped thence to Liverpool, the bank having no control over the cattle until they reached the vessel, when they were to be received by the steamship for the bank, & the customer's possession & control over them was to end. On arriving at the steamship, & before the bills of lading were made out, a creditor of the customer attached the cattle under a writ of *saisie-arret*, but the steamship owners, disregarding the writ, signed the bills of lading & conveyed the cattle to their destination:—*Held:* under Banking Act, s. 53 (4), the bank had an equitable lien upon the cattle from the time of the making of the agreement, which prevailed over the attachment.—*Re* CENTRAL BANK, CANADIAN SHIPPING CASE (1891), 30 C. L. T. 281; *affd.* 21 O. R. 515.—**CAN.**

c. *Substitution of securities—Effect of.*]—S. & Co. used to transmit linens to B. & Co. to be bleached. On Nov. 23, 1874, B. & Co. then holding a quantity of such goods subject to a lien of a bank for advances made to S. & Co. as against those goods, a deed was executed, by which S. & Co. transferred all the goods then with B. & Co. to secure all moneys for the time being to be due to the bank by S. & Co., & B. & Co. covenanted that they held those goods, & would hold any other goods which might be substituted by S. & Co. therefor from time to time with the concurrence of the bank, for the bank, & that they would at all times retain goods which should in the gross be equal in value to those which they should part with in substitution, & that the bank might enter & take the goods for the time being subject to their lien. The bank continued to make advances in the ordinary course of trade; the goods were withdrawn by S. & Co., & other goods sent by them to B. & Co. in substitution for them. No special authority of the bank for each substitution was proved, but there was evidence of their general authority sanctioning such a course of dealing:—*Held:* (1) future goods substituted for existing goods under the terms of the deed were bound by the lien thereby given, as against the assignees in bkpcy. of S. & Co.—MERCHANT BANKING CO. OF LONDON *v.* SPOTTEN (1877), I. R. 11 Eq. 586.—**IR.**

advanced, & also for his general balance :—*Held :* as the deposit of the deed of conveyance was for the special purpose of giving a security upon one property only, the bankers could claim no general lien, by the custom of bankers, on the other property.—WYLDE *v.* RADFORD (1863), 33 L. J. Ch. 51 ; 9 L. T. 471 ; 9 Jur. N. S. 1169 ; 12 W. R. 38.

Annotations :—**Folld.** *Re* Bowes, Strathmore *v.* Vane (1886), 33 Ch. D. 586. **Expld.** *Re* London & Globe Finance Corpn., [1902] 2 Ch. 416.

894. —— —— Customer's right to return of securities—Rights of surety.]—W. was surety for the general balance of a customer's account. On the bkpcy. of the customer, resps. sued W. for £1,000 on his guarantee. After the guarantee was given the customer had obtained advances against securities given in respect of each advance, & the securities had been returned to him on repayment of the advances for which they had been respectively deposited :—*Held :* the customer was entitled to have back the securities deposited in respect of the special transactions, without reference to the state of the guaranteed account, & the surety was not entitled to any relief.—WILKINSON *v.* LONDON & COUNTY BANKING CO. (1884), 1 T. L. R. 63, H. L.

895. —— —— With commission & interest.]—Testator, who died in Oct., 1885, had three accounts at a bank : a private account, an estate account in the name of his agent, & an account for the purposes of a museum. He deposited a policy of assurance for £5,000 with the bank, giving at the same time a memorandum charging the policy with advances to him not exceeding £4,000 besides commission & interest. Testator was at the time of his death indebted upon his first & third accounts with the bank for a sum exceeding £4,000 :—*Held :* the bank had no lien for more than £4,000, commission & interest, the right to a general lien being negatived by the express charge given by the memorandum.—*Re* BOWES, STRATHMORE (EARL) *v.* VANE (1886), 33 Ch. D. 586 ; 56 L. J. Ch. 143 ; 55 L. T. 260 ; 35 W. R. 166.

Annotations :—**Distd.** *Re* London & Globe Finance Corpn., [1902] 2 Ch. 416. **Mentd.** *Re* Gregson, Christison *v.* Bolam (1887), 57 L. J. Ch. 221.

896. —— —— Bills not withdrawn—Lien for fresh advances.]—A. & Co., bankers in the country, being pressed by B. & Co., bankers in town, to whom they were indebted, to send up any bills that they could procure, transmitted for account accommodation bills accepted by D. When the bills became due, the balance was in favour of A. & Co., but the bills were not withdrawn, & afterwards the balance between the houses turned considerably in favour of B. & Co., & was so when A. & Co. became bkpts. :—*Held :* by allowing the bills to remain in the hands of B. & Co., their lien revested, when, upon fresh advances made, the balance turned in their favour.—ATWOOD *v.* CROWDIE (1816), 1 Stark. 483.

Annotations :—**Mentd.** Sturtevant *v.* Ford (1842), 4 Man. & G. 101 ; Burdon *v.* Benton (1847), 9 Q. B. 843 ; *Re* Overend, Gurney, *Ex p.* Swan (1868), L. R. 6 Eq. 344.

897. —— Securities deposited by solicitor & secretary of bank to secure overdraft—Other securities on bank premises.]—On Aug. 1, 1850, A., one of the secretaries & solrs. of the R. B. Bank, in accordance with the terms of a memorandum of that date, deposited policies of assurance with the bank to secure the balance of a cash credit account for £3,000, but which might be increased to £4,000. A. afterwards drew on that account to an amount beyond the sum of £3,000, & on one of the clerks of the bank mentioning the circumstance to him, he replied that it was of no consequence, as the bank held securities for his cash credit account to an amount exceeding £5,000. In Dec., 1853, A. died, & after his death there was discovered in a drawer in a repository kept in the office used by the secretaries & solrs. of the bank, & situate on the bank premises, a parcel of papers & securities belonging to the bank. A. kept the key of the drawer, & in this parcel there were tied up, in addition to the policies deposited with the bank on Aug. 1, 1850, a policy on A.'s life for £1,000, granted in 1851, & the title deeds relating to certain real estate belonging to A. :—*Held :* the custody of the policy for £1,000 & the title deeds was with the bank, & the bank had a lien on the policy for £1,000 & on the title deeds.—FERRIS *v.* MULLINS (1854), 2 Sm. & G. 378 ; 2 Eq. Rep. 809 ; 24 L. T. O. S. 32 ; 18 Jur. 718 ; 2 W. R. 649 ; 65 E. R. 445.

898. —— Deposit of stolen foreign bonds—Advance on one, not on other.]—A bank advanced moneys to a customer upon promissory notes, on the back of each of which he placed an indorsement, by which he charged all his property, shares, or securities, which then were, or which might be, at any time prior to the payment of the note, "in the possession or power of the holder thereof for the time being," with the payment of the promissory note, & interest. After several such transactions had taken place, the customer obtained an advance upon a French bond, payable to bearer & transferable by delivery, & he subsequently handed the bank another French bond, & requested that both might be sold on his account. On the latter occasion he obtained no advance of money. On the bonds being sent to the bank's broker's for sale, it was discovered for the first time that both had been stolen :—*Held :* (1) as to the first bond, the bank had a charge upon it, since an advance had been obtained upon it, but, as to the second bond, there was no such charge, since, no advance having been made upon it, there could be no charge otherwise than by virtue of the charge indorsed upon the promissory note, which did not apply to the case, because it could only apply to property of the drawer of the note placed in the possession or power of the holder for a purpose not inconsistent with an assertion of such a charge, & the bond in question was not so situated ; (2) the bank had no general lien on the two bonds.—SYMONS *v.* MULKERN (1882), 46 L. T. 763 ; 30 W. R. 875.

899. —— Deposit on undue bills—Advances not on specific credit of bills discounted but on general account—Lien.]—Pltfs. were bankers at Bristol, with whom C. kept an account. The course of dealing between them was as follows. C. lodged bills payable at future days with pltfs. from time to time, & drew upon them for any money he wanted in advance. Pltfs. charged no interest on these advances, but used to select out of the bills in their hands such as they pleased & as were nearest to the sum advanced, & discounted these bills, debiting C. with the amount of such discount in his account. C. paid in to pltfs. bills to the amount of about £3,000, & pltfs. advanced to C. about £1,400, & actually entered the discount on such of the bills as they selected, amongst which the bill sued on was not one. On pltfs. refusing to make C. any further advance, he demanded this & the other bills which had not been discounted, none of which were then due. Pltfs. refused to deliver them up in case any of the discounted bills should prove bad. The discounted bills had longer to run than the bill in question, & none of them had then been dishonoured, though some of them beyond the amount of the bill sued on afterwards were so. At the time of the demand & refusal the sums which pltfs. had advanced to C. were more than covered by the amount of the discounted bills in their hands, in the event of their proving to be good bills. Some evidence was given that it was the custom of bankers at Bristol to keep their

Sect. 22.—The banker's lien and set-off or counter-claim: Sub-sect. 1, B. C. & D.]

accounts in the manner above described, & that it was not thereby understood that the money was so advanced on the specific credit of the bills discounted, but on the credit of the general account:—*Held:* pltfs. were entitled to recover by virtue of their general lien.—DAVIS *v.* BOWSHER (1794), 5 Term Rep. 488; 101 E. R. 275.

Annotations:—**Apprvd.** Young *v.* Bank of Bengal (1836), 1 Moo. Ind. App. 87, P. C. **Consd.** Barnett *v.* Brandao (1843), 6 Man. & G. 630, Ex. Ch.; Jones *v.* Peppercorne (1858), John. 430. **Refd.** Brandao *v.* Barnett (1840), 1 Man. & G. 908.

900. —— Deposit in breach of trust—Notice.]—Bankers took from a customer an equitable mtge. by deposit of title deeds. The property comprised in the deeds was subject to a trust, of which the bankers had no notice, & the deposit was made in breach of that trust:—*Held:* the trust must prevail against the bankers' lien.—MANNINGFORD *v.* TOLEMAN (1845), 1 Coll. 670; 14 L. J. Ch. 160; 9 Jur. 438; 63 E. R. 591.

Annotations:—**Distd.** Pennell *v.* Deffell (1853), 23 L. J. Ch. 116, n. **Consd.** Stackhouse *v.* Jersey (1861), 1 John. & H. 721; Cory *v.* Eyre (1862), 1 De G. J. & Sm. 149, L.JJ.

901. —— —— ——.]—Title deeds, securing a sum in which A. & B. were jointly interested as trustees, were deposited by A. with a banking co. as a security for advances made to him:—*Held:* the trust, of which the banking co. received notice upon the deeds, must prevail over their lien, & delivery of the deeds to B. ordered.—WELCHMAN *v.* COVENTRY UNION BANK (1860), 8 W. R. 729.

902. —— Deposit for specific purpose.]—A banker's lien does not arise on securities deposited with him for a special purpose, as where exchequer bills are placed in his hands to get interest on them, & to get them exchanged for new bills. Such a special purpose is inconsistent with the existence of a general lien.

A. was the London agent of B., a Portuguese merchant, & in that character purchased exchequer bills for him, received interest on them, & at proper intervals got them exchanged for others. He acted in the same manner for several other foreign customers. A. kept an account with C., as his banker, & at C.'s banking house had several tin boxes, in which he deposited these exchequer bills, & of which he kept the keys. A. took out of a tin box several exchequer bills, which he delivered to C., requesting C. to get the interest due on them, & to get the exchequer bills exchanged for others. C. did so. Before A. came to take back the exchequer bills, acceptances of his beyond the amount of his cash-credit account were presented at C.'s bank, & paid. A. afterwards became bkpt.:—*Held:* C. had not a lien on the exchequer bills in his hands for the balance due to him on A.'s account.—BRANDAO *v.* BARNETT (1846), 3 C. B. 519; 12 Cl. & Fin. 787; 7 L. T. O. S. 525; 136 E. R. 207, H. L.; *revsg.* S. C. *sub nom.* BARNETT *v.* BRANDAO (1843), 6 Man. & G. 630, Ex. Ch.; *restg.* BRANDAO *v.* BARNETT (1840), 1 Man. & G. 908.

Annotations:—**Consd.** Jones *v.* Peppercorne (1858), John. 430: Frith *v.* Forbes (1862), 31 L. J. Ch. 793; Leese *v.* Martin (1873), L. R. 17 Eq. 224. **Apprvd.** London Chartered Bank of Australia *v.* White (1879), 4 App. Cas. 413, P. C. **Refd.** Foley *v.* Hill (1848), 2 H. L. Cas. 28, H. L.; Bock *v.* Gorrissen (1860), 2 De G. F. & J. 434, L.C.; Thayer *v.* Lister (1861), 30 L. J. Ch. 427; Wylde *v.* Radford (1863), 33 L. J. Ch. 51; Jeffryes *v.* Agra & Masterman's Bank (1866), L. R. 2 Eq. 674; Webb *v.* Whinney (1868), 18 L. T. 523; Stumore *v.* Campbell, [1892] 1 Q. B. 314, C. A.; *Re* London & Globe Finance Corpn., [1902] 2 Ch. 416; Hope *v.* Glendinning, [1911] A. C. 419, H. L. **Mentd.** Ireland *v.* Armstrong & Armstrong (1843), 1 L. T. O. S. 12, N. P.; Cooper *v.* Shepherd (1846), 7 L. T. O. S. 282; Smart *v.* Sandars (1846), 3 C. B. 380; Reynell *v.* Lewis, Wyld *v.* Hopkins (1846), 4 Ry. & Can. Cas. 351; Bank of Australasia *v.* Breillat (1847), 6 Moo. P. C. C. 152, P. C.; Gibson *v.* Small (1853), 17 Jur. 1131, H. L.; Hare *v.* Henty (1861), 10 C. B. N. S. 65; Brinsmead *v.* Harrison (1871), L. R. 6 C. P. 584; Crouch *v.* Credit Foncier of England (1873), L. R. 8 Q. B. 374; Goodwin *v.* Robarts (1875), L. R. 10 Exch. 337, Ex. Ch.; Misa *v.* Currie (1876), 1 App. Cas. 554, H. L.; Bechuanaland Exploration Co. *v.* London Trading Bank, [1898] 2 Q. B. 658; Biddell *v.* Clemens Horst Co., [1911] 1 K. B. 934, C. A.

903. —— Bank not fulfilling conditions.]—Pltf. handed title deeds to his brother to enable the brother to borrow £600 from H. The brother deposited them at his bankers, with a memorandum of deposit purporting to be executed by pltf., & addressed to them, "In consideration of our lending F." (the brother) "£1,000 for seven days from this date, I deposit," etc. The bankers did not place £1,000 to the credit of the brother, but during the next seven days they allowed him, by cheques drawn in the ordinary way, to overdraw his account to an amount somewhat less than £1,000. Pltf. filed his bill for delivery up of the deeds, alleging the memorandum of deposit to be a forgery, & also alleging that the bank had not lent the brother £1,000 for seven days:—*Held:* assuming the memorandum to be genuine, the bankers had no lien on the deeds, for they had not fulfilled the condition.—BURTON *v.* GRAY (1873), 8 Ch. App. 932; 43 L. J. Ch. 229, L.JJ.

904. Collateral security for bills under discount—Surplus on realisation—Retention against general balance.]—A co. deposited deeds with a bank "as collateral security for bills under discount." At the time of the winding up of the co. they were indebted to the bank for a bill which had been discounted for the co. & also for certain other bills which had not been discounted for the co., but which had been deposited with the bank to secure advances made to various persons by an arrangement under which the proceeds were to follow the rights to the property. The securities comprised in the deeds having been realised, there remained in the bankers' hands a balance after satisfying the bill which had been discounted for the co. themselves:—*Held:* the bank were not bound to hand over the balance to the official liquidator, but were entitled to retain it to meet the amount due upon the other bills in respect of which the co. were indebted to them.—*Re* GENERAL PROVIDENT ASSURANCE CO., *Ex p.* NATIONAL BANK (1872), L. R. 14 Eq. 507; 41 L. J. Ch. 823; 27 L. T. 433; 20 W. R. 939.

Annotations:—**Refd.** *Re* Gregson, Christison *v.* Bolam (1887), 36 Ch. D. 223. **Mentd.** Pile *v.* Pile (1875), 23 W. R. 440; *Re* General South American Co. (1876), 2 Ch. D. 337, C. A.

C. On Securities received for Collection.

905. For balance due from customer—Dishonour of cheque—Right to sue drawer.]—On June 8, 1910, deft. drew a cheque on G. & Co. for £500 in favour of W. or bearer, & delivered it to W. On June 9 W. paid the cheque (with cash & bills) into his bankers. Excluding the cheque & deducting £73 13*s.* 1*d.* then due to the bankers for interest &

PART II. SECT. 22, SUB-SECT. 1.—C.

d *On note left for payment—Revocation of bank's authority to receive payment*]—To a count alleging that pltf. delivered to defts. a promissory note for the special purpose that they should procure payment at maturity, & if they should not so procure payment, they should redeliver same to pltf. on request, & that defts. had refused to deliver the note to him, but had wrongfully collected the money & applied same to their own use, defts. pleaded that the maker of the note paid the amount of it to defts. when it became due, & that they gave the note up to him as he required. Pltf.'s replication alleged that while the note was in defts.' hands, & before payment, he revoked defts.' authority to collect, & defts. rejoined that, before pltf. revoked the authority to collect, he became indebted to them in a larger sum than the amount

commission, there was a balance in their favour on that day of £54 19*s.* 9*d.*, but the sums standing to the credit of W. included bills not due. The bank did not reopen after June 9. The cheque was presented for payment & dishonoured on June 11, & one of the bills for £19 10*s.* was subsequently dishonoured. The bankers became bkpt.: —*Held:* bkpts. had a general lien on the cheque, & their assignees were entitled to recover from the drawer (who defended on behalf of W.) the two sums of £54 19*s.* 9*d.* & £19 10*s.*—SCOTT *v.* FRANKLIN (1815), 15 East, 428; 104 E. R. 906.

Annotation:—**Mentd.** Graham *v.* Mulcaster (1827), 4 Bing. 115.

906. —— —— ——.]—Deft., on Feb. 11, purchased of L. in London certain bills drawn by himself on Port Cadiz at 15 days' date, which, by the custom of the trade, were to be paid for on the next post day, which was Feb. 14. L. was largely indebted to pltfs., his bankers, & in consequence of pressure on their part he on the 13th handed to them an order requesting deft. to pay to pltfs. the price of the bills which he had purchased. On the 14th deft.'s agent handed pltfs. a cheque for this amount, & received the other document in exchange, but the same afternoon, hearing that L. had stopped payment, he countermanded payment of the cheque. The bills were remitted to Cadiz, & were refused acceptance. In an action upon the cheque:—*Semble:* even if pltfs. were merely agents to collect the money from deft., their lien in respect of the balance due from their customer entitled them to enforce payment of the cheque.—MISA *v.* CURRIE (1876), 1 App. Cas. 554; 45 L. J. Q. B. 852; 35 L. T. 414; 24 W. R. 1049, H. L.

Annotations:—**Mentd.** Hogarth *v.* Latham (1878), 47 L. J. Q. B. 339, C. A.; McLean *v.* Clydesdale Banking Co. (1883), 9 App. Cas. 95, H. L.; Stott *v.* Fairlamb (1883), 49 L. T. 525, C. A.; *Re* Matthew, *Ex p.* Matthew (1884), 12 Q. B. D. 506, C. A.; *Re* Romer, *Ex p.* Snell (1893), 62 L. J. Q. B. 610, C. A.; Fleming *v.* Bank of New Zealand, [1900] A. C. 577, P. C.; Nash *v.* De Freville (1900), 69 L. J. Q. B. 484, C. A.; Banbury *v.* Bank of Montreal, [1918] A. C. 626, H. L.

907. Short bills remitted by bank—General balance due from remitting bank.]—*Semble:* a banker has a lien against the owners of short bills, sent to him by another banker for collection, for the general balance due from the remitting banker. —*Re* PARKER, *Ex p.* FROGGATT (1843), 3 Mont. D. & De G. 322; 7 Jur. 910, Ct. of R.

908. Cheques remitted by bank—Knowledge of ownership of third parties.]—*Semble:* bankers have no lien against third parties on cheques sent to them by other bankers for collection which, as bankers, they would know might be the property of customers of the remitting bank.—AKROKERRI (ATLANTIC) MINES, LTD. *v.* ECONOMIC BANK, [1904] 2 K. B. 465; 73 L. J. K. B. 742; 91 L. T. 175; 52 W. R. 670; 20 T. L. R. 564; 48 Sol. Jo. 545; 9 Com. Cas. 281.

Annotation:—**Mentd.** Bevan *v.* National Bank, Bevan *v.* Capital & Counties Bank (1906), 23 T. L. R. 65.

D. On Deposits for Safe Custody.

909. Bullion—Payment of freight & charges by Bank—Lien for.]—Pltf. deposited bullion in the Bank of England, which was claimed by H. & G. The bullion was deposited for security by the importers, the Bank paying the freight & charges on it, & having a lien for the money so advanced. The Bank made no additional charge. Having received notice of claim from H. & G., the Bank refused to deliver the bullion to pltf., who thereupon sued the Bank:—*Held:* the Bank were entitled to relief by way of interpleader subject to their lien, which was chargeable against the bullion.—COTTER *v.* BANK OF ENGLAND (1833), 2 Dowl. 728; 3 Moo. & S. 180; 2 L. J. C. P. 158.

Annotations:—**Mentd.** Agar *v.* Blethyn (1835), Tyr. & Gr. 160; Clench *v.* Dooley (1886), 56 L. T 122.

910. Railway shares—Collection of dividends by bank—Lien on certificates.]—J., the owner of railway shares, deposited the certificates for safe custody with a banking co., who undertook to receive the dividends for a small commission:—*Semble:* the bank were entitled to a general lien on the certificates, although the possession of the documents was not essential to the collection of the moneys which the bank were employed to collect.—*Re* UNITED SERVICE CO., JOHNSTON'S CLAIM (1870), 6 Ch. App. 212; 40 L. J. Ch. 286; 24 L. T. 115; 19 W. R. 457, L.JJ.

Annotations:—**Refd.** Leese *v.* Martin (1873), L. R. 17 Eq. 224. **Mentd.** Arnold *v.* Cheque Bank (1876), 34 L. T. 729; *Re* Cooper, Cooper *v.* Vesey (1882), 20 Ch. D. 611, C. A.; Jobson *v.* Palmer, [1893] 1 Ch. 71.

911. Boxes containing securities—Bank ignorant of contents—Lien for balance of account.]—L., a stockbroker, deposited with his bankers boxes containing securities belonging to himself & his customers. L. kept the keys, & the bankers were ignorant of the contents of the boxes. L. became lunatic, & on his committee applying to the bankers for the boxes, they claimed a lien on the securities for a balance due to them in their accounts with L.:—*Held:* defts. were not entitled to any lien on the boxes or their contents.—LEESE *v.* MARTIN (1873), L. R. 17 Eq. 224; 43 L. J. Ch. 193; 29 L. T. 742; 22 W. R. 230.

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of the note, which he refused to pay, whereupon they refused to deliver the note to him:—*Held:* a departure from the plea.

Qu.: whether there was a banker's lien in the province. *Semble:* if such a lien existed the person against whom it was sought to enforce it must be a customer of the bank.—ALLEN *v.* BANK OF NEW BRUNSWICK (1877), 1 P. & B. 446.—**CAN.**

e. *On bills left with bank — After refusal to discount.*]—Pltf. indorsed bills to a firm in St. John's, to be collected. The firm indorsed them to the N. Bank & deposited them for discount with others. The bank refused to discount two bills, & they were left with it for some weeks, & the jury found that they were thus left for collection. The depositing firm having become embarrassed, the bank retained the bills & received the money against the firm's indebtedness to it:—*Held:* (1) if bills were deposited for a special purpose, & not for general account, the banker's general lien did not attach: (2) in the circumstances the lien did attach.—MURDOCK *v.* BANK OF BRITISH NORTH AMERICA (1848), 3 Nfld. L. R. 31.—**NFLD.**

f. —— —— *Entered in "bills for collection ledger."*]—A bill of exchange was drawn by R. upon W., accepted by W., indorsed by R., & offered by R. to the A. Bank. R.'s account was overdrawn. The bank refused to discount the bill, & requested R. to reduce his overdraft. He promised to reduce his overdraft, but did not do so otherwise than by leaving with the bank the acceptance of W. & other acceptances. & the acceptance was entered by the bank clerk in the "bills for collection" ledger. R. drew a further cheque, which the bank clerk, having found the bill of exchange in the bank "for collection," paid:—*Held:* there was evidence to go to the jury of a lien on the bill by the bank, & the bank had a right to one.—BANK OF AUSTRALASIA *v.* WALTERS (1865), 2 W. W. & A'B. 89.—**AUS.**

g. *On bills handed over for discount, but held for collection.*] — When a customer hands over notes & bills to a bank for discount, & part of them only is discounted, the rest being held for collection, the bank acquires no lien on the latter for the customer's indebtedness to it. — FREEDMAN *v.* DOMINION BANK (1909), Q. R. 37 S. C. 535.—**CAN.**

PART II. SECT. 22, SUB-SECT. 1.—D.

h. *Title deeds.*]—A banker may have a lien for his general balance upon title deeds of his customer deposited with him as banker, but not over deeds deposited for safe custody merely.—DALE *v.* BANK OF NEW SOUTH WALES (1876), 2 V. L. R. 27.—**AUS.**

j. —— *Insurance policies.*]—A bank has not a general lien over title deeds & policies of insurance expressly lodged with the bank for safe custody. *Semble:* deeds & policies of insurance lodged with a bank are not documents like exchequer bonds & negotiable instruments, over which a bank has a general lien.—HAMILTON *v.* BANK OF NEW SOUTH WALES (1894), 15 N. S. W. L. R. 100.—**AUS**

Sect. 22.—The banker's lien and set-off or counter-claim: Sub-sect. 1, E. & F. Sub-sect. 2.]

E. Arising on Combining Accounts.

912. Promissory note written short in cash account—Balance due on discounting account—Lien on note for general balance.]—Defts. had been bankers to N., a bkpt., & were sued in trover by his assignees for a promissory note which had been paid in by N. & written short in his cash account with the house. Bkpt., besides his keeping cash with defts., had also a discounting account with them, & before his bkpcy. they had discounted for him fifteen bills, five of which had turned out to be bad ones:—*Held:* defts. had a lien on the note, although the discounting & cash accounts were distinct & separate, there being a balance due to defts. on general account.—JOURDAINE *v.* LEFEVRE (1793), 1 Esp. 66.

Annotations:—**Refd.** Barnett *v.* Brandao (1843), 6 Man. & G. 630. **Mentd.** Bower *v.* Foreign & Colonial Gas Co. (1874), 22 W. R. 740.

913. Deposits by partner on private account—Overdrawn account of firm.]—Bankers have no lien on the deposit of a partner on his separate account for a balance due to the bank from a firm.—WATTS *v.* CHRISTIE (1849), 11 Beav. 546; 18 L. J. Ch. 173; 13 L. T. O. S. 297; 13 Jur. 845; 50 E. R. 928.

Annotation:—**Mentd.** Farley *v.* Turner (1857), 5 W. R. 666.

914. Deposit of bills as security for advance—Three accounts—Balance of one account satisfied—Lien for general balance.]—The O. Bank kept three accounts at the A. Bank, namely, a loan account, a discount account, & a general account. They from time to time received advances from the A. Bank, which were entered in the loan account, & to meet which they deposited securities with the A. Bank. In the course of the transactions the O. Bank deposited three bills of exchange with the A. Bank, accompanied by a letter stating that they proposed to draw upon them for £10,500, but that, as their credit would not afford a margin to that extent, they sent the bills as a collateral security:—*Held:* there was nothing in the course of dealing or in the terms of the letter to exclude the general rule that a banker had a lien on the securities deposited by a customer for the customer's general balance, & the balance of the loan account being satisfied, the A. Bank might retain the bills for the balance of the general account.—*Re* EUROPEAN BANK, AGRA BANK CLAIM (1872), 8 Ch. App. 41; 27 L. T. 732; 21 W. R. 45, L.JJ.

F. On Shares in Bank held by Customer.

915. Held in trust—Assignment as security for advances—Customer beneficial owner & trustee.]—Trust funds were invested in the purchase of transferable shares in a banking co., in the name of one of the trustees, who executed a declaration of the trusts thereof (the rules of the co. not allowing shares to stand in the name of joint owners or *cestuis que trust*). The trustee was also a proprietor of shares in his own right in the same co., & made various sales & purchases of shares therein. There was nothing to distinguish which were the individual shares held by the different proprietors, same being in the nature of capital, expressed by quantity. The trustee contracted to assign a certain number of shares to the banking co. as a security for advances which they made to him, but no transfer was made. He afterwards became bkpt.:—*Held:* the banking co. had no lien on any of the shares which had been held in trust.—MURRAY *v.* PINKETT (1846), 12 Cl. & Fin. 764; 8 E. R. 612, H. L.

Annotations:—**Mentd.** Pennell *v.* Deffell (1853), 4 De G. M. & G. 372, L.JJ.; Clack *v.* Holland (1854), 19 Beav. 262; Ashwin *v.* Burton (1862), 32 L. J. Ch. 196; Aberaman Ironworks *v.* Wickens (1868), L. R. 5 Eq. 485; Brown *v.* Adams (1869), 21 L. T. 71; *Re* Birchall, Wilson *v.* Birchall (1881), 44 L. T. 243; *Re* Leslie, Leslie *v.* French (1883), 23 Ch. D. 552; Société Générale de Paris *v.* Tram. Union Co. (1884), 14 Q. B. D. 424, C. A.; *Re* Bell, *Ex p.* Hodgson (1891), 65 L. T. 245.

916. Issued as negotiable securities.]—By a clause of a deed of settlement of a colonial banking co. the directors had power to issue shares on such terms as they thought expedient. By another clause the co. was to have a lien for debts due to the co. from the shareholders upon any shares of debtors. The directors issued shares, with powers of attorney, for the expressed purpose of enabling the person to whom they were issued to remit them to England & to deal with them as negotiable securities or as money payments:—*Held:* no lien attached to the shares so issued.—HUNTER *v.* STEWART (1861), 4 De G. F. & J. 168; 31 L. J. Ch. 346; 5 L. T. 471; 8 Jur. N. S. 317; 10 W. R. 176; 45 E. R. 1148, L.C.

Annotations:—**Mentd.** Simpson *v.* Fogo (1863), 1 Hem. & M. 195; Vijaya Raganadha Bodha Gooroo Swamy Periya Odaya Taver *v.* Katama Natchiar (1866), 11 Moo. Ind. App. 50, P. C.; *Re* Agra & Masterman's Bank, *Ex p.* Asiatic Banking Corpn. (1867), 36 L. J. Ch. 222; Wilson *v.* Church (1879), 13 Ch. D. 1, C. A.; Caird *v.* Moss (1886), 33 Ch. D. 22, C. A.; *Re* Hilton, *Ex p.* March (1892), 67 L. T. 594.

917. Equitable mortgage by customer—Lien as against mortgagee—Estoppel.]—In Jan., 1878,

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PART II. SECT. 22, SUB-SECT. 1.—E.

913 i. *Deposits by partner on private account—Overdrawn account of firm.*]—Where the members of a firm have separate private accounts with the bankers of the firm, & a balance is due to the bankers from the firm, the bankers have no lien for such balance on the separate accounts.—RICHARDS *v.* BANK OF BRITISH NORTH AMERICA (1901), 8 B. C. R. 143, 209.—**CAN.**

PART II. SECT. 22, SUB-SECT. 1.—F.

k. *Right to retain against debts due from shareholders.*]—Circumstances in which a bank held entitled to retain the shares of stock standing in the name of a shareholder in satisfaction of debts due to them by the shareholder.—BURNS *v.* LAWRIE'S TRUSTEES (1840), 2 Dunl. (Ct. of Sess.) 1348.—**SCOT.**

l. *Assignment as security for advances.*]—Circumstances in which a bank held justified in retaining shares owned by pltf. of the stock of the bank to be applied on the balance of its claim for advances.—LAMOUREUX *v.* MOLLEUR, Cass. Dig., 2nd ed., 692.—**CAN.**

915 i. *Held in trust—Lien on shares for trustee's indebtedness.*]—A., B., & C. held shares in deft. bank in their joint names as trustees under a marriage settlement. A., whose name stood first in the bank books, died, being indebted to the bank in an amount exceeding the value of the shares. The bank had notice of the trusts, but it did not appear whether they obtained such notice before or after A. became indebted to them:—*Held:* the bank entitled under their deed of settlement to enforce their lien & retain the shares. *Semble:* if the bank had notice of the trust before they made advances to the trustee, the interest of the *cestui que trust* would prevail, & the bank would not be allowed to exercise their lien.—BUDGE *v.* BANK OF NEW SOUTH WALES (1890), 11 N. S. W. L. R. 385.—**AUS.**

915 ii. —— *Dividends applied to reduce trustee's debt.*]—M. & G. purchased with pltf.'s money shares in deft. bank, & were registered as proprietors. M. received the dividends & remitted them to pltf. In 1870 M. informed the bank of the trust for pltf. The dividends then due were thereupon paid to M. as usual, but none were afterwards paid. M. being indebted to the bank, & the bank claiming that under their bye-laws they were entitled to apply the dividend to the reduction of M.'s debt:—*Held:* the bank were entitled to retain the dividends against M.'s debt. *Semble:* it would have been otherwise if the debt had been incurred after the bank had notice of the trusts.—BROWNE *v.* BANK OF NEW SOUTH WALES (1872), 11 N. S. W. L. R. 392, n.—**AUS.**

917 i. *Equitable mortgage as collateral security for advances.*]—D., registered proprietor of shares in a bank, wrote to the directors a letter authorising them to hold his shares as collateral security for advances to be made to him on bills discounted for him, & to sell the shares to pay such debt with interest. He never executed any deed of transfer, & he continued to be the reputed owner of the shares:—*Held:* the letter of deposit constituted a valid equitable mtge., & the bank entitled, under their deed of settlement, to a lien on the shares.—DUNNE'S ASSIGNEES *v.* HIBERNIAN JOINT STOCK CO. (1868), 2 I. L. T. Jo. 5.—**IR.**

B., a customer of & shareholder in deft. bank, & secretary of a club having an account there, fraudulently altered a cheque for £600 drawn by the club in favour of S. or order, by striking out the word "order," & adding the word "bearer," & then induced the bank to place the £600 to the credit of his own account. In Nov., 1878, pltf. lent B. £1,000 upon the security of the deposit of a share-certificate for fifty shares in the bank. The certificate gave the holder thereof notice that the bank had a paramount lien on the shares of any shareholder for whatever might be due from him to the bank. On Mar. 17, 1880, pltf. gave notice to the bank of the deposit of the certificate, & was told by the bank manager, in answer to his inquiry, that the bank had no claim on the shares. In May, 1880, the bank got notice of B.'s fraud, & having settled with the club, debited B.'s account with the £600, which they had paid to him on the irregular cheque, & gave pltf. notice that they claimed a lien on the shares for that amount. In an action by pltf. claiming a declaration that the shares were subject to his equitable mtge. :—*Held :* (1) the bank, on discovering B.'s fraud, were entitled to set the account right as between themselves & him by debiting him with the amount of the cheque ; (2) as pltf. was in no way prejudiced by the statement made by the bank manager on Mar. 17, 1880, the bank were not estopped from setting up their lien on the shares.—HORSFALL *v.* HALIFAX & HUDDERSFIELD UNION BANKING CO. (1883), 52 L. J. Ch. 599.

918. Debt due from partnership — Shares in name of partner.]—By the articles of assocn. of a joint-stock bank it was provided that the shares of every shareholder should be always subject to a lien thereon in favour of the bank for all moneys from time to time due from him to the bank in respect of any calls, or as a debt or liability to the bank from him alone, or jointly with any other person. At the commencement of the bkpcy. of two partners some shares in the bank stood in the name of A., one of the two. The shares were in fact partnership property, though the bank did not know that any one but A. was interested in them. The partners owed the bank a large debt for moneys advanced to them. The whole of such debt had been contracted since the shares, which were originally the property of A. alone, had become partnership property :—*Held :* the bank's security was on the joint estate, & they could only prove against that estate for the balance of their debt after deducting the value of the shares.—*Re* COLLIE, *Ex p.* MANCHESTER & COUNTY BANK (1876), 3 Ch. D. 481 ; 45 L. J. Bcy. 149 ; 35 L. T. 23 ; 24 W. R. 1035, C. A.

Annotation :—**Apld.** *Re* Cooksey, *Ex p.* Portal (1900), 83 L. T. 435.

919. Deposit of title deeds as security for overdraft—Death of depositor—Devisee's right to contribution.]—A testator held shares in a bank, whose deed of settlement provided that, if a shareholder did not pay on demand moneys due from him to the bank, the directors might declare his shares forfeited for the benefit of the other proprietors, & that such forfeiture should not operate to discharge debtor from his debt. Testator, at the time of his death, owed the bank £31,363. He had some time previously deposited the title deeds of his real estate, which was valued at £25,630, as security for his overdrawn account. He also held shares in the bank valued at £21,164. The devisee of the real estate claimed contribution from the bank shares in discharging the debt to the bank :—*Held :* (1) the real estate was not entitled to the contribution claimed, as the terms of the bank's deed of settlement did not create a charge upon the shares, but only gave the bank a right of forfeiture ; (2) if the deed of settlement had created a charge, the real estate would still have been primarily liable as being specifically charged, whilst the charges upon the shares would have been a charge in the nature of a general lien.—*Re* DUNLOP, DUNLOP *v.* DUNLOP (1882), 21 Ch. D. 583 ; 48 L. T. 89 ; 31 W. R. 211, C. A.

SUB-SECT. 2.—SET-OFF OR COUNTERCLAIM.

920. Bank discounting bills—Promissory note under discount—Balance on current account—Death of customer.]—A.'s bankers advanced money to him by discounting his promissory note for £1,000. The note was renewed every three months for several years & discounted on each occasion. A. also accepted, payable at his bankers, a bill drawn by B. on A. for £467 ; this bill was discounted by the bankers, & they were the holders when it became due. On the morning the bill became due, before the arrival of the post, the bankers, who had then in their hands £1,421 of A.'s money, wrote off the bill to the debit of A.'s account ; the same day's post informing them of A.'s death two days before, they called upon B. to pay, & B. paid them £40, on account of the bill, on a representation that £40 would be wanting to make A.'s account

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918 i. *Debt due from firm—Liability of partner.*]—Under R. S. C., c. 120, s. 59, a bank has a lien on the stock held in it by a member of a firm for a debt due to it by such firm.

When a debt is due to a bank & debtor acquires stock in same, such stock is at once affected by the lien of the bank, & moneys realised by the bank out of such stock may be applied by it to the payment of the debt, in preference to another debt contracted subsequently by same debtor.—*Re* CHINIC (1888), 14 Q. L. R. 289.—**CAN.**

PART II. SECT. 22, SUB-SECT. 2.

m. *Promissory note of customer—Right to set off deposits.*]—Liquidators of the C. Bank were ordered to allow by way of set-off, as against a note for $6,000, the amount of the maker's deposit account, $1,406.76, an accepted but unpaid cheque for $74.76 & a dishonoured sterling draft on the C. Bank for $2,000. The maker of the note having paid the liquidators $2,518.48, the note & $6,000 of debentures held as collateral security were ordered to be delivered up to the maker.—*Re* CENTRAL BANK, *Ex p.* REID (1888), 30 C. L. T. 268.—**CAN.**

n. *Bank discounting notes—Customer debited on dishonour of note—Balance drawn out by customer.*]—Deft. was a depositor in a bank, & had there discounted a note, which was not paid when due. The bank charged the note to deft.'s account, & the latter drew out the exact amount of the balance remaining to his credit :—*Held :* a set-off had been thereby effected.—THOMAS *v.* SMITH (1895), Q. R. 16 S. C. 354.—**CAN.**

o. —— *Proceeds charged against dishonour of overdue note.*]—Pltf. had a note for $600 discounted by defts., & the latter retained out of the proceeds of the note the amount of another note overdue by pltf. to the bank, & which was duly protested :—*Held :* the bank had a right to retain the amount of the note so held by them.—BANQUE NATIONALE *v.* GUAY (1865), 15 L. C. R. 496.—**CAN.**

p. *Overdue notes—Liability of depositor as indorser—Interest after set-off.*]—At the death of L., deft. bank had money on deposit to his credit bearing interest at 3 per cent., & when this was demanded by pltfs., his exors., the bank, on Jan. 6, 1910, refused to allow the money to be withdrawn until some settlement was made relative to overdue notes upon which L. was indorser. Afterwards a cheque upon the deposit account was given by pltfs., & other payments were made sufficient to discharge the whole indebtedness on the notes with interest as calculated by pltfs. :—*Held :* (1) at any time after the notes became due the bank could have set off its indebtedness to the depositor against the depositor's indebtedness to the bank *pro tanto* ; (2) if on Jan. 6, 1910, the bank so applied the deposit, the unpaid balance of the indebtedness continued to bear interest at 5 per cent., & on that basis was ultimately paid, but if no application of the deposit was made, the bank wrongfully refused to allow it to be withdrawn, & pltfs. entitled to interest at 5 per cent.—ROYAL TRUST CO. *v.* MOLSONS BANK (1912), 27 O. L. R. 441 ; 4 O W. N. 437 ; 8 D. L. R. 478.—**CAN.**

q. *Notes left in the bank for collection—Insolvency of debtor of bank before collection—Compensation.*]—*Held :* where drafts & notes were placed with a bank by a debtor of the bank, not as collateral security, but for collection, compensation did not take place until the bank had received the amounts collected by

Sect. 22.—The banker's lien and set-off or counter-claim: Sub-sect. 2. Sect. 23.]

right. At this time the last promissory note had fifty-three days to run, but the bankers immediately entered that note as well as the bill to the debit of A.'s account, allowing a rebate of discount for the time the note had to run. A.'s exors. before the fifty-three days expired sued the bankers for the balance in their hands at the time of A.'s death: —*Held:* (1) the bankers might set off the £467 on the bill as they had no notice of A.'s death when it was written off; (2) the bankers could not set off the note before it was due.—ROGERSON *v.* LADBROKE (1822), 1 Bing. 93; 7 Moore, C. P. 412; 130 E. R. 39; *sub nom.* ROBINSON *v.* LADBROKE, 1 L. J. O. S. C. P. 6.

921. —— Bills indorsed to bank—Balance on current account.]—Defts., bankers in London, had acted as, & were, the bankers of E. & Co. up to Oct. 24, 1842, when E. & Co. became bkpt. Previously to that day defts. had discounted for them bills to a large amount, & on that day defts. had in their hands a balance of £179 19*s.* 11*d.* belonging to bkpts. The bills were indorsed by E. & Co., & two of them were paid by the acceptors before the bkpcy.; the others, far exceeding in amount the sum of £179 19*s.* 11*d.*, did not become due until Nov. 16, & other later periods. An action for money lent, etc., was commenced on Nov. 2 by bkpts.' assignee, & on the 8th of the same month defts. proved against bkpts.' estate the whole of the bills, except the two which had been paid, deducting the balance of £179 19*s.* 11*d.*:—*Held:* defts., as indorsees of the bills, were entitled to set them off in the action.—ALSAGER *v.* CURRIE (1844), 12 M. & W. 751; 13 L. J. Ex. 203; 3 L. T. O. S. 59; 152 E. R. 1402.

Annotations:—**Refd.** Naoroji *v.* Chartered Bank of India (1868), L. R. 3 C. P. 444. **Mentd.** Astley *v.* Gurney (1868), 38 L. J. C. P. 111.

922. —— Bankruptcy of banker—Dishonour of bills—Credit balance of drawer.]—The drawer of bills of exchange accepted for value discounted them with his bankers, who afterwards became bkpt. before the bills arrived at maturity, having a cash balance belonging to the drawer in their hands. The bills were dishonoured:—*Held:* he was not entitled to have the cash balance in his favour applied in discharge of the amount due upon the unpaid bills, &, on payment of the difference, to have those bills delivered up to him, but the bank had a right to obtain payment of such bills from the acceptors, & leave the drawer to prove in respect of his cash balance in the usual way.—*Re* ROYAL BRITISH BANK, *Ex p.* BANES (1857), 28 L. T. O. S. 296.

923. —— Assignment of marginal receipts—Set-off for sums actually due.]—Where a bank, on discounting bills for a customer, places part of the money to a separate account, giving him "marginal receipts" for the money retained, & the customer afterwards assigns these marginal receipts to a third party, the bank are only entitled to a set-off for any sums actually due & payable to them up to the date of notice of the assignment.—JEFFRYES *v.* AGRA & MASTERMAN'S BANK (1866), L. R. 2 Eq. 674; 35 L. J. Ch. 686; 14 W. R. 889.

Annotations:—**Refd.** *Re* Agra & Masterman's Bank, *Ex p.* Asiatic Banking Corpn. (1867), 16 L. T. 162, L.JJ.; Higgs *v.* Northern Assam Tea Co. (1869), L. R. 4 Exch. 387. **Mentd.** Aberaman Ironworks *v.* Wickens (1868), 18 L. T. 305; Hill *v.* South Staffs. Ry. Co. (1874), L. R. 18 Eq. 154; *Re* Fastnedge, *Ex p.* Kemp (1874), 9 Ch. App. 383, L.J.

924. Advance to customer—Bankruptcy of customer—Balance on current account.]—A banking firm advanced A. £1,000 on a bond by crediting his account for that sum. The name of B., who was a partner, was made use of in trust for the banking firm, & the £1,000 was the proper money of the firm. A. became bkpt., & the bankers were indebted to him at the time in a larger sum on the balance of his cash account:—*Held:* the bankers were entitled to set off the £1,000 in an account current between them & A. as against his assignees in bkpcy.—CROSSE *v.* SMITH (1813), 1 M. & S. 545; 105 E. R. 204.

Annotations:—**Mentd.** Harris *v.* Richardson (1831), 4 C. & P. 522; Allen *v.* Edmundson (1848), 17 L. J. Ex. 291.

925. —— Death of customer before advance repayable.]—Testator borrowed £6,500 from his bankers, to be repaid on a specified day. He died before the day of payment, & at his death a sum of £629 was standing to his credit on his current drawing account:—*Held:* the £629 must be treated as a set-off against the sum due on the loan account & was not to be dealt with as an asset in the hands of the exors.—THOMAS *v.* HOWELL (1874), L. R. 18 Eq. 198; 30 L. T. 244; 22 W. R. 676.

Annotations:—**Distd.** Halse *v.* Rumford (1878), 47 L. J. Ch. 559. **Mentd.** *Re* Corcoran, Corcoran *v.* Riddell (1892), 62 L. J. Ch. 267; Nickall *v.* Fawkes (1905), 50 Sol. Jo. 126.

926. —— Surplus after realising security—Promissory note of customer—Bankruptcy of customer.]—P. & Co. having borrowed a large sum of the B. Bank deposited the paper, *i.e.*, promissory notes of the Govt. of Bengal, with the bank to a great amount, as collateral security, accompanied by an agreement in writing, authorising the bank, in default of repayment of the loan by a given day, "to sell the paper for the reimbursement of the bank, rendering to P. & Co. any surplus." Before default was made in the repayment of the loan P. & Co. were declared insolvents. At the time of the adjudication of insolvency the bank were also holders of promissory notes of P. & Co., which they had discounted for them before the loan transaction & the deposit of the co.'s paper. The time for repayment of the loan having expired, the bank sold the co.'s paper, the proceeds of which, after satisfying the principal & interest due on the loan, produced a considerable surplus. In an action by the assignees of P. & Co. against the bank to recover the amount of this surplus:—*Held:* the bank could not set off the amount of the two promissory notes.—YOUNG *v.* BANK OF BENGAL (1836), 1 Moo. Ind. App. 87; 1 Moo. P. C. C. 150; 1 Deac. 622; 18 E. R. 34, P. C.

Annotations:—**Distd.** Alsager *v.* Currie (1844), 12 M. & W. 751. **Consd.** Naoroji *v.* Chartered Bank of India (1868), L. R. 3 C. P. 444. **Refd.** Fearnley *v.* Wright (1840), 1 Scott, N. R. 657, Ex. Ch.; *Re* Daintrey, *Ex p.* Mant, [1900] 1 Q. B. 546, C. A. **Mentd.** Bittleston *v.* Timmis (1845), 1 C. B. 389.

927. Advance to two partners—Bankruptcy—Credit balance of one—Joint & separate estates.]—R. & C. carried on business as C. & Co. under a deed of partnership dated May 30, 1895, & in Oct., 1907, the L. Bank advanced to the partners jointly the

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them on such notes, & debtor having become insolvent before any amounts were received on such notes, compensation did not take place between the amount collected by the bank & the debt due to them.—EXCHANGE BANK OF CANADA *v.* CANADIAN BANK OF COMMERCE (1886), M. L. R. 2 Q. B. 476; 10 L. N. 110.—**CAN.**

r. *Advances on deposit of cheque—Failure of drawee bank—Cheque certified after suspension—Set-off against accruing liabilities.*]—On Nov. 15, 1887, the day before the suspension of the C. Bank, B., having sufficient funds to his credit, drew a cheque payable to A., who deposited same in the D. Bank, & obtained an advance upon it, & the D. Bank claimed upon it in the winding-up proceedings. On Nov. 23 the C. Bank marked the cheque good, debiting B.'s account & crediting the D. Bank with the amount thereof. Afterwards the liquidators claimed the right to set off certain subsequently accruing liabilities of B. against the cheque. After the first dividend had been paid A. filed a claim on the cheque, but the master allowed the claim only subject to the set-off:—*Held:* there was no right to set off as claimed.—*Re* CENTRAL BANK, CAYLEY'S CASE (1889) 17 O. R. 122.—**CAN.**

sum of £11,000. On Sept. 20, 1909, R. & C. purported to dissolve the partnership, & C. retired from the business. By the terms of the deed of dissolution C. assigned his interest to R., & an account was to be taken of C.'s share as on Dec. 31, 1909, & such share when ascertained was to be credited to him in the books of the firm & was to remain a loan to the firm for ten years, bearing interest at 5 per cent. per annum. It was, however, provided that, if on the taking of this account the assets of the firm were found to be insufficient to meet all its liabilities, C. was to pay to R. a half part of such deficiency. On Nov. 4, 1909, R. suspended payment, & he was adjudicated bkpt. on Jan. 7, 1910, & on July 25, 1910, C. was also adjudicated bkpt., & on Aug. 28, 1911, the two bkpcies. were consolidated. The trustee of the separate estate of R. claimed a sum of £1,657 6*s.* 7*d.* lying on current account at the L. Bank in the name of the firm, but the bank contended that they were entitled to set off against that claim the joint liability of C. & R. for £11,000 :—*Held :* upon the true construction of the deed of Sept. 20, 1909, there was a dissolution of partnership as from that date, & not as from Dec. 31, 1909, so that the trustee of the separate estate of R. was entitled to the sum of £1,657 6*s.* 7*d.* which was standing to the credit of the firm on Nov. 4, 1909.—*Re* JANE, *Ex p.* THE TRUSTEE (1914), 110 L. T. 556, C. A.

928. Accounts in name of principal & agent—Account of agent overdrawn—Credit balance of principal.]—Where a principal has a banking account in his own name & another in the name of an agent, should the agent's account be overdrawn & the principal's be in favour, the one may be set off against the other.—*Re* GODDARD (1843), 1 L. T. O. S. 361.

929. Several accounts—Credit balance on trust account—Overdrawn private account.]—T., a partner in a firm of solrs., opened three accounts with the W. B. Bank, kept under the heads of (1) office account, (2) deposit account, (3) private account. T. informed the bank that the deposit account would be mostly clients' money. It was later closed & transferred to the office account. The office account, into which clients' money was thereafter paid, was in credit, but the private account was overdrawn to a greater extent :—*Held :* the bank could set off the debit balance on the private account against the credit balance on the office account.—GREENWOOD TEALE *v.* WILLIAMS (WILLIAM), BROWN & CO. (1894), 11 T. L. R. 56.

930. Set-off or counterclaim—Balance on current account—Right to set off undue promissory note.]—In an action by an administrator for the balance of the intestate's banking account at the time of his death, defts. in their statement of defence sought to avail themselves either by way of set-off or of counterclaim of a debt due to them from the intestate as one of several makers of a promissory note for £1,000 which did not become due until after the intestate's death. Reply, that before action an order was made in an administration suit in the Ch. Div. to take an account of the debts & liabilities affecting the personal estate of deceased, of which defts. before action had notice, & that under Law of Property Amendment Act, 1860 (c. 38), s. 14, equity would restrain any proceedings on the note until the account had been taken :—*Held :* the claim in respect of the promissory note could not be relied on as a set-off, &, in accordance with the practice in equity, defts. must be restrained from setting it up by way of counterclaim & be left to prove for it in the administration suit. — NEWELL *v.* NATIONAL PROVINCIAL BANK OF ENGLAND (1876), 1 C. P. D. 496 ; 45 L. J. Q. B. 285 ; 34 L. T. 533 ; 40 J. P. 376 ; 24 W. R. 458 ; 3 Char. Pr. Cas. 47.

Annotations :—**Refd.** Macdonald *v.* Carrington (1878), 48 L. J. Q. B. 179 ; Hallett *v.* Hallett (1879), 13 Ch. D. 232 ; *Re* Gregson, Christison *v.* Bolan (1887), 36 Ch. D. 223 ; Watkins *v.* Lindsay (1898), 67 L. J. Q. B. 362.

SECT. 23.—GUARANTEES TO SECURE ADVANCES OR BALANCE OF ACCOUNT.

See, generally, GUARANTEE.

931. Overdraft by customer—Presumption.]—No surety asked to guarantee a banking account is entitled to assume that the customer of the bank has not been in the habit of overdrawing ; the proper presumption in most instances is that he has been doing so, & wishes to do so again. That is a legitimate carrying on of business, & that is what the surety is asked to guarantee (FARWELL, L.J.).—LONDON GENERAL OMNIBUS CO., LTD. *v.* HOLLOWAY, [1912] 2 K. B. 72 ; 81 L. J. K. B. 603 ; 106 L. T 502, C. A.

Annotation :—**Refd.** National Provincial Bank of England *v.* Glanusk, [1913] 3 K. B. 335.

932. Continuing guarantee—Consideration—Termination.]—*Semble :* where a guarantee is given to secure a running account at a banker's, the consideration is supplied from time to time, & unless the guarantee stipulates to the contrary,

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929 i. *Several accounts—Credit balance on new account—Overdrawn old account—Special agreement.*]—A bank agreed with the directors of a co., which had an overdrawn account, to close that account, & open a No. 2 account. The bank was informed that this was done for the purpose of winding up the business of the co., which was in difficulties. Money was lodged in the No. 2 account & cheques drawn against it. The co. afterwards went into voluntary liquidation. The bank declined to allow the liquidator to draw against the No. 2 account, & claimed to set off the credit balance on that account against the debit balance of the No. 1 account :—*Held :* there was a special arrangement which prevented the bank exercising its ordinary rights of setting off one account of a customer against another.—*Re* JOHNSON & CO., LTD., [1902] 1 I. R. 439.—**IR.**

929 ii. —— —— —— ——.]—A co., being in debt to their bankers on their current account, agreed to open another current account with the bank, & the bank agreed that they "would not appropriate any of the funds, which might at any time be lying at the credit of the No. 2 account, in reduction of the debt due to the bank on the overdraft on the current account, without your knowledge & consent" :—*Held :* the agreement did not deprive the bank of their right in the winding up of the co. to set off the balance standing to the credit of the No. 2 account against the overdraft on the other account, & to prove for the difference in the winding-up proceedings.—BRITISH GUIANA BANK *v.* OFFICIAL RECEIVER (1911), 104 L. T. 754, P. C.—**BRITISH GUIANA.**

a. *Set-off of money at one branch against dishonoured acceptance at another.*]—A bank has a right at one of its branches, where money has been paid in to the credit of a customer without appropriation to set off a dishonoured acceptance of the customer held by the bank at another of its branches.—NATIONAL BANK OF NEW ZEALAND *v.* HESLOP (1882), 1 N. Z. L. R. 47.—**N.Z.**

b. *Claim or fraud — Overdrawn account of customer—Set-off after judgment.*]—Applt. sued resp. bank for damages for fraud. The bank claimed in reconvention £400 in respect of applt.'s overdrawn account. In his plea to the claim in reconvention applt. said he was indebted in respect of the amount of the overdraft, but in a later paragraph he said the overdraft was not yet due & payable by reason of his claim in convention. Applt., not being satisfied with the affidavit of discovery made by the bank, sought an order of further & fuller discovery, which, on appeal, was granted with costs. The taxed costs amounted to £165, but the bank refused to pay that amount on the ground that such indebtedness was extinguished by set-off :—*Held :* as the overdraft of £400 was not involved in the claim in convention, & as applt.'s claim was unliquidated, it could not be set off against the claim in reconvention, & as applt. had, in fact, admitted his indebtedness on the overdraft, his claim for costs was extinguished by set-off against the overdraft.—RAINSFORD *v.* AFRICAN BANKING CORPN. (1912), C. P. D 1106.—**S. AF.**

Sect. 23.—Guarantees to secure advances or balance of account. Sect. 24.]

the guarantor may terminate it at any time by notice.—LLOYD'S *v.* HARPER (1880), 16 Ch. D. 290; 50 L. J. Ch. 140; 43 L. T. 481; 29 W. R. 452, C. A.

Annotations:—**Refd.** *Re* Crace, Balfour *v.* Crace, [1902] 1 Ch. 733. **Mentd.** *Re* Flavell, Murray *v.* Flavell (1883), 25 Ch. D. 89, C. A.; Shepheard *v.* Bray, [1906] 2 Ch. 235.

933. Whether surety released—Customer credited with full amount—No advances.]—A surety by promissory note for a floating balance due to bankers from a customer:—*Held:* released by the bankers crediting the customer with the full amount of the note, without advancing the money at the time.—ARCHER *v.* HUDSON (1844), 7 Beav. 551; 13 L. J. Ch. 380; 8 Jur. 701; 49 E. R. 1180; *affd.* (1846), 15 L. J. Ch. 211, L.C.

Annotations:—**Mentd.** Blackie *v.* Clark, Cock *v.* Clark (1852), 15 Beav. 595; Espey *v.* Lake (1852), 10 Hare, 260; Hoghton *v.* Hoghton (1852), 15 Beav. 278; Baker *v.* Bradley (1854), 2 Sm. & G. 531; Bury *v.* Oppenheim (1859), 26 Beav. 594; Dettmar *v.* Metropolitan & Provincial Bank (1863), 1 Hem. & M. 641; Turner *v.* Collins (1871), 7 Ch. App. 334, n.; Parfitt *v.* Lawless (1872), L. R. 2 P. & D. 462; Bainbrigge *v.* Browne (1881), 18 Ch. D. 188; De Witte *v.* Addison (1899), 80 L. T. 207, C. A.; Powell *v.* Powell, [1900] 1 Ch. 243.

934. —— Advances beyond agreed amount—Limitation of liability.]—If a bond be given by one as surety to secure the payment of the advances made by a banker to his customer, the bond is not altogether avoided as against the surety by the banker advancing beyond the agreed amount, unless it clearly appear by the instrument that such was the intention of the parties; but the liability of the surety is limited to the agreed amount.

Deft. as surety executed a bond conditioned for the payment of any balance due from the principal not exceeding £1,000, together with interest thereon. He consented to do so upon receiving from the banker a memorandum that the advance to the principal was to be limited to £950, & that the surety was to be informed if the amount with interest should reach £1,000, & not be reduced within one month:—*Held:* the only effect of such memorandum was to limit the liability of the surety in point of amount, & a violation by the banker of the stipulations contained in it afforded no defence either at law, or upon equitable grounds, to an action against the surety upon the bond.—GORDON *v.* RAE (1858), 8 E. & B. 1065; 27 L. J. Q. B. 185; 31 L. T. O. S. 55; 4 Jur. N. S. 530; 120 E. R. 396.

Annotation:—**Mentd.** Price *v.* Kirkham (1864), 3 H. & C. 437.

935. —— Novation—Release of principal debtor—Liability for balance of debt.]—A mtge., which contained no covenant to pay the debt, provided that defts. should be at liberty, without thereby affecting their rights therein, at any time to "vary, exchange or release any other securities held or to be held by defts. for or on account of the money thereby secured or any part thereof, & to compound with, give time for payment of, & accept compositions from & make any other arrangements with debtors or any of them." In 1908 defts. received a letter from the secretary of F. Co., which was formed under a general arrangement made with all the creditors of P. Brothers, of which arrangement pltf. had approved, to take over the assets & liabilities of P. Brothers, offering defts. debenture-stock therein for the amount of their debt from P. Brothers, with a bonus of 25 per cent. At the foot of the letter was the following statement: "Amount of debt £3,530, less value of security held £1,630—£1,900, 25 per cent. bonus £475, total £2,375." The £1,630 was the value put upon securities held by defts. on the property of the firm. There was inclosed an application form headed, "Form of request, the F. Company," & continuing: "Please allot to me debenture stock to the value of £2,375, being the amount of my claim against P. Brothers. I agree to accept such debenture stock in full discharge of my claims against P. Brothers." Defts. signed the form of request, & stock of the nominal value of £2,375 was allotted to them. Pltf. claimed that nothing was due to defts. from P. Brothers & that he was discharged from any liability to defts. under the mtge. or otherwise, & asked for an order that defts. should reconvey to him the mtged. properties:—*Held:* (1) the proviso in the mtge. preserved the rights of defts. against the surety, & his property was not released; (2) the debentures were accepted in accord & satisfaction of the £1,900, but the £1,630 was still a charge on the mtged. property.—PERRY *v.* NATIONAL PROVINCIAL BANK OF ENGLAND, [1910] 1 Ch. 464; 79 L. J. Ch. 509; 102 L. T. 300; 54 Sol. Jo. 233, C. A.

936. Surety also partner in bank—Payment of debt—Rights against principal.]—Pltf., a shareholder in a banking co., became a surety for advances to be made by the co. to deft. Deft. afterwards executed a composition deed, to which pltf. & the banking co. were parties, whereby he assigned his property to trustees for the benefit of his creditors, & this deed contained a stipulation for a reserve of remedies against sureties for deft. Pltf. having been compelled to pay the debt to the banking co., in an action for money paid:—*Held:* he was entitled to recover back the amount from deft.—KEARSLEY *v.* COLE (1846), 16 M. & W. 128; 16 L. J. Ex. 115; 8 L. T. O. S. 234; 153 E. R. 1128.

Annotations:—**Distd.** Owen *v.* Homan (1851), 3 Mac. & G. 378. **Apld.** Price *v.* Barker (1855), 4 E. & B. 760. **Consd.** Cragoe *v.* Jones (1873), L. R. 8 Exch. 81. **Refd.** Webb *v.* Hewitt (1857), 3 K. & J. 438; Bateson *v.* Gosling (1871), L. R. 7 C. P. 9. **Mentd.** *Re* Wolmershausen, Wolmershausen *v.* Wolmershausen (1889), 62 L. T. 541.

See, further, CONTRACT; GUARANTEE.

SECT. 24.—CHARGES AND COMMISSION.

937. Agreement to pay commission—Debit in pass-book—Acquiescence of customer.]—Since it is usual to charge commission at a lower or higher rate according to the amount of business done, acquiescence in a charge in the pass-book of a higher rate, or a lump sum, for one half-year is no proof of an agreement for similar charges in future.—WILLIAMSON *v.* WILLIAMSON (1869), L. R. 7 Eq. 542; 20 L. T. 389; 17 W. R. 607.

Annotation:—**Mentd.** Barfield *v.* Loughborough (1872), 8 Ch. App. 1, L.C.

Pass-book, generally, *see* Sect. 13, *ante.*

938. —— —— —— Custom.]—A customer from time to time for a period of ten years received from his bankers his pass-book, containing charges for interest & commission, & acknowledged that the accounts were correct. After ten years the cus-

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PART II. SECT. 24.

c. *Charge on cheques drawn against cash credit—Interest on credit—Usury.*]—In an action on a bond, penalty £10,000, given to secure a cash credit of £5,000, deft. pleaded usury in that pltfs. charged him a quarter per cent. on all cheques drawn on such account besides the usual interest of six per cent. The charge was made on cheques drawn on all deposits as well as such cheques:—*Held:* the transaction was not usurious.—COMMERCIAL BANK *v.* CAMERON (1858), 9 C. P. 378.—**CAN.**

tomer brought an action to reopen the account on the ground of overcharges for commission, & evidence was given, on behalf of the bankers, that there was a custom or usage among bankers in the north of England that each half-year, when a balance was struck & a "rest" made & interest chargeable thereon, there was a new transaction, on which commission was chargeable as well as interest:—*Held:* having regard to the customer's acquiescence, & the above evidence of custom or usage, his action failed.—SPENCER *v.* WAKEFIELD (1887), 4 T. L. R. 194.

939. Right to charge commission—Discounting bills for customer.]—E., a bkpt., carrying on business in London, got J. & Co., country bankers, to discount bills on persons in London for him, they charging him 5 per cent. interest & commission at the rate of 2*s.* 6*d.* per month for the time the bills had to run:—*Held:* the bankers could prove for their commission, unless the bills were sent into the country merely colourably.—*Ex p.* JONES (1810), 17 Ves. 332; 34 E. R. 128.

Annotation:—**Refd.** *Re* Watson, *Ex p.* Henson (1815), 1 Madd. 112.

940. —— Banker as executor.]—An exor., who is one of a banking firm, cannot charge the ordinary banker's commission against his testator's estate.—HEIGHINGTON *v.* GRANT (1840), 5 My. & Cr. 258; 10 L. J. Ch. 12; 4 Jur. 1052; 41 E. R. 369, L.C.; *subsequent proceedings* (1842), 11 L. J. Ch. 171.

Annotations:—**Mentd.** Jesus College *v.* King (1839), 3 Y. & C. Ex. 662; A.-G. *v.* Carrington (1843), 6 Beav. 454; Hardy *v.* Hull (1853), 17 Beav. 355; Feltham *v.* Turner (1870), 23 L. T. 345; Knight *v.* Purssell (1879), 49 L. J. Ch. 120; Saner *v.* Bilton (1879), 48 L. J. Ch. 545.

941. —— Interest on advances—Usury.]—G. & Co., bankers in London, opened a banking account with defts.' house of trade in Manchester, on an agreement that they should receive 5 per cent. besides interest on all moneys paid & advanced by them. Defts. had also another house of trade in London, & the bills drawn by them upon G. & Co. were dated & signed at Manchester, but were filled up in London, & carried from the London house to G. & Co., & were payable in London, & the letters of advice were dated London, & also sent to G. & Co. from the London house. Evidence was given to show that the account was opened as a country account, by way of getting a commission upon what was in reality a town account:—*Held:* commission was lawful, as for trouble in transacting money negotiations a banker might as well receive commission as a factor might for trouble in making sales, etc., & the only question was, whether it was reserved as a colour for usury upon a loan of money, or for trouble.—CURTIS *v.* LIVESEY (1790), cited 4 M. & S. at p. 196; 105 E. R. 807.

942. Undertaking to accept bills — Bills dishonoured after acceptance—Liability of acceptor for charges paid.]—PREHN *v.* ROYAL BANK OF LIVERPOOL, No. 752, *ante.*

943. —— —— —— Re-exchange.]—J. Co. in England agreed with the L. Bank in Peru to grant it a continuing credit upon terms entitling the bank to draw bills on London on the co. at 90 days. The bank undertook to remit cover before the due date of the acceptances & paid the co. a commission for accepting & paying them. Business proceeded on this footing until the co. stopped payment, when the bank were creditors without any allowance for re-exchange for a large sum on which they had received dividends. In addition the bank claimed to prove for £10 per cent. for re-exchange on the amount of bills sent back to Peru, which they had had to pay & which they were entitled to charge according to the laws of Peru:—*Held:* the amount claimed was reasonable, & the bank were entitled to prove for it.—*Re* GENERAL SOUTH AMERICAN CO. (1877), 7 Ch. D. 637; 47 L. J. Ch. 67; 37 L. T. 599; 26 W. R. 232.

Annotations:—**Folld.** *Re* Gillespie, *Ex p.* Robarts (1886), 18 Q. B. D. 286, C. A. **Refd.** Banque Populaire de Bienne *v.* Cavé (1895), 1 Com. Cas. 67.

944. Improper charges — Dishonour of cheque caused by—Damages.]—Defts. discounted a bill for pltf. of which he was the drawer. The bill was dishonoured, &, as a result of negotiations between pltf. & defts., the latter sued the acceptors. Pltf. subsequently provided for the bill, but a dispute arose as to whether he should pay £2 3*s.* 10*d.*, the costs of defts.' solrs. Defts. debited pltf.'s account with this sum, & if entitled to do so, they were justified in refusing to pay a cheque of pltf., which they had dishonoured:—*Held:* pltf. was entitled to damages & defts. had no right without his consent to debit his account with such a charge.—HOLL *v.* MERCANTILE & EXCHANGE BANK, LTD. (1865), Grant on Banking, 6th ed., p. 178, n.

945. —— Usurious discount & commission — Mortgage to secure balance of account.]—Pltf. gave a mtge. of land to defts., bankers, to secure the balance of his banking account with interest. On defts. threatening to sell the land, pltf. paid the sum demanded as the balance by defts. Pltf. then filed a bill for an account, not alleging usury, but alleging improper charges for discount & commission, & a decree was made directing an account of all dealings between pltf. & defts., & inquiries as to the charges for interest & commission. The master found that on taking the account defts. had been overpaid £112, that certain sums above £5 per cent. had been charged for discount on bills, & certain sums for commission. No exceptions were taken to the report. Upon the cause coming on for further directions, pltf. claimed that several charges of defts. for discount & commission should be disallowed as usurious:—*Held:* at this stage of the proceedings, pltf. was precluded from taking the objection. *Qu.:* whether a customer, having given to a banker a mtge. of land to secure the balance due from him, can object to any usual charges as between banker & customer, on the ground of usury.—THOMAS *v.* COOPER (1855), 3 Eq. Rep. 417; 24 L. T. O. S. 330; 3 W. R. 295, L.JJ.

946. —— Banking account opened for limited company—Misappropriation of company's funds.]—A limited co. paid its bankers a sum of £5,000 as their "banking commission" in consideration of their opening an account & receiving subscriptions for its shares. A balance ranging from £30,000 to £70,000 stood to the co.'s credit between Feb. 27 & June 29, on which day the £5,000 was paid:—*Held:* the payment was a gross misapplication of the funds of the co. & could not be justified as a fair charge for keeping a troublesome account.—*Re* IMPERIAL LAND CO. OF MARSEILLES, *Re* NATIONAL BANK (1870), L. R. 10 Eq. 298; 39 L. J. Ch. 331; 22 L. T. 598; 18 W. R. 661.

Annotations:—**Refd.** Spiller *v.* Paris Skating Rink Co. (1878), 27 W. R. 225. **Mentd.** *Re* General Provident Assce., *Ex p.* National Bank (1872), L. R. 14 Eq. 507; Carter's Case (1886), 31 Ch. D. 496; *Re* Western Counties Steam Bakeries & Milling Co., [1897] 1 Ch. 617, C. A.; *Re* Carpenter & Bristol Corpn., [1907] 2 K. B. 617, C. A.

947. —— Presentment of bill to foreign bank—Bill dishonoured—Liability of acceptor.]—Deft. was sued as acceptor of a bill of exchange drawn in Switzerland by A. & payable in London. The bill had been indorsed to pltfs. & dishonoured. Pltfs. claimed material charges & interest & also 2*s.* 6*d.* for banker's commission charged for presenting the bill to a foreign bank through their agent in London:—*Held:* there being no special contract, the commission was not recoverable.—BANQUE POPULAIRE DE BIENNE *v.* CAVÉ (1895), 1 Com. Cas. 67.

SECT. 25.—**FAILURE OF BANK.**

948. Payment to agent of bank—Rights of customer.]—A customer paid in on Jan. 3 notes & cash to the Glasgow agent of M. & Co. for the purpose of being remitted to London to retire an acceptance of his to the same amount. On the previous day the London house of M. & Co. had stopped payment. On the 4th the Glasgow agent transmitted the notes to the Edinburgh agent:—*Held:* as between M. & Co.'s assignees & the customer, the assignees must deliver up the notes to the customer or pay over their amount.—*Re* MABERLY, *Ex p.* WYLIE (1833), 3 Deac. & Ch. 82.

949. —— ——.]—A London banker, having a branch bank at Edinburgh, stopped payment in London, & after the stoppage, but before notice, a customer paid to the agent, who had the management of the bank at Edinburgh, promissory notes to be remitted to London. At that time the banker was indebted to the agent, & the agent, after the notice, in pursuance of a special direction from the banker, received money from other agents for the purpose of forwarding to London. A fiat issued against the banker, at which period the moneys in the hands of the agent were more than sufficient to cover the amount due to him from the banker, but the amount which he had at the time of notice of the stoppage, including the notes, was insufficient. The customer required the agent to return the bank-notes, which he did not do, & the agent refused to pay any part of the money to the assignees. The Ct. of Session ordered the agent to pay, without prejudice, the balance of moneys, after deducting in the meantime the amount due to him, to the assignees, which he did, & afterwards, it appearing clear that he was not entitled to retain any part of the sum which he received from the other agents after notice, he paid to the assignees the difference between the sum paid to the assignees under the order of the Ct. of Session & the amount so received from the other agents:—*Held:* the assignees of the banker must refund to the customer the amount paid in by him.—*Re* MABERLEY, *Ex p.* CUNNINGHAM (1833), Mont. & B. 269; 3 Deac. & Ch. 58; 2 L. J. Bcy. 58, Ct. of R.; *affd. sub nom. Re* MABERLY, *Ex p.* BELCHER, Mont. & B. 286, L.C.

Annotations:—**Consd.** *Re* Maberly, *Ex p.* Solomons (1833), 2 L. J. Bcy. 62. **Distd.** *Re* Nash, *Ex p.* Clutton (1850), Fonbl. 167. **Refd.** *Re* Maberly, *Ex p.* Wylie (1833), 3 Deac. & Ch. 82; *Re* Maberly, *Ex p.* National Bank of Scotland (1834), 4 Deac. & Ch. 32.

950. *S. P. Re* MABERLY, *Ex p.* SOLOMONS (1833), Mont. & B. 308; 3 Deac. & Ch. 77; 2 L. J. Bcy. 62, Ct. of R.; *affd.* 2 L. J. Bcy. 63, n., L.C.

Annotation:—**Refd.** *Re* Maberly, *Ex p.* National Bank of Scotland (1834), 1 Mont. & A. 644, Ct. of R.

951. —— ——.]—A. paid money to the London agents of a country bank to his own credit with the country bank. On the following day the country bank stopped payment, of which fact the London agents received notice before they advised the payment:—*Held:* the payment to the London bankers was a payment to their correspondents in the country, & A. was not entitled to recover the money back from the London agents as money had & received.—WILLIAMS *v.* DEACON (1849), 4 Exch. 397; 13 L. T. O. S. 286; 154 E. R. 1267, Ex. Ch.

952. —— —— **Specific appropriation.**]—On the failure of debtors, who carried on business as bankers in the country, a claim was made by certain customers that they were entitled to have paid in full out of money in the hands of the London agents of debtors three cheques drawn by them upon debtors' bank in favour of third parties, & also a sum of £1,043, being the amount of cash & London & country cheques paid in to the London agents of debtors by the customers to the credit of their current account with debtors shortly before the receiving order:—*Held:* (1) the question depended on whether the money in the hands of the London agents of debtors was held by them specifically appropriated in favour of the customers, & unless debtors through their London agents received those sums, not as bankers in the ordinary course but as the agents of the customers for collection & specific appropriation, the customers could have no claim to the moneys; (2) none of the sums claimed were specifically appropriated when paid in, nor was there anything in the course of business with the London agents which amounted to an appropriation, & the claim must be disallowed.—*Re* MILLS, BAWTREE & CO., *Ex p.* STANNARD (1893), 10 Morr. 193.

Banking agents, generally, *see* Sect. 1, sub-sect. 3, *ante.*

953. Deposit for specific purpose—Specific appropriation.]—A bill lodged in a banker's hands to be applied for a particular purpose, but not so applied, is claimable on the banker becoming bkpt.—*Re* ASPINALL, *Ex p.* AIKEN (1817), 2 Madd. 192; 56 E. R. 306.

954. —— ——.]—The customer of a country bank having a sum of £942 standing to his account, paid in a further sum of £707, with a written direction that £500 of that sum should be forwarded to another bank to meet a bill to become due. A sum of £500 was sent as directed, but before the bill became due the country bank ceased to carry on business:—*Held:* the £500 was specifically appropriated, & belonged to the customer of the bank, & not to the general creditors.—FARLEY *v.* TURNER (1857), 26 L. J. Ch. 710; 29 L. T. O. S. 257; 3 Jur. N. S. 532; 5 W. R. 666.

Annotation:—**Distd.** *Re* Barned's Banking Co., Massey's Case (1870), 39 L. J. Ch. 635.

955. —— ——.]—When a person pays money into a bank to be applied in a specific manner, & the banker stops payment before taking any step towards applying it to the purpose, the payer cannot recover the money paid, but has merely a right of proof as a general creditor.—*Re* BARNED'S BANKING CO., LTD., MASSEY'S CASE (1870), 39 L. J. Ch. 635; 22 L. T. 853; 18 W. R. 818.

PART II. SECT. 25.

953 i. *Deposit for specific purpose—Specific appropriation.*]—A customer gave directions to a bank to utilise the money standing to his credit for a certain purpose, & the officers of the bank, when the customer called at the bank, informed him that his instructions would be carried out in due course. The bank became insolvent before the directions were so carried out:—*Held:* (1) (MUNRO, J.) by virtue of the direction by the customer, a fiduciary relationship was established between the customer & the bank; (2) (ABDUR RAHIM, J.) the mere promise to carry out the customer's directions, without doing anything to appropriate the money, was not sufficient to create a fiduciary relationship.—MADRAS OFFICIAL ASSIGNEE *v.* LUPPRIAN (1909), I. L. R. 33 Mad. 145.—**IND.**

d. *Purchase of draft on foreign branch—Payment by cheque on overdrawn account—Payment of overdraft & draft by customer—Fiduciary relationship.*]—Where a customer of a banking co. receives from it a draft payable to his creditor at its foreign branch, pays for the draft by a cheque upon his already overdrawn account with the co., & forwards it to his creditor, but before the draft matures the co. goes into liquidation & refuses to pay the draft, he cannot, by reason of the fact that he pays the amount of his overdraft at the time of liquidation without knowledge of the dishonour of the draft, & afterwards pays the creditor the amount of the draft, obtain a refund by the liquidator of the money paid by him to the co. for the draft in priority to the other creditors of the co. The circumstances in which the draft was obtained do not create a fiduciary relation or special contract between the banking co. & its customer so as to entitle the customer to such refund.—*Re* CITY OF MELBOURNE BANK, LTD., FERGUSON'S CASE (1897), 23 V. L. R. 78, 87, n.—**AUS.**

956. —— ——.]—A banker in London was in the habit of accepting for the accommodation of a customer, a merchant in Sweden, bills drawn on him by the merchant, who used to remit other bills to the banker to put him in funds to meet the acceptances when they became due. The banker, with the knowledge of the customer, generally discounted the remitted bills before they fell due, & paid the proceeds to his current account with his own bankers. He rendered yearly accounts to the customer, & in those accounts he credited him with interest on the amounts of the remitted bills from their due dates, & debited him with interest on the amounts which he paid in discharge of the acceptances. The amounts of the bills remitted by the customer did not always exactly correspond with the amounts of the acceptances which they were intended to cover. In Apr., 1883, the banker accepted a bill for £450 drawn on him by the customer, & maturing on July 21. On July 13 the customer sent to the banker a bill for £450 upon W., of London, payable at sight. This bill was received by the banker on July 17, & the proceeds were paid to his bankers & carried to his current account. On July 20 the banker stopped payment. His acceptance for £450 was dishonoured the next day, & the customer had to pay it. In Nov., 1883, the banker filed a liquidation petition:—*Held:* the remitted bill for £450 was not specifically appropriated to meet the banker's acceptance for £450, &, as the amount of the bill had been received by the banker before the commencement of the liquidation, the customer was not entitled to the proceeds in specie, but could only prove for the amount as a debt in the liquidation. *Semble:* if the remitted bill had remained in specie at the commencement of the liquidation the customer would, on retiring the acceptance, have been entitled to have the bill returned to him.—*Re* BROAD, *Ex p.* NECK (1884), 13 Q. B. D. 740; *sub nom. Re* NECK, *Ex p.* BROAD, 54 L. J. Q. B. 79; 51 L. T. 388; 32 W. R. 912, C. A.

957. Collection of money for customer—Money received & customer advised—Rights of customer.]—A banking co. were employed as agents to collect money & to remit it to their employers. The bank received the money in cash, placed it with the other cash of the bank, & informed their employers that the money had been remitted, but before the money was actually remitted the bank went into liquidation:—*Held:* the money was part of the general assets of the bank, & the employers of the bank were not entitled to be paid in priority to the other creditors.—*Re* WEST OF ENGLAND & SOUTH WALES DISTRICT BANK, *Ex p.* DALE & CO. (1879), 11 Ch. D. 772; 48 L. J. Ch. 600; 40 L. T. 712; 27 W. R. 815.

Annotations:—**Dbtd.** *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A. Looking at the authorities to find out the principle, you do not find out any such distinction established as that suggested by Fry, J. The learned judge conceived himself bound by some decisions of the Appeal Ct. to decide against his own opinion (JESSEL, M.R.). **Expld. & Distd.** Crowther *v.* Elgood (1887), 34 Ch. D. 691, C. A.

958. Cheque handed to bank—Creation of trust—Rights of customer.]—P. received on behalf of foreign principals a cheque drawn on an English bank, which on the same day he handed to A., a banker, "to keep the money for him in trust," & received a receipt, which stated that the cheque was received "for collection." Afterwards P. received from A. two sums which were required to send abroad. A receiving order was subsequently made against A., on which he was adjudicated bkpt., & his trustee claimed the balance of the proceeds of the cheque:—*Held:* as the cheque was handed to A. in trust, the relationship of banker & customer did not exist between the parties, & the trustee was not entitled to the money:—*Re* BROWN, *Ex p.* PLITT (1889), 60 L. T. 397; 37 W. R. 463; 6 Morr. 81.

959. Payment of money to be remitted to India—Failure of bank—Creation of trust.]—Bkpts. were bankers carrying on business in London & India. Two sums of money were paid to them in London to be remitted through their Bombay branch to a third party about to proceed to India. Neither the person who paid the money, nor the person to whom it was to be remitted, was a customer of bkpts. The receiving order was made before the arrival at Bombay of the person to whom the money was to be remitted:—*Held:* (1) no trust was constituted, & the person who paid the money had no right to be paid in full in priority to the other creditors; (2) the ordinary relationship of debtor & creditor was established between bkpts. & the person to whom the money was to have been remitted.—*Re* WATSON & CO., *Ex p.* LLOYD (1904), 91 L. T. 665.

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957 i. *Collection of money for customer—Creation of trust—Rights of customer.*]—Where moneys are intrusted to a banker to collect & pay same over, a trust is created, &, in the event of the insolvency of the banker before the moneys have been paid over, payment may be demanded out of the estate.—UNION BANK TRUSTEES *v.* COMMERCIAL BANK TRUSTEES (1896), 7 Nfld. L. R. 897.—**NFLD.**

959 i. *Payment of money to be remitted to England—Creation of trust.*]—If a bank in Australia have received money as agents & undertaken to remit it & pay it in England on a certain date, & have not sent the actual cash, but have directed their London agent to pay it on such date, & before that date arrives go into liquidation, the ordinary rules as to following trust moneys apply, & the money will be directed to be paid by the bank to their principal in priority to the claims of creditors of the bank.

If a person, having money to his credit deposited in such bank to his current account, has drawn a cheque on that account & sent it to the bank with a direction to remit the money represented by it less exchange, & to pay it on a certain date in London, & the bank have not sent the actual cash, but after debiting the customer with the amount of the cheque have directed their London agent to pay the amount less the exchange, & to debit the bank in Australia with the amount, & before the amount is paid in London the bank go into liquidation, the bank do not become the agents of the customer, but remain as bankers who have borrowed their customer's money, & the customer cannot follow the money, but must prove for it as a creditor in the liquidation.

Money paid to a bank for remission to England & payment there on a particular day by a cheque on another bank, which has been taken into account through the daily clearing-house of the various banks, although the amount in cash has not actually passed to the bank, & money similarly paid to a bank by a cheque on a customer's account at that bank, which has been debited to the customer's account by the bank, is money which may under the ordinary rule of following trust moneys in a liquidation be followed if the bank go into liquidation before the money is payable or paid in England, although the bank have not actually sent to England any cash representing the amounts, but have merely directed their London agent to pay the amounts there on the days when they are due.—*Re* CITY OF MELBOURNE BANK, LTD., *Ex p.* MELBOURNE & METROPOLITAN BOARD OF WORKS, *Ex p.* THE CITY OF PRAHRAN (1895), 21 V. L. R. 143, 563.—**AUS.**

e. Cheque accepted as payment—Failure before presentment—Rights of judgment creditor.]—Deft. sent a transcript of the entry of a judgment recovered by pltf. to M., division ct. clerk of E., with directions to remit the money by post-office order or by cheque. M. having recovered the money, paid it into his private account at B. Brothers, private bankers, & sent their cheque to deft. for the amount, which deft. acknowledged in the following words: "Received from the division ct. clerk, W., $70.40." Before the cheque was presented B. Brothers failed, & pltf. sued deft. for the money:—*Held:* the cheque & receipt operated as payment between M. & deft., & pltf. entitled to recover the money from deft. as money received to his use.—MCLEISH *v.* HOWARD (1878), 3 A. R. 503.—**CAN.**

f. —— —— *Laches.*]—F., in settlement of a claim for material supplied, sent to R. a cheque, drawn on D. Co. R. did not present the cheque for five days. Upon presentation it was dishonoured, D. Co. having suspended payment:—*Held:* (1) if D. Co. was an incorporated bank or a savings bank so as to come within the definition of bank contained in Bills of Exchange Act, F. was discharged as to the amount of actual damage suffered by him through the delay in presentation, & R., under s. 166 (*b*), became a creditor, in lieu of F., of D. Co. to that amount; (2) if D. Co. was not a "bank" within the above definition, not only was F. discharged in respect of the bill, but he was also

Sect. 25.—Failure of bank.]

960. Cheques received for specific purpose—Drawn on overdrawn accounts—Payment to bank's assignees by drawers—Recovery by remitting bank.]—Bkpts. were bankers trading under the name of the N. Bank. Petitioners were also bankers, carrying on business at Exeter under the name of the D. Bank. On July 14, 1841, petitioners sent to bkpts. three cheques drawn upon bkpts. by three of their customers named L., P., & R., inclosed in a printed letter saying, "We enclose sundries, value £295 7*s.*—for our credit with C. & Co., bankers, London." The amounts for which the cheques were drawn were £200, £3 19*s.*, & £13 12*s.* The accounts of all the three customers were overdrawn at the time, but with regard to L., whose account was overdrawn to the amount of £600, bkpts. had security of his of greater value than that sum together with the amount of the £200 cheque. The cheques had been paid into petitioners' bank by customers of theirs, who had received them from L., P., & R. No acknowledgment was sent by bkpts. on receiving the cheques, but the amounts were entered to the debit of L., P., & R. respectively & to the credit of petitioners. The cheques themselves were cancelled, *i.e.*, marked in the same manner on the face of them as was usual with paid cheques; but no remittance was made to C. & Co. or to petitioners, nor in fact did any money pass on the occasion. On July 17 bkpts. stopped payment, their bank not having opened after the evening of July 16. The fiat issued on July 20. After the bkpcy. the assignees called on L., P., & R. to pay the sums with which they were respectively debited in their overdrawn accounts, including the amount of the cheques in question, & received from them the three sums. Petitioners sought to be paid in full the amount of the three cheques on the ground that they were remitted for a special purpose which had not been fulfilled:—*Held:* petitioners were entitled to an order for the three sums.—*Re* WISE, *Ex p.* COLE (1843), 3 Mont. D. & De G. 189, Ct. of R.

961. Purchase of bill from bank—Statement by bank—Equitable assignment—Specific appropriation—Estoppel.]—Pltf. purchased from the N. Bank a bill drawn by them upon the L. Bank, & was told by the persons representing the N. Bank at the time of the purchase that the L. Bank had, or would

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discharged from his liability on the original consideration for which it was given.—REVELSTOKE SAWMILL CO., LTD. *v.* FAWCETT (1915), 8 W. W. R. 477.—**CAN.**

g. *Cheques exchanged for accommodation—Failure of one bank—Rights of holder in due course.*]—A., a private banker, exchanged cheques with B. for mutual accommodation. A. used B.'s cheques. A cheque of A.'s had been dishonoured, & the holder called at A.'s office on the same day, & a clerk in the ordinary course of business gave the holder B.'s cheque to pay the dishonoured cheque. Next day A. stopped payment:—*Held:* the holder could recover against B. on his cheque.—CITY BANK *v.* SMITH (1869), 20 C. P. 93.—**CAN.**

h. ——— *Negligence in presentment—Notice of dishonour.*]—On June 26, P. & M. exchanged cheques for the accommodation of P., the cheque of P. being drawn on a bank in H., & the cheque of M. being drawn on private bankers in T. It was agreed that the former cheque should not be presented before July 1, & it was alleged by P., but denied by M., that a similar restriction applied to the latter cheque. The private bankers suspended payment & closed their doors about noon on June 27, having a large balance in their hands at the credit of M., who on that day served a writ on them in an action to recover such balance (the amount of the cheque being included). His cheque was never presented for payment, nor was any notice of dishonour given. The cheque of P. was presented & paid:—*Held:* (1) P. had not been guilty of *laches* up to the time of the suspension of the bankers; (2) although the suspension would not in itself excuse non-presentment & want of notice of dishonour before action, yet that event & the bringing of the action by M., which operated as a countermand of payment, would do so.—BLACKLEY *v.* MCCABE (1889), 16 A. R. 295.—**CAN.**

k. *Accepting deposits—When contemplating suspension—Immediate stoppage—Liability to refund.*]—A deposit was made in a bank. At a directors' meeting, held the previous day, the necessity of seeking outside assistance or suspending payment had been considered & a resolution passed to suspend payment if such assistance were refused. When the bank closed on the day the deposit was made, it did not open again, & notice of suspension of payment was given on the following morning:—*Held:* the depositors were entitled to be repaid the amount of their deposit as obtained from them by fraud, with interest from the date of the deposit.—*Re* CENTRAL BANK OF CANADA, WELLS & MACMURCHY'S CASE (1888), 15 O. R. 611.—**CAN.**

l. ——— *After suspension—Liability to refund.*]—A deposit of money made with a bank on the day & at the very hour when it suspended payments may lawfully be returned to the depositor.—EXCHANGE BANK *v.* MONTREAL COFFEE HOUSE ASSOCN. (1886), M. L. R. 2 S. C. 141.—**CAN.**

m. ——— ——— *Depositor's right to preference.*]—A deposit made with a bank subsequently to its having suspended payment of cheques of creditors of the bank does not give the depositor preference over other creditors.—ONTARIO BANK *v.* CHAPLIN (1889), 17 R. L. 246; *affd.* 20 S. C. R. 152.—**CAN.**

n. *Withdrawal of deposit by bank president before suspension—President acting without authority—Rights of customer.*]—Claimant, having $1,200 on deposit in the bank, & being about to go on a journey, left a cheque for that amount with the president, payable to his order, with instructions to invest it for him in a mtge. as soon as a suitable security could be found. On the last day before the suspension of the bank, no investment having yet been found for the money, the president, in order to protect claimant, indorsed the cheque, drew the amount in notes from the teller, & placed the notes in an envelope, which was then sealed up & addressed to claimant & placed in the vault of the bank:—*Held:* the cheque having been indorsed & the bank-notes drawn without the authority of claimant, they were still the property of the bank, & claimant must rank only as an ordinary creditor for the $1,200.—*Re* COMMERCIAL BANK OF MANITOBA, ROBERTSON'S CLAIM (1894), 10 Man. L. R. 61.—**CAN.**

o. *Cheques paid after suspension—Discharge of drawer—Liability of payees.*]—Resp., having funds to his credit in a bank which had suspended payment, drew cheques on the bank for various sums. The cheques were accepted by the bank on the same day, & resp. then, for valuable consideration, disposed of them to various parties who were paid the respective amounts by the bank, by credits or otherwise:—*Held:* the bank had no action against resp. to recover the amount of the cheques so paid, their recourse, if any, being against the parties to whom they had paid the money.—EXCHANGE BANK OF CANADA *v.* HALL (1886), M. L. R. 2 Q. B. 409.—**CAN.**

p. ——— *For goods sold by bank—On third party's account—Consideration.*]—A bank suspended payment on Sept. 15, 1883, & a winding-up order was made on Dec. 5. R. & G. purchased hardware held by the bank, on which they owed $14,000 at the time of the suspension. The bank wishing to close the account, sold the balance of the stock to A. & Co. for $5,700, & agreed to accept in payment cheques of deft. drawn on his deposit account, which were drawn on & accepted by the bank on Oct. 31. For those cheques A. & Co. gave their acceptances, which were duly paid. Before the stock was delivered R. & G. settled the balance of their debt to the bank:—*Held:* the liquidators of the bank could not recover back the amount thus paid on deft.'s cheques, as deft. had received no valuable consideration from the bank which he should be ordered to repay.—EXCHANGE BANK OF CANADA *v.* STINSON (1885), 8 O. R. 667.—**CAN.**

q. *Deposit as security for execution of contract—Deposit in name of & at risk of Government—Tender back after failure of bank—Liability of Government.*]—Applt. agreed to put up a cash security of $15,000 to the Govt. for the performance of a contract by resps., which security was to remain in the hands of the Govt. until the contract should be fulfilled, & resps. were to pay to applt. $2,000 per annum until the security should be released. By arrangement with the E. Bank a deposit receipt for $15,000 was accepted by the Receiver-General, & that sum was placed to his credit in the E. Bank & remained under his control:—*Held:* the loss of the $15,000 by the failure of the bank was a loss to be borne by the Govt., & not by applt., & applt. entitled to recover the $2,000 from resps. notwithstanding the tender back to him of the deposit receipt, &, the amount being entered in the books of the bank to the credit of the Receiver-General, the deposit thereby became a debt due by the bank to the Receiver-General, & was at the risk of the Govt.—GILMAN *v.* GILBERT (1889), M. L. R. 4 S. C. 226; *affd.* 17 R. L. 124.—**CAN.**

r. *Right of creditor to sue ninety days after suspension.*]—A creditor of an incorporated bank that has suspended its payments can, even before the expiration of ninety days since the suspension, sue the bank & obtain a judgment for the amount of his claim.—SENECAL *v.* BANQUE D'EXCHANGE (1884), 14 R. L. 317; M. L. R. 2 S. C. 108.—**CAN.**

s. *Creditor's preference in equity.*]—The creditor of a banker who has stopped payment is not entitled to any preference in equity.—WHITTINGHAM *v.* MITCHELL (1787), 1 Ridg. Parl. Rep. 436.—**IR.**

have, funds of the N. Bank sufficient & applicable to meet the bill & appropriated for the purpose. Before the bill was presented for acceptance the N. Bank stopped payment, & the L. Bank declined to accept the bill on presentation, or to pay it at maturity, on the ground that, although they had sufficient funds of the N. Bank to meet the bill, none of such funds were specifically appropriated to the payment of it. The course of business between the two banks was for the N. Bank to remit to the L. Bank bills for collection, & to draw bills against the remittances, taking care to keep them always in funds to meet the bills drawn upon them :—*Held :* there was no specific appropriation of the funds of the N. Bank in the hands of the L. Bank to meet pltf.'s bill, & the statement made to him did not amount to an equitable assignment, & was no more than a representation of the course of dealing between the two banks.—CITIZENS' BANK OF LOUISIANA *v.* FIRST NATIONAL BANK OF NEW ORLEANS (1873), L. R. 6 H. L. 352 ; 43 L. J. Ch. 269 ; 22 W. R. 194, H. L.

Annotations :—**Consd.** Lovett *v.* Lovett, [1898] 1 Ch. 82. **Refd.** Mills *v.* Fox (1887), 37 Ch. D. 153 ; Rainford *v.* Keith (James) & Blackman Co., [1905] 1 Ch. 296 ; Gresham Life Assce. Soc. *v.* Crowther (1914), 83 L. J. Ch. 867. **Mentd.** Coxon *v.* Gorst, [1891] 2 Ch. 73 ; Williams *v.* Pinckney (1897), 67 L. J. Ch. 34, C. A. ; Coleman *v.* North (1898), 47 W. R. 57.

962. Set-off—Balance due on partnership account—Credit balance on separate account of partner—Assignment to partnership account after stoppage of bank.]—T. W. & W. W. were indebted to C. & Co., bankers, on their partnership account, but there was a balance due to T. W. from the bankers on his private account. On Apr. 22, 1843, the bankers stopped payment, but the bank continued open for business, the bankers receiving their own notes in payment of debts due to them, but making no cash payments, & the stoppage being represented to be temporary. On May 25 T. W. assigned the balance due to him to T. W. & W. W. as partners, & notice was on the same day given to the bankers to transfer such balance to the account of T. W. & W. W. This was not done, &, on May 31, a fiat in bkpcy. issued against the bankers on an act of bkpcy. committed the day before :—*Held :* T. W. & W. W. had no right in equity to set off the balance due to T. W. against the balance due from T. W. & W. W.—WATTS *v.* CHRISTIE (1849), 11 Beav. 546 ; 18 L. J. Ch. 173 ; 13 L. T. O. S. 297 ; 13 Jur. 244, 845 ; 50 E. R. 928.

Annotation :—**Mentd.** Farley *v.* Turner (1857), 5 W. R. 666.

963. —— Credit balance on current account—Assignment of customer's securities by bank—Rights of customer.]—Bankers assigned the securities given by a customer indebted to them without giving him any notice of the assignment. The bankers afterwards became bkpt. In a suit, by the customer, against the assignees of the securities :—*Held :* he was entitled to set off the moneys due to him on his running account against the debts due from him, & the assignees had merely the rights of the assignors, & could claim no advantage beyond what the bankers were entitled to.—CAVENDISH *v.* GEAVES (1857), 24 Beav. 163 ; 27 L. J. Ch. 314 ; 29 L. T. O. S. 256 ; 3 Jur. N. S. 1086 ; 5 W. R. 615 ; 53 E. R. 319.

Annotation :—**Apprvd. but Distd.** Pellas *v.* Neptune Marine Insce. (1879), 5 C. P. D. 34, C. A.

964. —— —— Loan on promissory note.]—A benefit building society borrowed a sum of money from its bankers upon the joint & several promissory note of two of its trustees & a director. The bankers at the time of their bkpcy. held the note, & there was also a balance in their hands to the credit of the society upon current account :—*Held :* the society was entitled to set off the amount of its balance against the sum due upon the note, which must be delivered up on payment of the difference.—*Re* DAVIES & TROUGHTON, *Ex p.* CLENNELL (1861), 4 L. T. 60 ; 9 W. R. 380.

965. —— Trust account—Dividends carried to customer's account at direction of trustees.]—Shares in a bank were settled on a marriage on the usual trusts, & two of the trustees were registered as shareholders, & directed the bank to carry over the dividends on the shares to the account of the husband, who was a customer, & the dividends were so carried over. The bank failed & was ordered to be wound up, & the chief clerk allowed a set-off in respect of the sum so carried over in respect of dividends. A claim by the husband to be admitted as a creditor for the whole sum made up of dividends so carried over, & his own balance, was allowed.—*Re* ROYAL BANK OF LIVERPOOL, *Ex p.* MOLYNEUX (1868), 19 L. T. 445.

966. —— Credit balance on joint executorship account—Overdrawn account of executor-legatee.]—An exorship. account was kept with bankers in the joint names of the two exors., who were brother & sister. The brother, who was the residuary legatee under the will, kept another account of his own with the bankers. The bankers filed a liquidation petition, & at that time there was a balance standing to the credit of the joint account, but the other account was overdrawn. Securities had been set apart to answer the legacies bequeathed by the will, & testator's debts & funeral & testamentary expenses had been paid, but the exors. were jointly

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962 i. *Set-off—Amount of cheque accepted & deposit receipt issued when bank about to suspend payment.*]—One who had become the holder of a cheque accepted by the bank & of a deposit receipt issued by them, at a time when such bank had suspended payment, but when it was believed by the public & announced by the directors that they would pay in full all moneys received on deposit, can set off the amount of the cheque & deposit receipt against a debt which he himself owes to the bank, & that in spite of the fact that the bank have afterwards been declared insolvent, & that their insolvency dates back to the time of the suspension.—PEOPLE'S BANK *v.* LANGLOIS (1899), Q. R. 9 Q. B. 13.—**CAN.**

962 ii. —— *Claims due before liquidation order.*]—There is a ground for set-off against an insolvent bank if the two claims became due before the liquidation order, although after suspension of payments by the bank.—EXCHANGE BANK *v.* ST. AMOUR (1885), 13 R. L. 443.—**CAN.**

962 iii. —— *Transfer of deposit—Deposit fund insufficient.*]—In an action by the trustees of a savings bank which had become insolvent, on an obligation for a loan by the bank, deft. pleaded compensation by an amount transferred to him by a depositor with the bank :—*Held :* as the amount of deposits could only be paid out of the deposit fund & the interest accrued thereon, & as the deposit fund was not sufficient to meet the deposits which had been made, the plea of compensation would not lie.—MORRIS *v.* MCGINN (1848), 1 L. C. R. 110.—**CAN.**

962 iv. —— *Note in exchange for deposit receipt—Liability as contributory.*]—Y., in making a deposit on a Govt. contract, gave a marked cheque on the C. Bank, in which he was a shareholder, which cheque was subsequently cancelled & a deposit receipt, issued by the bank, substituted therefor. Y. gave his note to the bank to cover the amount of the receipt. The bank went into liquidation on Dec. 3, 1887, & on Jan. 20, 1888, Y., having been required by the Govt. to take up the deposit receipt & replace it with other security, took an assignment of the receipt & notified the bank. Y. then filed a petition for leave to set off the deposit receipt against the note :—*Held :* (1) Y., as maker of the note to the bank, was a mere debtor & not a contributory, & although also a shareholder, & so liable as a contributory, he was not a contributory *quoad* the debt, which arose out of an independent transaction, & R. S. C., c. 129, s. 73, did not apply ; (2) the prohibition in the Act against acquiring debts for the purpose of set-off was limited to the case of contributories, but as to debtors the law of set-off as administered by the cts. was applicable as if the co. was a going concern ; (3) the right of set-off virtually arose, not by reason of dealings subsequent to the winding-up order, but of dealings prior thereto, &, in taking up the deposit receipt & supplying better security, Y. was only fulfilling that which he was obliged to do by a prior *bonâ fide* engagement.—*Re* CENTRAL BANK OF CANADA, YORKE'S CASE (1888), 15 O. R. 625.—**CAN.**

Sect. 25.—Failure of bank.]

liable for some rates & taxes & a solr.'s bill of costs which had not been paid :—*Held :* the one account could not be set off against the other in the liquidation of the bankers, & the rules of equitable set-off or mutual credit could not apply, unless the brother was so much the person solely beneficially interested in the balance of the joint account that a ct. of equity, without any terms or any further inquiry, would have compelled the sister to transfer the account into the brother's name alone.—*Re* WILLIS, PERCIVAL & Co., *Ex p.* MORIER (1879), 12 Ch. D. 491 ; 49 L. J. Bcy. 9 ; 40 L. T. 792 ; 28 W. R. 235, C. A.

Annotation :—**Consd.** *Re* Hett, Maylor (1894), 10 T. L. R. 412.

967. Securities held against acceptances—Rights of bill-holders.]—Securities, held by a banker against his acceptances, available to the bill-holders not directly, but through the equity of the acceptor, or the assignees under a commission of bkpcy. against him, to have them applied in discharge of the acceptances.—*Ex p.* WARING (1815), 19 Ves. 345 ; 34 E. R. 546 ; *sub nom. Re* BRICKWOOD & Co., *Re* BRACKEN & Co., *Ex p.* WARING, *Ex p.* INGLIS, 2 Rose, 182 ; 2 Gl. & J. 404.

Annotations :—**Expld.** *Re* Brickwood, *Re* Leigh, *Ex p.* Parr (1818), Buck, 191. **Expld. & Apld.** *Re* Neville, *Ex p.* Perfect (1830), Mont. 25. **Distd.** *Re* Mildred, *Ex p.* Copeland (1833), 3 L. J. Bcy. 15. **Consd.** *Re* Thompson, *Ex p.* Copeland (1833), 3 Deac. & Ch. 199. **Apld.** *Re* Manning, *Ex p.* Smith, Payne & Smith (1834), 4 Deac. & Ch. 579. **Consd.** *Re* Thompson, *Ex p.* Prescott (1834), 3 Deac. & Ch. 218. **Dbtd. but Folld.** *Re* Munday, *Re* Glass, *Ex p.* Hobhouse, *Ex p.* Gower (1837), 2 Deac. 291, Ct. of R. *Waring's Case* is admitted to have introduced, for the first time, a new & anomalous principle of equity, which was adopted by Lord Eldon after six months' consideration, though not at last, as he said, with much confidence in his own opinion ; but I feel it to be my duty, however reluctantly, to acquiesce in that decision (ERSKINE, C.J.). **Expld. & Distd.** Laycock *v.* Johnson (1847), 6 Hare, 199. **Distd.** *Re* Geering, *Ex p* Sparks (1850), 14 L. T. O. S. 548. **Consd. & Folld.** Powles *v.* Hargreaves (1853), 3 De G. M. & G. 430, L.C. & L.JJ. **Distd.** *Re* Harrison, *Ex p.* Carrick (1858), 2 De G. & J. 208, L.JJ. **Apld.** *Re* Warwick, *Ex p.* Brown (1858), 2 Jur. 82, Ct. of R. ; *Re* Cheesebrough, *Ex p.* Ackroyd (1860), 3 De G. F. & J. 726, L.JJ. **Folld.** *Re* Streatfield, Laurence & Mortimore, *Ex p.* Cunliffe (1862), 6 L. T. 695. **Expld. & Distd.** *Re* New Zealand Banking Corpn., Hickie & Co.'s Case (1867), L. R. 4 Eq. 226. **Expld.** *Re* Joint Stock Discount Co., Loder's Case (1868), L. R. 6 Eq. 491. **Apld.** Trimingham *v.* Maud (1868), L. R. 7 Eq. 201. **Distd.** City Bank *v.* Luckie (1869), 5 Ch. App. 774, n. **Expld. & Apld.** *Re* General Rolling Stock Co., *Ex p.* Alliance Bank (1869), 4 Ch. App. 423, L.JJ. **Distd.** *Re* New Zealand Banking Corpn., Levi & Co.'s Case (1869), L. R. 7 Eq. 449. **Apld.** City Bank *v.* Luckie (1870), 5 Ch. App. 773, L.C. **Consd.** Bank of Ireland *v.* Perry (1871), L. R. 7 Exch. 14. **Expld.** Banner *v.* Johnston, *Re* Barned's Banking Co. (1871), L. R. 5 H. L. 157, H. L. **Apld.** *Re* Richardson, *Ex p.* Smart (1872), 8 Ch. App. 220, L.JJ. **Expld.** *Re* Leggatt, *Re* Gledstanes, *Ex p.* Dewhurst (1873), 8 Ch. App. 965, L.JJ. **Consd.** *Re* Adansonia Fibre Co., Miles' Claim (1874), 9 Ch. App. 637, n. **Apld.** *Re* Barned's Banking Co., *Ex p.* Joint Stock Discount Co. (1874), L. R. 19 Eq. 1. **Expld. & Distd.** Vaughan *v.* Halliday (1874), 9 Ch. App. 561, L.JJ. **Consd.** *Re* Barned's Banking Co., *Ex p.* Joint Stock Discount Co. (1875), 10 Ch. App. 198, L.JJ. **Expld. & Distd.** *Re* Lindsay, *Ex p.* Lambton (1875), 10 Ch. App. 405, L.JJ. **Distd.** *Re* Yglesias, *Ex p.* General South American Co. (1875), 10 Ch. App. 635, L.JJ. ; *Re* Yglesias, *Ex p.* Gomez (1875), 10 Ch. App. 639, L.JJ. **Consd.** *Re* Tappenbeck, *Ex p.* Banner (1876), 2 Ch. D. 278, C. A. ; *Re* Pollard, *Ex p.* Dickin (1878), 8 Ch. D. 377, C. A. **Expld.** *Re* Mellor, *Ex p.* Manchester Bank (1879), 12 Ch. D. 917. **Consd. & Distd.** Royal Bank of Scotland *v.* Commercial Bank of Scotland (1882), 7 App. Cas. 366, H.L. **Apld.** *Re* Suse, *Ex p.* Dever (1885), 14 Q. B. D. 611, C. A. **Refd.** Inman *v.* Clare (1858), John. 769 ; *Re* Barned's Banking Co., *Ex p.* Stephens (1868), 3 Ch. App. 753, L.JJ. ; *Re* Childs (1874), 9 Ch. App. 508, L.JJ. ; Engleback *v.* Nixon (1875), L. R. 10 C. P. 645 ; *Re* Walker, Sheffield Banking Co. *v.* Clayton, [1892] 1 Ch. 621. **Mentd.** Ebsworth *v.* Alliance Marine Insce. (1873), 42 L. J. C. P. 305 ; *Re* Wood, *Ex p.* Musgrave (1878), 10 Ch. D. 94, C. A.

See, further, BANKRUPTCY & INSOLVENCY ; BILLS OF EXCHANGE, PROMISSORY NOTES, & NEGOTIABLE INSTRUMENTS.

968. Two banks holding notes & securities of each other to nearly same amount—Payment received by provisional assignee of one—Recovery from provisional assignee.]—A. & Co. & B. & Co. respectively carried on the business of bankers at M. B. & Co. became bkpt., & at the time of their act of bkpcy. the two banks held notes & other securities of each other to nearly the same amount. The provisional assignee of B. & Co., knowing that fact, presented & obtained payment of the notes of A. & Co., partly at their bank, & partly at the house of their agents in London, who were ignorant of the situation in which the parties stood :—*Held :* A. & Co. might recover the amount so received, in an action for money had & received against the provisional assignee.—EDMEADS *v.* NEWMAN (1823), 1 B. & C. 418 ; 2 Dow. & Ry. K. B. 568 ; 107 E. R. 155.

969. Two banks mutually exchanging notes periodically—Bankruptcy of one—Retention of notes by agent of bankrupt bank.]—M., a banker, & the N. Bank mutually exchanged their notes at stated periods. M. became bkpt., his agent B. in Edinburgh having the notes of the N. Bank in his hands. The assignees allowed B. to retain those notes in account with them, he having claims against M. :—*Held :* the N. Bank could recover the notes against the assignees.—*Re* MABERLY, *Ex p.* NATIONAL BANK OF SCOTLAND (1834), 1 Mont. & A. 644 ; 4 Deac. & Ch. 32, Ct. of R.

970. Fraudulent sale of customer's stock—Stock replaced by bonds—Rights of customer.]—Bankers fraudulently sold out stock belonging to a customer, which stood in their names, & applied the proceeds to their own use. While they remained solvent they wrapped up certain bonds belonging to them in an envelope inscribed with the customer's name, & inclosed a memorandum, stating that they had deposited the bonds with him as a collateral security for his stock which they promised to replace. This parcel they in fact deposited among the securities belonging to other persons who dealt with them, but they gave no information of any of these circumstances to the customer till the eve of their bkpcy., when they sent him the parcel with the bonds, saying they must stop payment next morning :—*Held :* the customer could not retain the bonds against the assignees of the bankers.—WILSON *v.* BALFOUR (1811), 2 Camp. 579, N. P.

Annotations :—**Distd.** New, Prance & Garrard's Trustee *v.* Hunting, [1897] 2 Q. B. 19, C. A. **Consd.** *Re* Cozens, Green *v.* Brisley, [1913] 2 Ch. 478. **Refd.** Mogg *v.* Baker (1838), 7 L. J. Ex. 94.

971. Bills exchanged for promissory notes of bank—Rights of bank to retain bills.]—An agreement was made to pay into a bank of four partners bills of exchange, indorsed, & to take in return their promissory notes. Three of the four became bkpt. Bills were then paid in, & their notes taken, & then the fourth became bkpt. On a petition that the bills, or (in the event of their being received) the proceeds, might be paid to petitioner :—*Held :* the assignees were not entitled to retain the bills.—*Re* WOOD, *Ex p.* MCGAE (1816), 2 Rose, 376.

Annotation :—**Mentd.** *Re* Maberly, *Ex p.* Cunningham (1833), 3 Deac. & Ch. 58.

972. Payment in to credit of another upon condition—Failure before condition fulfilled—Liability of person paying in.]—Money paid into a banking house, to be placed to the credit of another upon a condition, the money in the meantime to stand in the bankers' books in the name of the party paying it in, is at his risk, & the loss is his, if the bankers fail before the condition is complied with, though the other party had written to desire it to be paid in generally.—CALLEY *v.* SHORT (1815), Coop. G. 148 ; 35 E. R. 511 ; *affd.* (1821), Jac. 631.

973. ——————.]—A direction by a debtor to his bankers, who were indebted to him in a larger amount, to place to the credit of his creditor, who was a debtor to the bankers, a sum of money, so as

to make same as a bill at one month, which the bankers consented to do, the bankers only considering it as a payment to be made at a future day, does not amount to a payment; & where the bankers become bkpt. before the day on which the credit would expire, debtor is not discharged.—PEDDER *v.* WATT (1796), 2 Chit. 619.

974. Transfer to credit of another—Delay in transfer—Notice of transfer.]—Pltf., in Oct., authorised deft. to pay in at certain bankers money due from deft. Owing to a mistake it was not then paid, but deft., who kept an account with the same bankers, transferred the sum to pltf.'s credit on Friday, Dec. 9. Pltf. being at a distance, did not receive notice of this transfer till the Sunday following, & on the Saturday the bankers failed:—*Held:* this was a sufficient payment by deft.—EYLES *v.* ELLIS (1827), 4 Bing. 112; 12 Moore, C. P. 306; 5 L. J. O. S. C. P. 110; 130 E. R. 710.

Annotations:—**Refd.** Maxwell *v.* Deare (1854), 23 L. T. O. S. 1, P. C.; *Re* Land Development Assocn., Kent's Case (1888), 39 Ch. D. 259, C. A.

975. Deposits in breach of trust—Knowledge of partner of bank—Separate liability of partners.]—The trustees of a settlement deposited £1,000 with a banking firm at 3 per cent. interest. The deposit was in itself a breach of trust, not having been a mere temporary deposit. The senior partner of the banking firm was a party to the settlement & knew that the deposit was a breach of trust; the other partners were not fixed with knowledge of that fact. The firm became bkpt. The trustees of the settlement sought to prove against the separate estates of each partner, their right to prove against the joint estate not being disputed:—*Held:* they were entitled to prove against the separate estate of the senior partner, but not against the separate estates of the other partners, as the mere payment of trust moneys into a bank did not make every member of the firm a constructive trustee.—*Re* NEWPORT OLD BANK, *Re* WILLIAMS & SON, *Ex p.* ASHWIN (1853), 21 L. T. O. S. 232.

976. Acceptance of bills by London bank for Hull bank—Customer's account debited by Hull bank — Bankruptcy of Hull bank — Payment of acceptance by London bank — Recovery from customer.] — A merchant at Hull being a customer of a bank there, dealt with the bank on the terms that they should procure their correspondents, a London bank, to accept on their credit such bills as might be drawn by his foreign correspondents & of which they might be advised by the Hull firm, & the London bank accepted all such bills, the customer paying the Hull bank a commission of ¼ per cent. on the amounts of the bills. They paid their London correspondent bank £600 per annum in respect of the whole of the London business done for them by the London firm. Interest was charged by the Hull firm to deft. on the amount of the bills from the day they became due. The Hull bank became bkpt., & the London bankers paid the amount of such of the bills, accepted by them as above, which became due subsequently to that event. In an action by the assignees of the bankers against the customer for the amount so paid by the London agents:—*Held:* they were entitled to recover.—BARKWORTH *v.* ELLERMAN (1861), 6 H. & N. 605; 7 Jur. N. S. 829; 9 W. R. 377; 158 E. R. 605, Ex. Ch.

977. Mis-statement in accounts—Manager's abuse of authority—Acquiescence & ratification by liquidating authorities.]—The accounts of a bank in liquidation had been changed so as to represent the bank as debtors in respect of a sum which had been borrowed by their manager for his own purposes:—*Held:* the doctrine of acquiescence & ratification by the liquidating authorities would not avail to render the bank liable to pay a debt which they never owed.—BANQUE JACQUES-CARTIER *v.* BANQUE D'EPARGNE DE MONTREAL (1887), 13 App. Cas. 111; 57 L. J. P. C. 42, P. C.

978. Partnership continued after death of partner—Subsequent bankruptcy—Liability of deceased partner's estate.]—Prior to the death of D., partner in a banking house, C. had deposited with the partners two exchequer bills for £500 each, without giving them any power or authority to dispose of same, except that when the exchequer bills should be paid off the partners were to buy with the produce, or take in exchange, other exchequer bills, to be held by them in the same manner. Without the consent or knowledge of C. the partners in the lifetime of D. sold the bills for £1,035 & applied the proceeds to their own use. At the death of D., C. had a balance of £1,713 on his cash account with the banking house. Between the death of D. & the bkpcy. of the firm the payments made to C. by the surviving partners exceeded the amount of the credit balance & the produce of the exchequer bills together, but their subsequent receipts largely exceeded the sums paid; & the balance due at the time of the bkpcy., exclusive of the produce of the exchequer bills, exceeded the amount of the balance due at D.'s death. C. having since the bkpcy. discovered that the exchequer bills had been sold, proved for the amount of the produce thereof & received dividends. The surviving partners rendered an account to C. falsely representing that the exchequer bills had been paid off on Oct. 31, 1809, & that a new bill for £1,000 had on the same day been purchased or taken in exchange:—*Held:* D.'s estate was liable on the ground that at the time of sale the amount received became a partnership debt, whether the individual partners were, or were not, privy to the sale, & as C. was ignorant that any such sum of money was in their hands, payments subsequently made in respect of cash balances were not to be taken as operating in extinction of such a debt.—DEVAYNES *v.* NOBLE, CLAYTON'S CASE (1816), 1 Mer. 529, 572; 35 E. R. 767, 781.

Annotations:—**Apld.** Bodenham *v.* Purchas (1818), 2 B. & Ald. 39; Brooke *v.* Enderby (1820), 2 Brod. & Bing. 70. **Distd.** Simson *v.* Ingham (1823), 2 B. & C. 65; *Re* Tills, *Ex p.* Alexanders (1824), 2 L. J. O. S. Ch. 159; Stoveld *v.* Eade (1827), 4 Bing. 154. **Apld.** Field *v.* Carr (1828), 5 Bing. 13. **Distd.** Taylor *v.* Kymer (1832), 3 B. & Ad. 320. **Expld. & Distd.** Smith *v.* Ure (1833), 2 Knapp, 188, P. C. **Distd.** Chitty *v.* Naish (1834), 2 Dowl. 511; Whittington *v.* Jennings (1834), 6 Sim. 493. **Consd.** Walker *v.* Hardman (1837), 11 Bli. N. S. 229, H. L. **Consd. & Distd.** Bower *v.* Marris (1841) Cr. & Ph. 351. **Distd.** *Re* Biddulph, *Ex p.* Eyre (1842), 3 Mont. D. & De G. 12. **Consd.** Parker *v.* Marchant (1843), 1 Ph. 356. **Distd.** *Re* Wright, *Ex p.* Eyre (1843), 1 Ph. 227. **Consd.** Pennell *v.* Deffell (1853), 4 De G. M. & G. 372, L.JJ. **Distd.** Wickham *v.* Wickham (1855), 2 K. & J. 478; Bell *v.* Buckley (1856), 11 Exch. 631. **Apld.** Cavendish *v.* Geaves (1857), 24 Beav. 163. **Distd.** Hipkins *v.* Amery (1860), 2 Giff. 292. **Consd.** Siebel *v.* Springfield (1863), 3 New Rep. 36. **Apld.** Laing *v.* Campbell (1865), 36 Beav. 3; *Re* Boys, Eedes *v.* Boys, *Ex p.* Hop Planters Co. (1870), L. R. 10 Eq. 467. **Distd.** Thompson *v.* Hudson (1871), 6 Ch. App. 320, L.JJ. **Apld.** *Re* Devonport & South Devon Steam Flour Mill Co., Bateman's Case (1873), 42 L. J. Ch. 577. **Expld. & Distd.** City Discount Co. *v.* McLean (1874), L. R. 9 C. P. 692, Ex. Ch. **Consd.** Lacey *v.* Hill, Leney *v.* Hill (1876), 4 Ch. D. 537, C. A.; *Re* Taurine Co., Anning & Cobb's Claim (1877), 38 L. T. 53. **Apld.** Kinnaird *v.* Webster (1878), 10 Ch. D. 139. **Distd.** *Re* Booth, Browning *v.* Baldwin (1879), 27 W. R. 644. **Consd.** *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A. **Apld.** London & County Banking Co. *v.* Ratcliffe (1881), 6 App. Cas. 722, H. L. **Consd.** Blackburn Bldg. Soc. *v.* Cunliffe, Brooks (1882), 22 Ch. D. 61, C. A.; *Re* Sherry, London & County Banking Co. *v.* Terry (1884), 25 Ch. D. 692, C. A. **Distd.** Parr *v.* Bradbury (1885), 1 T. L. R. 285. **Apld.** Dreyfus *v.* Peruvian Guano Co. (1889), 61 L. T. 180. **Distd.** Hancock *v.* Smith (1889), 41 Ch. D. 456, C. A. **Consd.** *Re* Wood, Anderson *v.* London City Mission, [1894] 2 Ch. 577. **Distd.** *Re* London & General Bank, [1895] 2 Ch. 673, C. A. **Consd. & Distd.** Cory *v.* Owners of Turkish Steamship Mecca, The Mecca, [1897] A. C. 286, H. L. **Distd.** Mutton *v.* Peat, [1899] 2 Ch. 556. **Apld.** Egg *v.* Craig (1903), 89 L. T. 41. **Consd.** *Re* Oatway, Hertslet *v.* Oatway, [1903] 2 Ch. 356. **Distd.** Smith *v.* Betty, [1903] 2 K. B. 317, C. A. **Consd.** Seymour

Sect. 25.—*Failure of bank.* *Sects.* 26, 27 & 28.]

v. Pickett, [1905] 1 K. B. 715, C. A.; Davis *v.* Petrie, [1906] 2 K. B. 786, C. A.; Deeley *v.* Lloyds Bank, [1910] 1 Ch. 648, C. A.; Galula *v.* Pintus (1911), 104 L. T. 574; *Re* O'Shea, *Ex p.* Lancaster, [1911] 2 K. B. 981, C. A. **Refd.** Pemberton *v.* Oakes (1827), 4 Russ. 154; Solarte *v.* Maes Hilbers (1832), 1 L. J. K. B. 196; Wilson *v.* Hirst (1833), 4 B. & Ad. 760; Nottidge *v.* Prichard (1834), 8 Bli. N. S. 493, H. L.; Toulmin *v.* Copland (1834), 2 Cl. & Fin. 681, H. L.; Smith *v.* Nicolls (1839), 8 L. J. C. P. 92; Foley *v.* Hill (1844), 1 Ph. 399, L.C.; Jones *v.* Broadhurst (1850), 9 C. B. 173; *Re* Medewe's Trust (1859), 26 Beav. 588; Scott *v.* Beale & Bishop (1859), 6 Jur. N. S. 559; Merriman *v.* Ward (1860), 1 John. & H. 371; Denison *v.* Avison (1865), 12 L. T. 340; Brown *v.* Adams (1869), 21 L. T. 71, L.J.; Fenton *v.* Blackwood (1874), L. R. 5 P. C. 167, P. C.; *Re* Hamilton, *Ex p.* Smith (1877), 25 W. R. 760; *Re* Pollard, *Ex p.* Dickin (1878), 8 Ch. D. 377, C. A.; *Re* Companies Acts, *Ex p.* Watson (1888), 21 Q. B. D. 301, D. C.; Parkinson *v.* Wakefield (1889), 5 T. L. R. 562; *Re* Miller, *Ex p.* Official Receiver, [1893] 1 Q. B. 327, C. A.; *Re* Head, Head *v.* Head (1894), 63 L. J. Ch. 549, C. A.; *Re* Stenning, Wood *v.* Stenning (1895), 73 L. T. 207; Bank of New South Wales *v.* Goulburn Valley Butter Co. Proprietary, [1902] A. C. 543, P. C.; Bannatyne *v.* MacIver, [1906] 1 K. B. 103, C. A.; *Re* Derbyshire, Webb *v.* Derbyshire, [1906] 1 Ch. 135; *Re* Bourne, Bourne *v.* Bourne, [1906] 1 Ch. 113. **Mentd.** Williams *v.* Rawlinson (1825), 3 Bing. 71; Proctor *v.* Brain (1828), 2 Moo. & P. 284; Sims *v.* Bond (1833), 5 B. & Ad. 389; Smith *v.* Wigley (1833), 3 Moo. & S. 174; Garrett *v.* Noble (1834), 6 Sim. 504; Devaynes *v.* Morris (1836), 1 My. & Cr. 213; Mills *v.* Fowkes (1839), 5 Bing. N. C. 455; Copland *v.* Toulmin (1840), 7 Cl. & Fin. 349, H. L.; Henniker *v.* Wigg (1843), 7 Jur. 1058; Parker *v.* Marchant (1843), 1 L. T. O. S. 74; Harford *v.* Lloyd (1855), 20 Beav. 310; Nash *v.* Hodgson (1855), 6 De G. M. & G. 474, L.C. & L.JJ.; Lodge *v.* Prichard (1863), 32 L. J. Ch. 775, L.JJ.; *Re* Hammond, *Ex p.* Brooke (1869), 20 L. T. 547; Hooper *v.* Keay (1875), 1 Q. B. D. 178; *Re* Hallett, *Ex p.* Blane, [1894] 2 Q. B. 237, C. A.; Ascherson *v.* Tredegar Dry Dock & Wharf Co., [1909] 2 Ch. 401.

979. —— —— ——.]—Consols belonging to W., a customer of a banking firm (see *Clayton's Case*, No. 978, *ante*), stood in the name of N., a partner of the firm, & after the death of W. his exors. continued to employ the firm as bankers in respect of his estate, & directed the dividends when received to be laid out in accumulation of the stock so standing in the name of N., which was done from time to time. The stock was placed in the name of N. alone for the convenience of the house & not by direction of the customers, although they knew that the stock had been placed in the name of N. alone & believed that it so continued until after the death of D., one of the partners. The stock was sold in the lifetime of D., & the proceeds were applied to the use of the partnership:—*Held:* D.'s estate was liable to make good the loss.—DEVAYNES *v.* NOBLE, BARING'S CASE (1816), 1 Mer. 529, 611; 35 E. R. 767, 794.

Annotations:—**Mentd.** Garrett *v.* Noble (1834), 6 Sim. 504; Devaynes *v.* Morris (1836), 1 My. & Cr. 213; Brown *v.* Weatherby (1841), 12 Sim. 6.

980. —— —— ——.]—On the death of D., a partner in a banking house, the surviving partners carried on the business without changing the name of the firm, & afterwards became bkpt. Creditors on D.'s death continued to deal with the surviving partners & were paid by them in part, including, also, creditors whose debts remained unaltered either by receipt or payment, & those whose debts had been subsequently increased by payments to the surviving partners:—*Held:* no discharge of the deceased partner's estate.—DEVAYNES *v.* NOBLE, SLEECH'S CASE (1816), 1 Mer. 529, 539; 35 E. R. 767, 771.

Annotations:—**Apld.** Wilkinson *v.* Henderson (1833), 1 My. & K. 582. **Distd.** Whittington *v.* Jennings (1834), 3 L. J. Ch. 157. **Consd.** Thorpe *v.* Jackson (1837), 2 Y. & C. Ex. 553. **Refd.** Sumner *v.* Powell (1816), 2 Mer. 30; Parker *v.* Marchant (1843), 12 L. J. Ch. 385; Foley *v.* Hill (1844), 13 L. J. Ch. 182; Lodge *v.* Prichard (1863), 1 De G. J. & Sm. 610; Bower *v.* Société des Affréteurs du Great Eastern (1867), 17 L. T. 490; Beresford *v.* Browning, Browning *v.* Beresford (1875), L. R. 20 Eq. 564; Kendall *v.* Hamilton (1878), 3 C. P. D. 403, C. A.; *Re* Hallett's Estate, Knatchbull *v.* Hallett (1880), 13 Ch. D. 696, C. A.; Rouse *v.* Bradford Banking Co., [1894] 2 Ch. 32, C. A.

981. —— —— —— **Notice.**]—D. was a partner in a private bank. He died, & the survivors continued to carry on business without changing the firm name, & afterwards became bkpt. H. deposited bills with the firm in D.'s lifetime, & they were sold, some in his lifetime & some after his death:—*Held:* D.'s estate was not answerable in respect of the latter, although H. had no notice of his death.—DEVAYNES *v.* NOBLE, HOULTON'S CASE (1818), 1 Mer. 529, 616; 35 E. R. 767, 796.

Annotation:—**Consd.** Friend *v.* Young, [1897] 2 Ch. 421.

982. Payment in after banking hours—Immediate stoppage of bank—Rights of customer.]—By the custom of a bank money paid in after banking hours was put into a separate place of deposit, & entered in a counter-book, but not carried to the customer's account till next day. A customer paid in a bank-note after banking hours, & the banker having before resolved not to open his bank again, placed the note in such separate place of deposit, without carrying it to the account of the customer, & next morning stopped payment, & became bkpt.:—*Held:* the bank-note remained the property of the customer.—SADLER *v.* BELCHER (1843), 2 Mood. & R. 489.

Annotation:—**Distd.** *Re* Nash, *Ex p.* Clutton (1850), Fonbl. 167.

983. —— —— ——.]—Money was paid into a bank through a clerk of the bank on Saturday after office hours. The same evening one of the partners of the bank made a declaration of insolvency, in the absence & without the knowledge of his partner. The bank never again opened for business, & the other partner concurred in allowing it to remain closed. Both partners were subsequently adjudicated bkpt.:—*Held:* the money so deposited passed to the assignees.—*Re* NASH, *Ex p.* CLUTTON (1850), Fonbl. 167.

SECT. 26.—BANKER'S OBLIGATION TO SECRECY.

984. Bank acting for drawer & acceptor of bill—Notifying drawer of instructions given by acceptor.]—*Semble:* bankers acting for the drawer & acceptor of a bill are not entitled to notify the drawer of the fact that the acceptor has given instructions to stop payment of the bill.—CROSSE *v.* SMITH (1813), 1 M. & S. 545; 105 E. R. 204.

Annotations:—**Refd.** Harris *v.* Richardson (1831), 4 C. & P. 522. **Mentd.** Allen *v.* Edmondson (1848), 2 Car. & Kir. 547.

985. Disclosing state of customer's account—Reasonable & proper occasion—Right of action.]—In an action against a banker for disclosing the state of his customer's account, the declaration alleging that deft. promised not to communicate to any other person the state of the account, except upon reasonable & proper occasion, the proper question for the jury is whether, in the circumstances of the case, there was reasonable & proper occasion for the disclosure. *Qu.:* whether there is any legal duty on a banker not to disclose the state of his customer's account, so as to make such disclosure the ground of an action without special damage.—HARDY *v.* VEASEY (1868), L. R. 3 Exch. 107; 37 L. J. Ex. 76; 17 L. T. 607.

PART II. SECT. 26.

985 i. *Disclosing state of customer's account—Reasonable & proper occasion.*]—The private account of a person at a banker's is not privileged, & may be made matter of evidence where it is established that money at issue in the cause has been lodged at the banker's by the party in question to the credit of his private account.—MCKENZIE *v.* TAYLOR (1862), 6 L. C. J. 83.—CAN.

986. —— Duty not to make disclosure—Question for jury.]—The sum standing to the credit of pltf., a customer of deft.'s bank, was £438. The bank disclosed the state of the account to another of their customers, one of his creditors, & the latter was thereby enabled to pay to the credit of pltf.'s account a sum sufficient to cover the amount of a bill & a cheque held by him, which the bank accordingly honoured —*Held:* it was for the jury whether there was a duty not to make such a disclosure, although there was no evidence of it beyond the existence of the relation of banker & customer.—FOSTER *v.* BANK OF LONDON (1862), 3 F. & F. 214.

Annotation:—**Consd.** Hardy *v.* Veasey (1868), L. R. 3 Exch. 107.

987. —— Compulsion of law—Evidence as to customer's balance.]—The banker of one of the parties in a cause is bound to answer what such party's balance was on a given day, as it is not a confidential communication (ABBOTT, C.J.).—LOYD *v.* FRESHFIELD & KAYE (1826), 2 C. & P. 325, N. P.

Annotations:—**Mentd.** Alliance Bank *v.* Kearsley (1871), L. R. 6 C. P. 433; Okell *v.* Eaton & Okell (1874), 31 L. T. 330.

988. —— —— Customer contributory of company—Companies Act, 1862 (c. 89), s. 115.]—The managing clerk of a bank, in which a contributory has an account, is a witness, compellable to answer as to that account, under the above sect.—*Re* FINANCIAL INSURANCE CO., LTD. (1867), 36 L. J. Ch. 687.

Annotations:—**Apprvd.** *Re* Bank of Hindustan, China & Japan, Swan's Case (1870), L. R. 10 Eq. 675. **Refd.** *Re* Mercantile Credit Assocn. (1868), 37 L. J. Ch. 295.

989. —— —— —— ——.]—Shares in a co., which was being wound up, had been transferred from C. to N. without consideration, G. being the active party in the transaction, & the subsequent calls had been paid with moneys supplied by G. The liquidators, considering it material to trace those moneys, applied for a summons calling upon the secretary of the banking co., with whom G. kept his account, to attend for examination, & produce all books containing entries as to G.'s affairs:—*Held:* the summons might issue, it being left open to the witness, upon his attending the summons, to take any objections he might have to the inspection of the books.—*Re* SMITH, KNIGHT & CO. (1869), 4 Ch. App. 421; 20 L. T. 206, L.JJ.

Annotation:—**Apld.** *Re* Contract Corpn. (1871), 6 Ch. App. 145, L.JJ.

990. —— —— —— ——.]—A banker, with whom a contributory has formerly kept an account, may be summoned under the above sect. & compelled to produce his books relating to the contributory's account, & to give all information in his power touching his affairs.—DRUITT'S CASE (1872), L. R. 14 Eq. 6; *sub nom. Re* CONTRACT CORPN., FORBES' CASE, 41 L. J. Ch. 467; 26 L. T. 680; 20 W. R. 585.

Production & inspection of books.]—*See* Sect. 28, *post.*

SECT. 27.—REPRESENTATIONS AS TO CREDIT.

991. Answers to inquiries as to financial position of customer—Banker's duty.]—Where information is asked of a banker concerning the financial position of one of his customers it must be shown, in order to render him liable for misrepresentation, that his statement is fraudulent in a legal sense, & it is no part of his duty to make inquiries elsewhere as to the solvency or otherwise of the customer respecting whom the inquiry is made, or to do anything more than answer the question put to him honestly from what he knows from the materials which he has before him.—PARSONS *v.* BARCLAY & CO., LTD. (1910), 103 L. T. 196; 26 T. L. R. 628, C. A.

992. —— —— Intending guarantor.]—A surety is not of necessity entitled to receive, without inquiry, from the banker to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the banker & his customer. If he requires to know any particular matter, of which the banker is informed, he must make it the subject of a distinct inquiry.—HAMILTON *v.* WATSON (1845), 12 Cl. & Fin. 109; 8 E. R. 1339, H. L.

Annotations:—**Apld.** North British Insce. *v.* Lloyd (1854), 10 Exch. 523. **Folld.** Wythes *v.* Labouchere (1859), 3 De G. & J. 593. **Distd.** Phillips *v.* Foxall (1872), L. R. 7 Q. B. 666; London General Omnibus Co. *v.* Holloway, [1912] 2 K. B. 72, C. A. **Refd.** Stewart *v.* M'Kean (1855), 10 Exch. 676, Ex. Ch.; Pledge *v.* Buss (1860), John. 663; Lee *v.* Jones (1864), 17 C. B. N. S. 482, Ex. Ch.; Welton *v.* Somes (1889), 5 T. L. R. 184, C. A.; Seaton *v.* Heath, Seaton *v.* Burnand, [1899] 1 Q. B. 782, C. A. National Provincial Bank of England *v.* Glanusk, [1913] 3 K. B 335. **Mentd.** Gardner *v.* Walsh (1855), 1 Jur. N. S. 828; Mackreth *v.* Walmesley (1884), 51 L. T. 19.

See, also, Nos. 250 *et seq., ante.*

SECT. 28.—PRODUCTION AND INSPECTION OF BOOKS.

SUB-SECT. 1.—IN GENERAL.

993. Books of agent for country bankers—Whether evidence against principals.]—The books of bankers, who are London agents for country bankers, are only evidence against themselves, unless the country bankers were acquainted with the mode of keeping them.—*Re* BOLDERO, *Ex p.* WAKEFIELD BANK (1812), 1 Rose, 243.

Annotation:—**Refd.** Thompson *v.* Giles (1823), 3 Dow. & Ry. K. B. 733.

994. Entries in books—Whether proof by clerk making them necessary—Absence of clerk abroad.]—Entries in the books of bankers, can only be proved by the clerk by whom the entries have been made, nor is other evidence admissible,

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t. —— —— *Bank Act,* 1890 (*c.* 31), *s.* 46.]—Evidence as to a customer's account is not privileged at common law, & the above sect. is no more than a prohibition against a bank voluntarily permitting any examination of customers' accounts save by a director. Discussion of Bankers' Books Evidence Act, 1879 (*c.* 11).—HANNUM *v.* MCRAE (1898), 17 P. R. 567; 18 P. R. 185.—**CAN.**

u. —— —— ——.]—The above sect. does not enable a bank to refuse to disclose their transactions with one of their customers, when the propriety of those transactions is in question in a ct. of law between the bank & another customer who attacks them, & shows good cause for requiring the information he seeks.—*Re* CHATHAM BANNER CO., BANK OF MONTREAL'S CLAIM (1901), 22 C. L. T. Occ. N. 22; 2 O. L. R. 672.—**CAN.**

w. —— —— ——.]—R. was indebted to his bank for moneys advanced, for which the bank held securities pledged to them by R. & a promissory note made by R., payable on demand, for a sum larger than the amount then due. M. was negotiating with the bank for an assignment of the debt due by R., & was permitted by the bank to see the entries in their books relating to that debt, & the bank assigned to M. the sum due & all the securities held by them, covenanting that the sum named was due & to produce & exhibit their books of account & other evidence of indebtedness etc.:—*Held:* the bank were not prohibited by the above sect. from allowing M., for the purposes mentioned, to inspect the account of R. with the bank, & the agreement was not invalid.—MONTGOMERY *v.* RYAN, RYAN *v.* BANK OF MONTREAL & MONTGOMERY (1908), 16 O. L. R. 75; 11 O. W. R. 279.—**CAN.**

PART II. SECT. 28, SUB-SECT. 1.

994 i. *Entries in books—Whether evidence for bank.*]—The books of a bank are not evidence in their favour to prove

Sect. 28.—Production and inspection of books: Subsects. 1 & 2.]

though such person is abroad.—COOPER *v.* MARSDEN (1793), 1 Esp. 1, N. P.

995. —— —— Proof of payment by partner producing book.]—In a case of alleged fraud between *cestuis que trust* & their trustees, the evidence of a partner in the banking house, bringing forward the ledger containing the entry of the money paid in to the trustee's account & stating that, from that entry, although not made by himself, he has no doubt of the money having been so paid, is admissible.—KNATCHBULL *v.* BRADSHAW (1835), 4 L. J. Ch. 62.

996. —— Not communicated to customer.]—Entries in bankers' books not proved to have been communicated to the customer are not evidence against him, but may be evidence for him.—*Re* BOLDERO, *Ex p.* PEASE (1812), 19 Ves. 25; 1 Rose, 232; 34 E. R. 428.

Annotations:—**Mentd.** *Re* Boldero, *Ex p.* Wakefield Bank (1812), 1 Rose, 243; Hornblower *v.* Proud (1819), 2 B. & Ald. 327; Thompson *v.* Giles (1823), 3 Dow. & Ry. K. B. 733; Jombart *v.* Wollett, Jombart *v.* Legg (1837), Donnelly, 229; *Re* Goren, *Ex p.* Cutts (1838), 3 Mont. & A. 549, L.C.; *Re* Wise, *Ex p.* Atkins (1842), 3 Mont. D. & De G. 103; Trimingham *v.* Maud (1868), L. R. 7 Eq. 20.

997. —— By several clerks.]—A banker's ledger is receivable in evidence to show that a customer had no funds in the banker's hands, although entries were made therein by several clerks.—FURNESS *v.* COPE (1828), 5 Bing. 114; Dan. & Ll. 167; 2 Moo. & P. 197; 6 L. J. O. S. C. P. 242; 130 E. R. 1004.

998. —— By deceased clerk—Ordinary course of duty.]—A banker's books kept by a clerk in the ordinary course of his duty may after his death be received in evidence, in an action against a surety on a bond conditioned for his fidelity, to prove the issue that certain sums had been received by the clerk.—WHITNASH *v.* GEORGE (1828), 8 B. & C. 556; 108 E. R. 1149; *sub nom.* WHITMARSH *v.* GENGE, Dan. & Ll. 171; 3 Man. & Ry. K. B. 42; 7 L. J. O S. K. B. 57.

Annotation:—**Distd.** Middleton *v.* Melton (1829), 10 B. & C. 317.

999. —— By deceased partner—Regular course of business.]—To make an entry in a banker's book, in the handwriting of a deceased partner, evidence, it must be proved not only to have been made in the regular course of business, but to have been made at the time it bears date or immediately after.—RAY *v.* JONES (1836), 2 Gale, 220.

1000. Secrecy clause in bank deed—Effect.]—The object of the secrecy clause in bank deeds is only to prevent vexatious attempts to pry improperly into the affairs of the concern, & wherever a proper case is made out the ct. will not hesitate to make an order for inspection, *non obstante* the secrecy clause.—*Re* BIRMINGHAM BANKING CO., *Ex p.* BRINSLEY (1866), 36 L. J. Ch. 150; 15 L. T. 203.

Annotation: — **Distd.** *Re* Glamorganshire Banking Co., Morgan's Case (1884), 28 Ch. D. 620.

1001. —— Application by dissentient shareholder.]—The deed of settlement of a banking co. provided that no member should be entitled to inspect or have in equity discovery of the books of the co. The co. went into voluntary liquidation under Cos. Act, 1862 (c. 89), with a view to reconstruction, & its business, customers, & books were transferred to a new co. M., one of six dissentient shareholders (who represented together about £3,000 paid-up capital out of a total of £338,000), refused an offer of the liquidators to buy her interest, & the liquidators appointed an arbitrator. M. also appointed an arbitrator, but previously to so doing took out a summons for production by the liquidators of all books, accounts, statements, returns, reports, & other documents containing entries or information relative to the assets of the bank at the date of the resolution to wind up:—*Held:* M. was not entitled to the order asked for, which would injure the business of the new co., while her interests were sufficiently protected by Cos. Act, 1862, ss. 161, 162, under which the burden was on the liquidators to show that their offer was a fair one.—*Re* GLAMORGANSHIRE BANKING CO., MORGAN'S CASE (1884), 28 Ch. D. 620; 54 L. J. Ch. 765; 51 L. T. 623; 33 W. R. 209.

Annotation:—**Apld.** *Re* British Building Stone Co., [1908] 2 Ch. 450.

1002. Notice to produce—Cheque.]—If a cheque, drawn by one of the parties in a cause, be proved to be in the hands of the banker of such party, having been paid, the opposite party need not, if he wishes to have it put in evidence, call the banker's clerk to produce it, but may call for it under a notice to produce, as the bankers are the agents of the drawer of the cheque, & the drawer would have a right to go to the bankers & demand the cheque of them.—BURTON *v.* PAYNE (1827), 2 C. & P. 520, N. P.

1003. Production at specified place.]—Pltfs. were ordered to file an affidavit of documents, & upon reasonable notice to produce for inspection at the office of their London solrs. those that they did not by that affidavit object to produce. Among the documents scheduled to the affidavit which pltfs. were willing to produce were certain bank books in constant use at their Hastings branch. On an application by deft. for inspection of these books pltfs.

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payments made by the bank.—BROOK *v.* CITY BANK (1849), 1 L. C. R. 112.—**CAN.**

994 ii. —— ——.]—In an action by the trustees of a bank, in process of being wound up, pltfs. proposed to prove the entries in the books of the bank as evidence in proof of the claim against the customer of the bank:—*Held:* such evidence was admissible.—MARE *v.* WINTER (1900), 8 Nfld. L. R. 388.—**NFLD.**

994 iii. —— —— *Payments by bank disputed.*]—Where the fact of payments by a banking firm is distinctly put in issue, the books of the firm being at most corroborative evidence, the mere general statement of the banker to the effect that his books were correctly kept is not sufficient to discharge the burden of proof that lies upon him, particularly if he has the means of producing much better evidence.—GUNGA PERSHAD *v.* INDERJIT SINGH (1875), 23 W. R. 390, P. C.—**IND.**

994 iv. —— —— *Balance due on death of customer.*]—In an action by bankers against the representatives of a deceased customer to recover a balance of an account alleged to be due to pltfs. by deceased at the time of his death, the production of the bankers' books, with the entries of the items constituting the demand, kept according to the established custom of mahajuns in India, is not of itself sufficient evidence to establish such a claim, strict proof of the debt being required.—RAI SRI KISHEN *v.* RAI HURI KISHEN (1853), 5 Moo. Ind. App. 432, P. C.—**IND.**

994 v. —— —— *Cashier disputing payments in.*]—In an action for an amount alleged to have been deposited in a savings bank, which was disputed by the cashier of the bank, entries made by him in the books of the bank were admitted as confirmatory testimony of his evidence.—KELLY *v.* HARBOUR GRACE SAVINGS BANK (1881), 6 Nfld. L. R. 57.—**NFLD.**

994 vi. —— —— *Deposits by & advances to customer.*]—Two books of a bank, one containing deposits by & the other advances to an employer:—*Held:* not sufficient evidence *per se* of a balance said to be due by him to the bank.—BRITISH LINEN CO.'S BANK *v.* THOMSON (1853), 2 Stuart, 175.—**SCOT.**

a. *Copies of entries in books — Evidence against bank.*]—In an action by a bank, in which deft. filed a statement of his account furnished by the bank from their books in support of his plea:—*Held:* such statement might be taken as evidence against the bank where there was nothing to show error.—MORRIS *v.* UNWIN (1851), 4 L. C. R. 235.—**CAN.**

b. —— ——.]—In an action against a banking co:—*Held:* excerpts from defenders' books, recovered under a commission & diligence granted by the ct., & certified to be correct by defenders' manager, who exhibited the books, & whose deposition under the commission was produced therewith, & the comr. & clerk, were good evidence against defenders in the jury ct., & it was not necessary to produce the books themselves.—THOM *v.* NORTH BRITISH BANK (1850), 23 Sc. Jur. 40.—**SCOT.**

1003 i. *Production of books—Refusal of bank agent to produce.*]—A bank agent

gave notice under R. S. C., Ord. 21, r. 17, that they would produce them at the Hastings branch & declined to produce them elsewhere:—*Held:* r. 17 had no reference to a case where the ct. had ordered documents to be produced at a specified place, & pltfs. were in contempt.—LLOYDS BANK, LTD. *v.* LUCK (1901), 45 Sol. Jo. 596.

1004. Inspection of bank books — Application against public officer of dissolved company—Covenant by shareholder not to call for inspection.]—Bill against a public officer of a joint-stock banking co., which had been dissolved, charging documents & praying an account. Deft. answered that the documents were not in his individual possession, but admitted them to be in the possession of the directors & the solr. to the co., & he set them forth in his sched. On a motion to produce same:—*Held:* notwithstanding the dissolution, he still represented the co. for the purposes of the motion, & was bound to produce the documents.

The covenant of a shareholder in the deed of settlement, that he will not call for inspection of certain books of the co., will not be a bar to his moving for their production in a suit brought by him against the co.—HALL *v.* CONNELL (1840), 3 Y. & C. Ex. 707; 9 L. J. Ex. Eq. 25; 160 E. R. 886.

1005. —— Of banking corporation not governed by Companies Acts—Right of shareholder to inspect.]—Resp. held one share in the B. Bank & claimed the right to inspect the register of shareholders. The corpn. was not governed by any Act conferring upon shareholders a general right of inspection:—*Held:* a member could not inspect the books of a corpn. not governed by Cos. Acts unless he showed there was some specific dispute or question in which he had a special interest different from that of the other members, & inspection, if granted, must be limited accordingly.—BANK OF BOMBAY *v.* SULEMAN SOMJI (1908), 99 L. T. 62; 24 T. L. R. 698, P. C.

—— Under Bankers' Books Evidence Act, 1879 (c. 11).]—*See* Nos. 1007 *et seq., post.*

1006. Sealed packet — Obligation to produce — "Document."]—A sealed packet may be a "document," & liable to production upon a *subpœna duces tecum.*

The fact that a banker has received a document upon the terms that it shall not be delivered up except with the consent of the depositors is no answer to a *subpœna duces tecum* requiring the banker to produce the document.—R. *v.* DAYE, [1908] 2 K. B. 333; 77 L. J. K. B. 659; 99 L. T. 165; 72 J. P. 269; 21 Cox, C. C. 659, D. C.

SUB-SECT. 2.—UNDER BANKERS' BOOKS EVIDENCE ACT, 1879 (c. 11), AND SIMILAR COLONIAL ACTS.

1007. Copies of entries in books — Evidence against any one.]—The effect of s. 3 of the above Act is to make copies of entries in the books of a banker admissible evidence against any one, & copies of entries in the books of the bankers of deft. are evidence against pltf.—HARDING *v.* WILLIAMS (1880), 14 Ch. D. 197; 49 L. J. Ch. 661; 42 L. T. 507; 28 W. R. 615.

Annotation:—**Dbtd.** Arnott *v.* Hayes (1887), 56 L. J. Ch. 844, C. A. *Harding* v. *Williams* has been disapproved by the Ct. of Appeal (FRY, L.J.).

1008. —— ——.]—Entries in bankers' books under the above Act are *primâ facie* evidence against the world.—LONDON & WESTMINSTER BANK *v.* BUTTON (1907), 51 Sol. Jo. 466.

1009. —— By whom provable.]—Copies of entries in bankers' books were made by a chartered accountant, to whom the books had been produced by a cashier of the bank. The cashier proved that the books were ordinary books of the bank & that the entries were made in the usual course of business, but he could not prove the copies were correct. The chartered accountant proved the copies were correct:—*Held:* under s. 5 of the above Act proof of the correctness of the copies need not be given by an

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refused to produce on the ground that he had no documents in his possession but as such bank agent:—*Held:* he ought to set out in his affidavit what documents were so in his possession; & it appearing that he had taken a conveyance to himself as trustee for the bank, & that he had certain documents not mentioned in his affidavit, he should be ordered to produce them, although the bank were not parties to the cause.—MCDONELL *v.* MCKAY (1867), 2 Ch. Ch. 141.—**CAN.**

1003 ii. —— *Refusal to produce verified copy.*]—Upon a bank refusing to produce a verified copy of an account, they were ordered to produce the books containing the account in question at the trial of the action.—COLEMAN *v.* COLEMAN (1898), 32 I. L. T. 66.—**IR.**

1003 iii. —— *Local manager examined as witness—Head office outside province.*]—Upon a motion by pltf. to commit the local manager of a chartered bank, who was subpœnaed to attend before a master upon a reference, & there to produce the books of the bank & give evidence, for his contempt in not complying with the subpœna:—*Held:* (1) it was unreasonable to expect the witness to take from the bank the books that were in use & attend during banking hours for the purpose of an examination in a matter in which he had no interest except as a witness, & it would be proper for the master to take the evidence at the banking offices after banking hours; (2) where the head office of the bank was outside of Ontario, the local manager was the proper person to subpœna to produce the books, & should be ordered to do so, more especially where it did not appear that in so doing he would be contravening any rule or regulation of the bank.—HANNUM *v.* MCRAE (1898), 17 P. R. 567; 18 P. R. 185.—**CAN.**

1004 i. *Inspection of bank books — Mandamus.*]—The ct. will not, although they have the power, grant a mandamus for the inspection of the stock book or other books of a bank, unless on special grounds.—BANK OF UPPER CANADA *v.* BALDWIN (1829), Dra. 55.—**CAN.**

1004 ii. —— *When granted—Account of person not party to action.*]—An application for inspection of the bank account of a person not a party to the action ought not, as a general rule, to be granted without notice to such person & to his bankers, & then only upon an affidavit showing, to the full satisfaction of the ct. or judge, that there are good grounds for believing that there are entries in the account material to some issue to be tried in the action, & which would be evidence at the trial for the party applying for such inspection.—L'AMIE *v.* WILSON, [1907] 2 I. R. 130.—**IR.**

1004 iii. —— —— —— *Examination of bank officer.*]—The manager of a branch of the N. Bank deposed that the United Irish League kept an account at that branch, & that he had a copy of it from Nov. 12 to Jan. with him. He objected to produce it:—*Held:* the bank's customer not being before the ct., production would not be ordered to assist a litigant to make out his case, but it was competent for counsel to examine the bank officer as to particular matters & to discover whether or not there was an entry in the bank book with regard to those matters.—CORK (EASTERN DIVISION) CASE (1911), 6 O'M. & H. 318.—**IR.**

PART II. SECT. 28, SUB-SECT. 2.

1007 i. *Copies of entries in books—Foreign banks.*]—Evidence Ordinance, 1889, s. 26, which allows extracts of bankers' books to be given in evidence, does not apply to foreign banks without an order of the Governor in Council, in virtue of s. 2.—LE LEUNG SHI *v.* LO LIM YEUK (1912), 7 Hong Kong L. R. 66.—**HONG KONG.**

1007 ii. —— *Bank not "company."*]—Copies of entries in the books of a bank, which does not come within the definition of a "co." in Bankers' Books Evidence Act, s. 2 (1), though certified in accordance with the form prescribed by that Act, are not admissible in evidence under that Act.—QUEEN EMPRESS *v.* MCGUIRE (1900), 4 C. W. N. 433.—**IND.**

1009 i. —— *Verification.*]—Oral evidence may be given of the accuracy of copies of bank books put in evidence under Bankers' Books Evidence Act, 1878 (No. 620), s. 4; proof by means of an affidavit is merely supplementary to such oral proof. It is necessary to prove that the institutions, copies of whose accounts it is sought to put in evidence, are banks of deposit as well as of issue.—R. *v.* SHIPP & STOCKALL (1888), 14 V. L. R. 198.—**AUS.**

1009 ii. —— —— *Proof of identity.*]—A copy of an account kept at a bank under the same name as that of prisoner, verified by affidavit under Banks & Bankers Act Amendment Act, 1887, s. 5:—*Held:* admissible as evidence of an account kept at that bank by prisoner, without preliminary proof of the identity of the person for whom the account was kept with prisoner, or other proof of such identity than was afforded by a comparison of paying-in slips & cheques, proved to have been signed by prisoner, with the entries in the copy account.—R. *v.* KIRBY (1896), 15 N. Z. L. R. 66.—**N.Z.**

Sect. 28.—Production and inspection of books: Subsect. 2.]

officer of the bank, but might be given by any person who had examined the copies with the original entries.—R. *v.* ALBUTT (1910), 75 J. P. 112; 6 Cr. App. Rep. 55, C. C. A.

1010. Accounts of third parties—Who may apply for order to inspect.]—Pltf. in an administration action was a residuary legatee of M., a solr., testator in the action, & in the course of the cross-examination on the accounts, before the chief clerk, of deft. H., who was testator's son-in-law & exor. & was carrying on business as a solr. under the firm of "M. & H.," applied to the ct., under s. 7 of the above Act, that she might be at liberty to inspect at the bankers' of testator & deft. the books of the bank for four years containing the entries of the accounts of testator & also of M. & H., & to take copies of such entries. Pltf.'s solr. deposed that the inspection was necessary for the purposes of the action:—*Held:* a person who formerly had a right to compel bankers to produce their books by *subpœna duces tecum* might apply for an order, & pltf. was entitled to the order asked for.—*Re* MARSHFIELD, MARSHFIELD *v.* HUTCHINGS (1886), 32 Ch. D. 499; 55 L. J. Ch. 522; 54 L. T. 564; 34 W. R. 511.

Annotation:—**Distd.** Arnott *v.* Hayes (1887), 36 Ch. D. 731.

1011. —— Power of court.]—The ct. has power under s. 7 of the above Act to order inspection of bankers' books containing the accounts of persons not parties to the action if it is satisfied that such accounts will be evidence admissible at the trial & that the accounts are in substance & in fact kept on behalf of a party to the litigation.—HOWARD *v.* BEALL (1889), 23 Q. B. D. 1; 58 L. J. Q. B. 384; 60 L. T. 637; 37 W. R. 555.

Annotations:—**Apprvd.** South Staffordshire Tram. Co. *v.* Ebbsmith, [1895] 2 Q. B. 669, C. A. **Refd.** Elder *v.* Carter (1890), 59 L. J. Q. B. 281.

1012. —— ——.]—An order for inspection of entries in a banker's books under s. 7 of the above Act will as a general rule be made only where they are entries in an account which is in form or substance the account of one of the parties to the litigation. If the ct. has jurisdiction under that sect. to order inspection of the banking account of a person not concerned with the litigation, it will exercise that jurisdiction with the greatest caution.

Pltf. sued to rescind a contract for purchase by him of shares in a co. from deft. on the ground that deft. had induced him to enter into the contract by misrepresentations, one of which was that the co. had a certain large balance at its bankers' at that time. Before the action was set down for trial pltf. applied to the ct. for liberty to inspect & take copies of any accounts of the co. in its bankers' books, & an order was made for inspection with the qualification, "but such inspection is to be limited to showing the balance of the co. in the books of the bankers on Dec. 2, 1895":—*Held:* this order must be discharged.—POLLOCK *v.* GARLE, [1898] 1 Ch. 1; 66 L. J. Ch. 788; 77 L. T. 415; 46 W. R. 66; 14 T. L. R. 16; 42 Sol. Jo. 32, C. A.

Annotation:—**Refd.** Cork (Eastern Division) Case (1911), 6 O'M. & H. 318.

1013. Verified copies not furnished—Subpœna duces tecum.]—The above Act, by s. 6, only excuses the attendance of a banker with his books where he has complied with ss. 2 & 5. If he has not furnished or been willing to furnish verified copies of the required entries the books may still be obtained by *subpœna duces tecum.*—EMMOTT *v.* STAR NEWSPAPER CO. (1892), 62 L. J. Q. B. 77; 67 L. T. 829; 57 J. P. 201; 9 T. L. R. 111; 5 R. 137.

Annotation:—**Apprvd.** *Re* Bankers' Books Evidence Act, 1879, R. *v.* Bono (1913), 29 T. L. R. 635, D. C.

1014. —— Books in custody of bank's successors—Book no longer in daily use.]—The above Act applies to books in the custody of a bank which has taken over the business of other bankers by whom the entries were made many years previously, & it also applies to a book which has ceased to be in daily use, if the book has been kept so that it may be referred to.—IDIOTS' ASYLUM *v.* HANDYSIDES (1906), 22 T. L. R. 573, C. A.

1015. Inspection of bank books—Ex parte application—Evidence in support.]—In an action for goods sold & delivered, to which payment & a counterclaim were pleaded, pltf., after issue joined, applied *ex p.* to a judge at chambers & obtained leave, under s. 7 of the above Act, to inspect deft.'s banking account. The application was supported by an affidavit of a solr., merely stating his belief that an inspection of deft.'s banking account was material to the matters in dispute. The order was served on deft.'s bankers, & they, on receipt of it, informed deft., who thus heard of the order which had been made. On the application of deft. the order was set aside on the ground that in the circumstances pltf. was not entitled to it.

In civil proceedings an application for such an order for inspection ought not to be made *ex p.*; & *semble:* the power to grant the order *ex p.* is limited to criminal proceedings.—DAVIES *v.* WHITE (1884), 53 L. J. Q. B. 275; 50 L. T. 327; 32 W. R. 520.

1016. —— —— ——.]—An order giving liberty to inspect a banker's books & take copies of any entries therein for the purposes of legal proceedings may under the above sect. be made *ex p.* & without

c. —— *Inspection of original entries—Effect of omission.*]—*Semble:* a notice of intention to adduce copies of entries in a bank book under Bankers' Books Evidence Act, 1878 (No. 620), will not be good if it omit to state that the original entries may be inspected.—BANK OF AUSTRALIA *v.* POLLARD (1882), 8 V. L. R. 66.—**AUS.**

d. *Production of books—Bank not party to action.*]—The ct. has power, under Bankers' Books Evidence Act, 1878 (No. 620), s. 8, to order the production of bank books at the trial of an action, although the bank are not parties to the action.—HAY *v.* PATERSON, *Re* COLONIAL BANK (1889), 15 V. L. R. 360.—**AUS.**

e. —— ——.]—The ct. has power, under Evidence Act, 1890 (No. 1088), s 39, to order the production of a banker's books at the trial of an action, although the bank are not parties to the action. The ct. will grant an order for such production, notwithstanding an undertaking by the bank to have verified copies of all the material entries in such books in ct. at the trial to be used in evidence if the ct. should so direct, because such verified copies could not in the circumstances, by virtue of s. 36, be adduced in evidence at the trial.—DARLING *v.* CARTER & CO. (1903), 29 V. L. R. 136.—**AUS.**

1015 i. *Inspection of bank books—Who may order—"Court or judge."*]—On the taking of evidence under a commission issued by the High Ct. in England, application was made for an order under Bankers' Books Evidence Act (58 Vict. No. 6), s. 7:—*Held:* the word "ct." in the above sect. was restricted to the ct. before whom the legal proceedings were held or taken, but the word "judge" in the sect. applied to any judge, & there was power to make the order asked for.—PEAK HILL GOLDFIELDS, LTD. *v.* SIMPSON (1905), 7 W. A. L. R. 286.—**AUS.**

1015 ii. —— *Books outside jurisdiction.*]—Bankers' Books Evidence Act, 1878 (No. 620), does not apply to books out of the jurisdiction of the ct.—BANK OF AUSTRALIA *v.* POLLARD (1882), 8 V. L. R. 66.—**AUS.**

1015 iii. —— *When granted.*]—In an action against a married woman on foot of building contracts, deft. alleged certain payments. All payments had been made by cheques drawn by deft.'s husband in his own name, or in his business name. The ct. made an order giving pltf. liberty to inspect the bank accounts of deft.'s husband & the firm, under Bankers' Books Evidence Act, 1879 (c. 11), s. 7.—M'GORMAN *v.* KIERANS (1901), 35 I. L. T. 84.—**IR.**

1015 iv. —— —— *One customer paying debt due by another.*]—In an action where one of the issues was whether pltf., who had an account in a bank, had paid to the bank a sum of money due to the same bank by another party, who had also an account therein, the ct., on the *ex. p.* application of deft., made an order under Bankers' Books Evidence Act, 1879, s. 7, giving him liberty to inspect & take copies of any entries in the accounts of pltf. & the party indebted to the bank, with reference to any sum or sums paid by pltf. for the indebtedness of the other party.—FITZPATRICK *v.* M'DONALD (1892), 30 L. R. Ir. 249.—**IR.**

evidence against a party to such proceedings, though generally it is better that notice of the application should be served on the person whose account is to be inspected, & in some cases the ct. may require evidence of the *bona fides* of the application, & of the materiality of the inspection. The order should be limited to such part of the accounts as is presumably connected with the matters in question in the proceedings.—ARNOTT *v.* HAYES (1887), 36 Ch. D. 731 ; 56 L. J. Ch. 844 ; 57 L. T. 299 ; 36 W. R. 246 ; 3 T. L. R. 807, C. A.

Annotations :—**Refd.** Emmott *v.* Star Newspaper Co. (1892), 62 L. J. Q. B. 77 ; Parnell *v.* Wood, [1892] P. 137, C. A. ; *Re* Bankers' Books Evidence Act, 1879, R. *v.* Bono (1913), 29 T. L. R. 635, D. C. **Mentd.** Elder *v.* Carter, *Ex p.* Slide & Spur Gold Mining Co. (1890), 25 Q. B. D. 194, C. A. ; R. *v.* Kinghorn, [1908] 2 K. B. 949.

1017. —— Irrevelant matters — Refusal of discovery.]—Pltf. in an action for probate having been ordered to produce for inspection documents in her possession relating to the matters in question in the action, produced the pass-books of her banking account, sealing up parts of them which were, as she deposed, irrelevant to the matters in issue. Application was thereupon made by the opposing parties for an order authorising them to inspect the books, or in the alternative for leave to issue a *subpœna duces tecum* to the officers of the bank for their production :—*Held :* (1) the application could not be granted, for there was nothing in the above Act to deprive a party to a legal proceeding of his right to refuse discovery of entries in his banker's books on the ground that they were irrelevant ; (2) whether the *subpœna duces tecum* should be granted was a matter which ought to be left for the determination of the judge at the trial.—PARNELL *v.* WOOD, [1892] P. 137 ; 66 L. T. 670 ; 40 W. R. 564 ; 8 T. L. R. 274, C. A.

Annotations :—**Distd.** Perry *v.* Phosphor Bronze Co. (1894), 71 L. T. 854, C. A. **Refd.** South Staffordshire Tram. Co. *v.* Ebbsmith, [1895] 2 Q. B. 669, C. A.

1018. —— —— ——.]—The jurisdiction to order inspection of entries in bankers' books under s. 7 of the above Act ought to be exercised in conformity with the general law as to discovery, by which a party to an action is entitled to refuse discovery of entries which he swears to be irrelevant.

Deft. in an action stated on affidavit that entries in his banking account were irrelevant to the matters in dispute :—*Held :* an order for inspection of those entries before the trial ought not to be made.—SOUTH STAFFORDSHIRE TRAMWAYS CO. *v.* EBBSMITH, [1895] 2 Q. B. 669 ; 65 L. J. Q. B. 96 ; 73 L. T. 454 ; 44 W. R. 97 ; 12 T. L. R. 32 ; 40 Sol. Jo. 49, C. A.

1019. —— Pass-book disclosed — Application to inspect other books.]—In a proper case the ct. will order inspection of bankers' books although the pass-book has been disclosed in the proceedings.

Pltf. made an affidavit of documents, to which he scheduled his bankers' pass-books. Defts. were charging pltf. with having paid sums received for petty cash into his private account at a bank, & they contended that the pass-books did not disclose what the various items actually were, & they desired to obtain inspection of the bankers' books into which the entries from the pass-books were copied, as showing more definitely the nature of pltf.'s account at the bank :—*Held :* a case for inspection before trial had been made out.—PERRY *v.* PHOSPHOR BRONZE CO., LTD. (1894), 71 L. T. 854 ; 14 R. 351, C. A.

1020. —— In English action—Books in Scotland or Ireland.]—The above Act applies to the whole of the United Kingdom & an English ct. has jurisdiction under s. 7, upon an application made in an English action, to order inspection of a bankers' books in Scotland or Ireland.—KISSAM *v.* LINK, [1896] 1 Q. B. 574 ; 65 L. J. Q. B. 433 ; 74 L. T. 368 ; 44 W. R. 452 ; 12 T. L. R. 333, C. A.

1021. —— In criminal proceedings—Jurisdiction of magistrate.]—A magistrate, before whom criminal proceedings are being taken, has power to make an order under the above Act for the prosecutor to inspect & take copies of entries in the books of a bank at which deft. keeps an account.—R. *v.* KINGHORN, [1908] 2 K. B. 949 ; 78 L. J. K. B. 33 ; 99 L. T. 794 ; 72 J. P. 478 ; 25 T. L. R. 219 ; 21 Cox, C. C. 727, D. C.

1022. —— —— To support justification of libel.]—In proceedings for criminal libel, in which they proposed to put in a plea of justification, defts. applied for an order under the above sect. to inspect the banking account of the person they were alleged to have libelled :—*Held :* an order would not be made in those circumstances. — *Re* BANKERS' BOOKS EVIDENCE ACT, 1879, R. *v.* BONO (1913), 29 T. L. R. 635, D. C.

BANKRUPTCY AND INSOLVENCY.

(*See* Volume IV.)

Owing to it not being practicable to include cases relating to the above subject to any useful extent in this Volume, it has been arranged for the Title to commence in Volume IV. The Editors are of the opinion that this method will be found far more serviceable to Practitioners than would be the case if merely a small section of the Title appeared in the present Volume.

BANNS.

See Husband and Wife.

BAPTISM.

See Ecclesiastical Law; Evidence.

BARBED WIRE.

See Boundaries, Fences, and Party Walls.

BARONETS.

See Peerages and Dignities.

BARRATRY.

See Action; Criminal Law and Procedure; Shipping and Navigation.

BARRING ENTAILS AND REMAINDERS.

See Real Property and Chattels Real.

BARRISTERS.

PAGE

Sect. 1. The Inns of Court and other Governing Bodies 315

Sub-sect. 1. Their Nature and Position 315

Sub-sect. 2. Powers of Benchers 316

A. Admission of Students, and Calling of Barristers 316
B. Discipline and Disbarring 316
C. Dues of the Inns, and Management of Chambers 317

Sect. 2. Rights and Privileges of Barristers 318

Sub-sect. 1. The Right of Audience 318

A. House of Lords, and Privy Council 318
B. Superior Courts 319
C. Inferior Courts and Other Tribunals 319
D. Courts outside England 320

Sub-sect. 2. Signature of Instruments, Pleadings, Documents, etc. 320

Sub-sect. 3. Certifying as to proceeding in Formâ Pauperis, Short Cause, Urgency and other Matters 321

Sub-sect. 4. Reports of Cases authenticated by Barristers 321

Sub-sect. 5. Privileges 321

A. Service of Process, or Demand when attending Court 321
B. Freedom from Arrest when attending Court : *see*, generally, Sheriffs & Bailiffs.
C. Immunity from Actions for Professional Utterances : *see* Libel & Slander.

Sub-sect. 6. Rights of Action 321

A. Proceedings for Defamation of Barrister by way of his Profession : *see* Libel & Slander.
B. Place of Trial—Former Right to Middlesex Venue 321

Sub-sect. 7. Qualifications for and Exemptions from certain Offices 322

A. Qualifications for Judicial and other Offices 322
B. Exemptions from certain Offices 322

Sub-sect. 8. Barristers' Clerks 322

Sect. 3. Relations between Court and Counsel 323

Sub-sect. 1. Jurisdiction of Court over Counsel 323

A. Jurisdiction since 1800 323
B. Former Jurisdiction 324

Sub-sect. 2. Appointment of Counsel by the Court 325

A. To the Prosecution 325
B. For the Prisoner 325

Sect. 4. Rules of Precedence and other Relations amongst Barristers 327

Sub-sect. 1. Rules of Precedence 327

PAGE

SUB-SECT. 2. KING'S COUNSEL AND JUNIORS 328

SUB-SECT. 3. OTHER CASES 328

SECT. 5. RELATION BETWEEN COUNSEL AND CLIENT 328

SUB-SECT. 1. EMPLOYMENT OF COUNSEL 328

A. In General 328
(a) In what Proceedings and for what Purposes necessary 328
(b) What Litigants must employ Counsel 328
(c) Who entitled to Assistance of Counsel 329
(d) Whether Counsel must be instructed through Solicitors 329
(e) Employment by Retainer 329
(f) Who may be employed as Counsel 330
(g) Conflict of Duty 330

B. Where Party conducts his own Case 331
(a) For what Purposes Counsel may be employed 331
(b) Effect of employing Counsel 331

SUB-SECT. 2. COUNSEL AND HIS FEES 331

SUB-SECT. 3. GIFTS, BARGAINS AND TRANSACTIONS BETWEEN COUNSEL AND CLIENT . 334

SUB-SECT. 4. COUNSEL AND THEIR CLERKS AS WITNESSES, AFFIDAVITS AND STATEMENTS BY COUNSEL, EXAMINATION OF COUNSEL 335

SUB-SECT. 5. COUNSEL'S PROPERTY IN AND LIEN OVER DOCUMENTS 337

SUB-SECT. 6. LIABILITY OF COUNSEL FOR NEGLIGENCE AND MISCONDUCT . . . 337

SUB-SECT. 7. AUTHORITY OF COUNSEL 338

A. Derivation of Authority 338
B. How evidenced 338
C. Extent of Authority 339
(a) General Authority in conducting Cases 339
(b) To Consent, Compromise, or Refer 339
(i.) In General 339
(ii.) In what Causes 340
(iii.) In regard to what Matters 341
(iv.) Grounds for Setting aside Compromise, Reference or Consent . . 342
D. Revocation and Termination of Authority 345

SUB-SECT. 8. STATEMENTS BY COUNSEL 345

SUB-SECT. 9. UNDERTAKINGS BY COUNSEL 345

SUB-SECT. 10. ADMISSIONS BY COUNSEL 345

SUB-SECT. 11. NOTICE TO COUNSEL 346

SUB-SECT. 12. ADVICE OF COUNSEL 346

SUB-SECT. 13. MISTAKES AND OMISSIONS OF COUNSEL 347

SECT. 6. DUTIES AND DISCRETION OF COUNSEL AT HEARING 348

SUB-SECT. 1. IN GENERAL 348

SUB-SECT. 2. AS TO WITNESSES 349

SUB-SECT. 3. IN REGARD TO NOTES 349

SUB-SECT. 4. NON-ATTENDANCE 349

SUB-SECT. 5. WHAT MAY BE SAID IN SPEECHES IN CIVIL CASES 351

SUB-SECT. 6. WHAT AUTHORITIES MAY BE CITED 352

SUB-SECT. 7. DUTY TO OBJECT AND RIGHT TO LEAVE COURT 353

SECT. 7. BARRISTER LITIGANTS 354

SECT. 8. CONVEYANCERS 355

Judges and other Judicial Officers . . *See* COURTS; PUBLIC AUTHORITIES AND PUBLIC OFFICERS.

Litigants appearing in Person . . . *See* PRACTICE AND PROCEDURE.

Practice, generally . ,, PRACTICE AND PROCEDURE.

Solicitors . . . ,, SOLICITORS.

NOTE.—*Cases on the position of barristers in colonies where the fusion of the two branches of the legal profession exists, have in general been omitted and will be dealt with under* SOLICITORS.

SECT. 1.—THE INNS OF COURT AND OTHER GOVERNING BODIES.

SUB-SECT. 1.—THEIR NATURE AND POSITION.

1. Voluntary society.]—The Inns of Ct. are voluntary societies.—MANISTY *v.* KENEALY (1876), 3 Char. Pr. Cas. 36; 24 W. R. 918.

2. —— Not corporate body — Remedy for grievances—Appeal to judges.]—The Inns of Ct. are not a body corporate, but only voluntary societies, & no writ can be directed to them, the ancient & usual way of redress for any grievance in the Inns of Ct. being by way of appeal to the judges.—BOOREMAN'S CASE (1641), March, 177, pl. 235; 82 E. R. 464.

Annotations:—**Apld.** R. *v.* Physicians' College (1681), 2 Show. 178. **Folld.** R. *v.* Gray's Inn (1780), 1 Doug. K. B. 353. **Apld.** Manisty *v.* Kenealy (1876), 24 W. R. 919.

3. *S. P.* R. *v.* GRAY'S INN (1780), 1 Doug. K. B. 353; 99 E. R. 227.

Annotations:—**Refd.** R. *v.* Lincoln's Inn Benchers (1825), 4 B. & C. 855. **Mentd.** Neate *v.* Denman (1874), L. R. 18 Eq. 127.

4. Benchers of Inn—Fluctuating body.]—The Benchers of the Inns of Ct. are not a corpn., but a fluctuating body (LORD HATHERLEY).—RATHVEN PARISH *v.* ELGIN PARISH (1875), L. R. 2 Sc. & Div. 535.

Annotation:—**Mentd.** Tancred, Arrol *v.* Steel Co. of Scotland (1890), 16 App. Cas. 125, H. L.

5. Sites & areas — Extra-parochial.]—The sites & areas of Inns of Ct. are extra-parochial.—R. *v.* PETERBOROUGH JJ. (1783), Cald. Mag. Cas. 238.

6. Inns of Court — Not places privileged from arrest.]—The Inns of Ct. are not places privileged from arrest.—BROWN *v.* BORLACE (1697), Skin. 684; Holt, K. B. 590; 12 Mod. Rep. 155; 3 Salk. 45; 90 E. R. 304.

7. —— Inns of Chancery — Relationship between.]—The Inns of Ch. were subservient to the Inns of Ct. in matters of Commons & exercise.—INNER TEMPLE *v.* INCE (1677), 3 Keb. 835; 84 E. R. 1041.

8. Benchers of Inner Temple — Clifford's Inn—Compulsory authority.]—A rule *nisi* for a *mandamus* to the Principal of Clifford's Inn to attend the Benchers of the Inner Temple, & produce the records & regulations of the Society of Clifford's Inn, to enable the Benchers to decide on the validity of his election to that office, was discharged, no sufficient proof appearing that the Benchers of the Inner Temple had a compulsory authority over Clifford's Inn for that purpose.—R. *v.* ALLEN (1834), 5 B. & Ad. 984; 3 Nev. & M. K. B. 184; 110 E. R. 1055.

Annotation:—**Refd.** Smith *v.* Kerr, [1900] 2 Ch. 511.

9. Inn of Chancery — Property vested in trustees —Charitable trust.]—The Society of Clifford's Inn was one of the Inns of Ch. established to provide for the legal education of students of the law. In the year 1618 by an indenture of feoffment the messuages & premises occupied by the society were assured to certain members thereof as trustees, in consideration of the payment of a sum of money, & the reservation of certain rents. The indenture declared that the intention of the grantors was that the messuage commonly called Clifford's Inn, which was stated to have been for many years used & employed as an Inn of Ch. for the study & practice of the common laws of the realm, & to have been governed to the good of the Commonwealth & the honour of the grantors & their ancestors, "shall & may hereafter continue to be employed as an Inn of Ch. for the furtherance of the practisers & students of the common law of the realm as aforesaid," & that the society should from thenceforth be assured of a certain state therein, & the operative part of the deed declared that the true intent & meaning thereof, & of the parties thereto, was that "Clifford's Inn shall for ever hereafter be continued & employed as an Inn of Ch. for the good of the gentlemen of the society & for the benefit of the commonwealth as aforesaid & not otherwise." The property had long been dealt with by the society as its own, & for its own purposes, & the surviving members contended that it was not now subject to or affected by any charitable trust, but belonged to the individual members for their own personal benefit, to be divided & disposed of as they might think fit:—*Held:* the property vested in the present trustees was held by them upon trust for charitable purposes.—SMITH *v.* KERR, [1902] 1 Ch. 774; 71 L. J. Ch. 369; 86 L. T. 477; 18 T. L. R. 456, C. A.

10. Inner Temple—Clifford's Inn—Trust funds—Administration of.]—Upon the application of the Honourable Society of the Inner Temple to intervene & attend all proceedings connected with the settlement of a scheme relating to the trust fund which had arisen from the sale of Clifford's Inn, on the ground that Clifford's Inn was a dependency of the Inner Temple, & had been under the control of that society in all educational matters for several centuries:—*Held:* on the evidence before the ct. the Inner Temple had no paramount right to be regarded as persons in the position of trustees of the fund, with power to administer it as they thought fit, & no useful purpose would be served by the ct. exercising its discretion in favour of the Inner Temple, & granting the application.—SMITH *v.* KERR (1905), 74 L. J. Ch. 763; *sub nom. Re* NEW INN, A.-G. *v.* COLDNAM, SMITH *v.* KERR, 49 Sol. Jo. 259.

SECT. 1. SUB-SECT. 1.

a. *Bar Council — Resolutions of.*]—Although the resolutions of the Bar Council are not binding on the cts., the Bar Council is the recognised authority on matters of professional conduct & etiquette affecting counsel, & its opinion is of the greatest weight & value.—WESTON *v.* PEARY MOHAN DASS (1912), I. L. R. 40 Calc. 898.—**IND.**

b. *Bencher of Law Society of Upper Canada—"Retired judge."*]—A judge of a superior ct. of Province of Ontario, who, after voluntary resignation of office, before he has become entitled to a retiring allowance, has been accepted, resumes practice of his profession, is a "retired judge" within R. S. O., 1877, c. 138, s. 4, & an *ex-officio* bencher of the Law Society of Upper Canada.—MACDONELL *v.* BLAKE (1890), 17 A. R. 312.—**CAN.**

Sect. 1.—The Inns of Court and other governing bodies: Sub-sect. 2, A. B. & C.]

SUB-SECT. 2.—POWERS OF BENCHERS.

A. Admission of Students, and Calling of Barristers.

11. Call to Bar—Holy orders—Disqualification.]—H. had been admitted a member of the Inner Temple, but when the time came for his call to the Bar a question was raised as to his being in holy orders. The Benchers of the Inner Temple having requested the opinion of the other Inns on the point, Lincoln's Inn, Middle Temple & Gray's Inn were of opinion that a person in priest's orders was not a proper person to be called to the Bar.—HORNE'S CASE (1779), 20 State Tr. 687, n.; 2 Lud. E. C. 281, n.

12. —— —— ——.]—At a joint meeting of delegations from the Benchers of the four Inns it was the opinion of all the deputies that a person in deacon's orders ought not to be called to the Bar.—TOOKE'S CASE (1794), 20 State Tr. 687, n.

13. —— Method to compel.]—A *mandamus* will not lie to compel admission to the degree of barrister. The only mode of relief is by appeal to the twelve judges.—R. *v.* GRAY'S INN (1780), 1 Doug. K. B. 353; 99 E. R. 227.

Annotations:—**Apld.** Neate *v.* Denman (1874), L. R. 18 Eq. 127. **Refd.** R. *v.* Lincoln's Inn Benchers (1825), 4 B. & C. 855.

14. —— Signing roll—Necessity for.]—The signing of the roll of barristers formerly kept in the Ct. of King's Bench is since Promissory Oaths Act, 1868 (c. 72), no longer necessary. Admission to the Bar is the act of the Inn of Ct. & is complete when the party is so admitted.—*Re* PERARA (1887), 3 T. L. R. 677.

15. Admission & call—Refusal of Benchers—Appeal from.]—The Benchers of each Inn can refuse to admit a person as a student, or to call a student to the Bar, but their decisions are subject to an appeal to the judges as visitors of Inns of Ct.—HARVEY'S CASE (1821), Pearce, Inns of Court, 2nd ed., p. 405.

16. Admission of students — Mandamus to Benchers.]—The ct. will not grant a *mandamus* to compel the Benchers of one of the Inns of Ct. to admit an individual as a member of the society with a view to his qualifying himself to be called to the Bar.—R. *v.* LINCOLN'S INN BENCHERS (1825), 4 B. & C. 855; 7 Dow. & Ry. K. B. 351; 107 E. R. 1277.

Annotation:—**Apld.** Neate *v.* Denman (1874), L. R. 18 Eq. 127.

17. Inns of Chancery—Admission of attorney—Mandamus to Benchers.]—The Inns of Ch. are so far voluntary societies that the ct. possesses no power to compel them by *mandamus* to admit an attorney to be one of their members.—R. *v.* BARNARD'S INN (1836), 5 Ad. & El. 17; 2 Har. & W. 62; 111 E. R. 1073.

B. Discipline and Disbarring.

18. Disbarring—Remedy of party aggrieved—Appeal to judges.]—A barrister in the Temple was expelled from the society & his chambers seized for non-payment of commons. He moved for a writ of restitution addressed to the Benchers:—*Held:* no writ could issue to the Benchers, they not being a body corporate, the only remedy being by appeal to the judges.—BOOREMAN'S CASE (1641), March, 177, pl. 235; 82 E. R. 464.

Annotations:—**Apld.** R. *v.* Physicians' College (1681), 2 Show. 178; R. *v.* Gray's Inn Benchers (1780), 1 Doug. K. B. 353; Manisty *v.* Kenealy (1876), 24 W. R. 919.

19. —— Benchers of Inn—Powers of.]—In England the cts. of justice are relieved from the unpleasant duty of disbarring advocates in consequence of the power of calling to the Bar & disbarring having been in very remote times delegated to the Inns of Ct. (LORD WYNFORD).—*Re* ANTIGUA JJ. (1830), 1 Knapp, 267; 12 E. R. 321, P. C.

Annotation:—**Mentd.** *Re* Monckton (1837), 1 Moo. P. C. C. 455, P. C.

20. —— Voluntary—Admission as solicitor.]—*Semble:* a barrister, who had been originally an attorney, must be disbarred before he can be readmitted as an attorney.—*Ex p.* WARNER (1842), 6 Jur. 1016.

Annotation:—**Refd.** *Ex p.* Bateman (1845) 6 Q. B. 853.

21. —— —— ——.]—A barrister cannot serve as an articled clerk, for the purpose of being admitted an attorney, without first being disbarred.—*Re* BATEMAN, *Ex p.* BATEMAN (1845), 6 Q. B. 853; 1 New Pract. Cas. 127; 2 Dow. & L. 725; 14 L. J. Q. B. 89; 4 L. T. O. S. 331; 9 Jur. 132; 115 E. R. 322.

22. —— Whether proper course.] — ANON., No. 124, *post.*

SECT. 1, SUB-SECT. 2.—A.

11 i. *Call to Bar—Trade or business—Disqualification.*]—S. was during part of the three years next preceding his application to be admitted to the Bar the proprietor, printer & publisher of a newspaper & collected the debts of the paper, & printed for gain, matters not essential to the owning, printing & publishing of the newspaper; he was also on the list of the members of the Melbourne Stock & Share Exchange:—*Held:* (1) he had followed a trade or business & was disqualified as to the portion of the three years during which he did so; (2) he should be suspended from practising for twelve months, the ct. not being satisfied he had obtained admission with the knowledge of his disqualification.—*Re* SPENSLEY (1864), 1 W. W. & A'B. 173.—**AUS.**

11 ii. —— *Criminal conviction—Disqualification.*]—K., a barrister of the Middle Temple, an advocate of the Supreme Ct. of the Cape of Good Hope, & of the High Ct. of the late South African Republic, was convicted in England of an attempt during the South African War to solicit to commit the crime of murder, & was disbarred by the benchers of the Middle Temple:—*Held:* the criminal conviction was not *per se* a disqualification for admission, & as the offence was of a political nature, in the exercise of the ct.'s discretion K. should be admitted to practice as an advocate.—*Ex p.* KRAUSE (1905), S. C. 221; O. R. C. 82.—**S. AF.**

c. —— *Power to exact fee.*]—*Held:* the benchers of the Law Society of British Columbia had no power to exact payment of $100 fee upon the examination of a candidate into his fitness to be called to the British Columbia Bar.—HOVELL *v.* LAW SOCIETY (1909), 11 W. L. R. 18.—**CAN.**

d. *Admission of women.*]—Both at common law, & under Columbia Legal Professions Act, women are not eligible as barristers.—*Re* FRENCH (1912), 19 W. L. R. 847; 1 W. W. R. 488; 1 D. L. R. 80; 17 B. C. R. 1.—**CAN.**

e. ——.]—A woman is not included within the purview of the Bar Act of the Province of Quebec, & cannot be admitted either to the study of the law or to the practice of the legal profession.—LANGSTAFF *v.* BAR OF QUEBEC (1915), Q. R. 47 S. C. 131; Q. R. 25 K. B. 11.—**CAN.**

15 i. *Admission—Motion for.*]—Under an order providing that a session should be held for "calling, arguing, & disposing of the causes remaining on the docket":—*Held:* except motions relating to causes on the docket, a motion for admission to the Bar alone was entertainable.—*Re* ADMISSION TO THE BAR (1881), 2 R. & G. 366.—**CAN.**

15 ii. —— *Mandamus—To whom addressed.*]—A petition for *mandamus* to secure admission to the Bar of the Province of Quebec should be addressed (*a*) to the examiners; (*b*) to the section of the Bar; (*c*) to the Bar generally.—LANGSTAFF *v.* BAR OF QUEBEC (1915), Q. R. 47 S. C. 131; Q. R. 25 K. B. 11.—**CAN.**

15 iii. —— *Pleadership & mukhtearship.*]—When a candidate applies to the Board of Examiners for Pleadership & Mukhtearship to be allowed to present himself for examination, stating that he has complied with the rules & regulations entitling him to enter for such examination, the Board of Examiners should inquire into each individual case & form its own opinion as to the fitness of such appct. even though he may have been rejected as an improper person on a previous application to the Board when composed of different members.—*Re* RUDRA NARAIN ROY (1901), I. L. R. 28 Calc. 479.—**IND.**

h. *Licence fee—"Profession."*]—The profession of a barrister is included in the term "profession" in Municipal Clauses Act, s. 171 (26), as amended in 1902, c. 52, & s. 173, as amended in 1903, c. 42, imposing the payment of a licence fee upon every person following a profession within a municipality.—VICTORIA *v.* BELYEA (1906), 12 B. C. R. 112; *affd.*, 13 B. C. R. 5.—**CAN.**

23. —— Decision of Benchers final—Appeal to judge.]—The decisions of the Benchers with regard to the disbenching & disbarring of their members are final & conclusive, subject only to an appeal to the Lord Chancellor & the judges as visitors.

An action by Benchers to recover possession of chambers & a reconveyance of property belonging to an Inn of Ct. from a person who has been disbenched & disbarred does not give the High Ct. of Justice jurisdiction to inquire into the question whether the disbenching & disbarring were for sufficient cause & otherwise regular, such question being *res judicata* so far as the ct. is concerned.—MANISTY *v.* KENEALY (1876), 24 W. R. 918.

24. Rescission of call—Misrepresentation of fact—Power of Benchers.]—S., a member of the Middle Temple, was proposed by a Master of the Bench, but he waived that proposal. He afterwards petitioned to have the proposal revived, but the Bench refused it, & no Master of the Bench would propose him again. S. having a certificate from the under-treasurer of the Middle Temple of his keeping & paying for commons, & performing his exercises, carried it to the under-treasurer of Lincoln's Inn, paid his fees of admission in that society, & was called to the Bar there, & took the oaths in Westminster Hall. He did not disclose to the under-treasurer of Lincoln's Inn what had passed in the Middle Temple. The Society of Lincoln's Inn, on hearing of the matter, annulled the call to the Bar as irregular & obtained by surprise, & an appeal by S. was dismissed by the judges. — SAVAGE'S CASE (1777), cited 1 Doug. K. B. 353 ; 99 E. R. 227.

25. Discipline—Inquiry by Benchers—Powers of tribunal.]—The Benchers of an Inn of Ct. being engaged in an inquiry into the conduct of a barrister, a member of the Inn, especially in relation to certain transactions in a co., he produced before them a director as a witness in his favour, & they, having procured from the solr. of the co. a manifold letter-book containing copies of letters to & from divers persons, mostly relating to the affairs of the co., but containing also two or three private letters, cross-examined him therefrom. He afterwards asked for it, in order, as he said, to offer an explanation, & having got it, put it in his pocket & declared he should keep it, &, when requested, refused to return it, whereupon they directed their porters to retake it by force. In an action for the assault they justified on the above facts. Pltf. had bought & paid for the book in blank :—*Held :* (1) unless the book was the private, personal book of pltf. they had lawful possession, & he had no right to retake it ; (2) if it was really & mainly the letter-book of the co., it would not be his private book merely by reason of his having originally bought the book in blank, or having put two or three private letters into it ; (3) whether it was his private book or that of the co. was a question for the jury on the whole of the evidence, including the letters themselves ; (4) if it were the co.'s book defts. had lawful possession of it, for the purpose of lawfully retaking it by force, even after pltf. had it in his pocket. *Semble :* even assuming it to be pltf.'s book, it having been once lawfully in the custody of the Benchers in the course of an inquiry into the matter over which they had jurisdiction, it could not be lawfully taken from them pending that inquiry.

The receipt of papers from the solr. of the co. when it was on the eve of expiring, he having a legitimate custody of the papers, & handing them over to the Benchers, managers of the inquiry, & who were bound to hand them back to him, gives the Benchers a special property in the papers, unless the pltf. solr. shows that he was entitled to them.

The "Parliament" of an Inn of Ct. sitting on such a question is not a ct. armed with the powers which a ct. of justice possesses for compelling persons to attend as witnesses, or to produce documents essential to the investigation of the truth. It is a good deal more than a mere "friendly tribunal," though it is not armed with powers of procedure co-extensive with its jurisdiction. The Benchers, on a charge being preferred against a member of the Bar, are armed with the power to disbar him—that is, to deprive him of his professional position & existence.—HUDSON *v.* SLADE (1862), 3 F. & F. 390, N. P.

26. —— Jurisdiction of Benchers.]—A barrister is subject to the domestic *forum* of the Benchers. If the conduct of a member of an Inn of Ct. is such as to be unworthy of a gentleman, he is within the jurisdiction of the Benchers of his Inn. Barristers are subject to the jurisdiction of the Benchers if their conduct is unbecoming the profession & unbecoming gentlemen. The Benchers exercise their jurisdiction partly for the protection of the profession & partly for the protection of the public—for the protection of the profession that it may not be disgraced by having enrolled among its members those who dishonour & discredit it, & for the protection of the public that their confidence in the rank of the barrister being a sufficient test of the trustworthiness & honour of each individual member of the Bar may not be misled & abused (COCKBURN, J.).—SEYMOUR *v.* BUTTERWORTH (1862), 3 F. & F. 372, N. P.

Annotation :—**Mentd.** Bryce *v.* Rusden (1886), 2 T. L. R. 435.

C. Dues of the Inns, and Management of Chambers.

27. Dues owing to—Recovery of.]—In debt upon a bond conditioned for the payment of all dues to an Inn of Ct. as a barrister, if deft. pleads payment, a replication that for a length of time each barrister has used to pay an annual sum for pensions to the

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SECT. 1, SUB-SECT. 2.—B.

23 i. *Disbarring—Decision of Benchers final—Appeal.*]—There is no appeal from the refusal of the Benchers to reinstate a disbarred barrister.—*Re* LEGAL PROFESSION ACT & HALL (1918), 24 B. C. R. 226.—**CAN.**

25 i. *Discipline—Inquiry by Benchers, —Powers of tribunal.*]—R. S. O., 1887, c. 145, s. 36, giving power to the benchers of the Law Society of Upper Canada to examine witnesses under oath, is not imperative.—HANDS *v.* LAW SOCIETY OF UPPER CANADA (1888), 16 O. R. 625 ; 17 O. R. 300 ; 17 A. R. 41.—**CAN.**

25 ii. —— —— ——.] — The local council of the Bar of Montreal have jurisdiction to proceed with an inquiry into charges against an advocate in the interest of the profession notwithstanding the withdrawal of the charge by the private prosecutor.

A complaint in any form sufficient to disclose charges against an advocate of improperly carrying on trade & commerce & unduly retaining the money of a client, contrary to the bye-laws of the local section of the Bar, is a matter over which the council of the Bar have complete jurisdiction.

The omission to preserve a complete record of the proceedings upon the inquiry held by the council or to take written notes of the evidence constitutes mere irregularities in procedure insufficient to justify a writ of prohibition.—HONAN *v.* BAR OF MONTREAL (1899), 30 S. C. R. 1.—**CAN.**

Jurisdiction of court over counsel.]—*See* Sect. 3, sub-sect. 1, *post.*

SECT. 1, SUB-SECT. 2.—C.

m. *Court buildings — Maintenance.*]—In 1846 the Law Society of Upper Canada entered into a covenant with the Crown to provide, at their own cost, & without further charge to the Province, for all time to come, fit & proper accommodation for the superior cts. of law & equity for Upper Canada, as then existing or thereafter to be constituted, & in default, or in case of the buildings becoming dilapidated, etc., the Crown to repair, etc., & the outlay to become a charge on the society's land :—*Held :* notwithstanding the greatly increased expense, since the establishment of the Ct. of Common Pleas & 18 Vict. c. 122, 20 Vict. c. 64, 22 Vict. c. 31, & C. S. U. C. c. 33, of repairing & maintaining the buildings at Osgoode Hall, the society was bound to repair & maintain them, & was not released therefrom, the society were entitled to have the Govt. account to them annually for the sum of $29,000, & this sum must be considered as a provision to enable them to perform their covenant, which was in full force.—R. *v.* LAW SOCIETY OF UPPER CANADA (1870), 20 C. P. 490 ; *affd.*, 21 C. P. 229.—**CAN.**

Sect. 1.—*The Inns of Court and other governing bodies; Sub-sect.* 2, *C. Sect.* 2, *Sub-sect.* 1, *A. B. & C.*]

treasurer of the society for the time being, & that an annual payment was in arrear from deft. at the time of the commencement of the action, is good, though it does not show that such sum was ever demanded.—LEVINZ *v.* RANDOLPH (1700), 1 Ld. Raym. 594; 12 Mod. Rep. 413; 91 E. R. 1298.

28. —— Bond for payment of.]—Under a bond conditioned for the due payment to the Society of Lincoln's Inn of all such sums as should from time to time become due & payable, according to the customs & orders of the society, the obligor cannot dispute such payments as were at the time of the execution of the bond considered as dues to the society.—ROSSLYN (EARL) *v.* JODRELL (1815), 4 Camp. 303; 1 Stark. 148, N. P.

29. —— —— Jurisdiction of court.]—On a demurrer to a bill filed by a barrister against his Inn, praying that the society might be restrained from prosecuting an action on the bond executed by pltf. on being called to the Bar, & that such bond might be delivered up to pltf.; & praying for a declaration that pltf. was entitled to retire from the Inn without undertaking not to practise at the Bar:—*Held:* the ct. had no jurisdiction, & demurrer allowed.—NEATE *v.* DENMAN (1874), L. R. 18 Eq. 127; 43 L. J. Ch. 409; 30 L. T. 290; 22 W. R. 400.

30. —— Right of seizure—Forcible entry to chambers.]—*Held:* (1) a writ of restitution should be granted to the Master & Society of Clement's Inn for restitution to chambers upon a forcible entry, & such a society might seize for non-residence or want of commons.—CLEMENT'S INN CASE (1661), 1 Keb. 135; 83 E. R. 859.

31. Chambers—Mansion house.]—Chambers in the Inns of Ct. & Ch. are the mansion houses of their respective inhabitants, so that a person who breaks & enters such chamber in the night time with intent to commit a felony therein is guilty of burglary.—EVANS & FINCH'S CASE (1637), Cro. Car. 473; W. Jo. 394; 79 E. R. 1009.

Annotations:—**Mentd.** R. *v.* Whistler (1702), 2 Ld. Raym. 842; R. *v.* Fletcher (1742), 1 Leach, 23; R. *v.* Mauncer (1792), 2 Leach, 567; Cook *v.* Humber (1861), 11 C. B. N. S. 33; Henrette *v.* Booth (1863), 15 C. B. N. S. 500; A.-G. *v.* Mutual Tontine Westminster Chambers Assocn. (1876), 1 Ex. D. 469, C. A.; Yorkshire Insce. *v.* Clayton (1881), 8 Q. B. D. 421, C. A.; Rogers *v.* Hosegood, [1900] 2 Ch. 388, C. A.

32. —— Inn of Chancery.]—An action for money due to an Inn of Ch. will not lie in the name of the principal only, but must be brought in the joint names of the principal & the ancients.—THIMBLETHORP *v.* HARDESTY (1702), 7 Mod. Rep. 116; 87 E. R. 1133.

33. —— Mortgage of—Redemption.]—A bill in equity will not lie to redeem a mtge. of chambers in the Inns of Ct., but pltf. must apply to the Bench or to the judges of the society: *secus*, if on application to the Bench they refer pltf. to his remedy in equity.—RAKESTRAW *v.* BREWER (1728), 2 P. Wms. 511; 24 E. R. 839; *affd.* (1729), Mos. 189, L.C.

Annotations:—**Refd.** *Re* Gray's Inn Benchers (1780), 1 Doug. K. B. 353. **Mentd.** Leigh *v.* Burnett (1885), 29 Ch. D. 231; *Re* Biss, Biss *v.* Biss, [1903] 2 Ch. 40, C. A.

34. —— Surrender—Purchase.]—A surrender of chambers in New Inn to the treasurer & ancients of the society, made with their assent, to the intent that they might grant the chambers to a purchaser, passes the estate to such purchaser before admission. Admission is not necessary, as in the case of copyholds, to complete the grantee's estate, but is only for the purpose of signifying the assent of the society that the grantee should become a member of the Inn.—DOE d. WARRY *v.* MILLER (1876), 1 Term Rep. 393; 99 E. R. 1157.

35. —— Renewal of grant — Action against Benchers.]—A bill will not lie against the Benchers of an Inn of Ct., relative to the renewal of a grant of chambers.—CUNNINGHAM *v.* WEGG (1787), 2 Bro. C. C. 241; 29 E. R. 134.

Annotation:—**Refd.** Neate *v.* Denman (1874), L. R. 18 Eq. 127.

36. —— Sub-letting.]—The tenant of a set of chambers in the Temple let to each of two sub-tenants a room unfurnished, of which the tenant had the exclusive use, with joint use of the vestibule & a key of the outer door, the tenant himself retaining one room for his own exclusive use, & providing attendance, light & firing for the whole set:—*Semble:* the position of the sub-tenant resembled an occupation as a licensee, or as a guest at an inn.—SMITH *v.* LANCASTER (1869), L. R. 5 C. P. 246; 1 Hop. & Colt. 287; 39 L. J. C. P. 33; 21 L. T. 492; 34 J. P. 22; 18 W. R. 170.

Annotation:—**Mentd.** Thompson *v.* Ward, Ellis *v.* Burch (1871), L. R. 6 C. P. 327.

37. —— Right of Bencher when disbenched & disbarred.]—A barrister, to whom a set of chambers is assigned as a Bencher, is not entitled to the set of chambers for life, in the event of his being disbenched & disbarred.—MANISTY *v.* KENEALY (1876), 24 W. R. 918.

SECT. 2.—RIGHTS AND PRIVILEGES OF BARRISTERS.

SUB-SECT. 1.—THE RIGHT OF AUDIENCE.

A. House of Lords, and Privy Council.

38. When sitting as ultimate appeal tribunal—Equal right of English, Irish & Scottish counsel.]—In the House of Lords, when sitting as the ultimate tribunal of appeal for the United Kingdom, English, Irish & Scottish counsel have equal & exclusive right of audience as advocates.—A.-G. *v.* LORD ADVOCATE (1834), 2 Cl. & Fin. 481; 6 E. R. 1236, H. L.

39. Before Appeal Committee.]—Counsel are not generally heard before the House of Lords Appeal Committee, but they may be heard.—GORE *v.* STACPOOLE (1812), 48 Lords' Journals, 822.

40. *S. P.* A.-G. *v.* WEST RIDING OF YORKSHIRE COUNTY COUNCIL (1906), 138 Lords' Journals, 416.

41. ——.]—Counsel are not heard before the Appeal Committee of the House of Lords, unless the circumstances of the case are very unusual.—SACKVILLE-WEST *v.* HOLMESDALE (VISCOUNT) (1877), 109 Lords' Journals, 346.

42. ——.]—Counsel are not generally heard before the House of Lords Appeal Committee; the practice is for parties and their agents to be called in.—CLEAVER *v.* CLEAVER (1884), 9 App. Cas. 631, H. L.

43. —— When leave given.]—On petition on behalf of an infant, the Appeal Committee of the House of Lords gave leave for counsel to attend & be heard on behalf of the infant in an appeal then pending.—GORE *v.* STACPOOLE (1812), 48 Lords' Journals, 822.

44. —— ——.]—Circumstances in which the House of Lords gave special leave for counsel to appear on behalf of applts. — SACKVILLE-WEST *v.* HOLMESDALE (VISCOUNT) (1877), 109 Lords' Journals, 346.

45. Barrister peer—Appeal at Bar of House—Limitation of right of audience.]—A barrister, who is also a peer, may argue as counsel on an appeal at the Bar of the House of Lords, but may not appear as counsel to argue before Committees of the House, or before the House when sitting under the presidency of the Lord High Steward on a criminal case.—*Re* KINROSS (LORD), [1905] A. C. 468; 74 L. J. P. C. 137, H. L.

B. Superior Courts.

46. In Court of Appeal.]—English barristers have exclusive right of audiences as advocates in the Ct. of Appeal.—*Re* ELLERTON (1887), 3 T. L. R. 324; *sub nom. Re* ELDERTON, *Ex p.* RUSSELL, 31 Sol. Jo. 235; 4 Morr. 367, C. A.

47. In superior courts.]—The superior cts. do not allow any person to interfere in their proceedings as an advocate, but confine that privilege to gentlemen admitted to the Bar by the members of one of the Inns of Ct. (LORD TENTERDEN, C.J.).—COLLIER *v.* HICKS (1831), 2 B. & Ad. 663; 9 L. J. O. S. M. C. 138; 109 E. R. 1290.

Annotations:—**Refd.** *Ex p.* Evans (1846), 9 Q. B. 279; *Re* Macqueen (1861), 9 C. B. N. S. 793. **Mentd.** R. *v.* York (1832), 3 B. & Ad. 770; Newton *v.* Constable (1841), 2 Q. B. 157; R. *v.* Denbighshire JJ. (1846), 2 New Sess. Cas. 422.

48. In Bankruptcy Court.]—The Bar was not entitled to exclusive audience in any proceedings in the old Cts. of Bkpcy., but only to precedence.—ANON. (1852), 20 L. T. O. S. 55; 1 W. R. 12.

49. ——.]—The right of audience given by Bkpcy. Act, 1883 (c. 52), s. 151, is strictly limited to the High Ct.—*Re* ELDERTON, *Ex p.* RUSSELL (1887), 31 Sol. Jo. 235; 4 Morr. 36; *sub nom. Re* ELLERTON, 3 T. L. R. 324, C. A.

50. In Probate Court—Not in non-contentious proceedings.]—Barristers-at-law were not admissible to practise in the Ct. of Probate in non-contentious business.—*In the Goods of* LUDLOW (1858), 27 L. J. P. & M. 7; 30 L. T. O. S. 278.

51. In Divisional Court—Appeal from county court sitting in bankruptcy.]—A solr. has a right of audience on an appeal to the Divisional Ct. from a county ct. sitting in bkpcy.—*Re* BARNETT, *Ex p.* REYNOLDS (1885), 15 Q. B. D. 169; 54 L. J. Q. B. 354; 53 L. T. 448; 2 Morr. 122, D. C.

Annotations:—**Mentd.** Sharp *v.* McHenry, Sharp *v.* Brown (1886), 55 L. T. 747; *Re* Bassett's Plaster Co., *Ex p.* Bassett (1894), 1 Mans. 297; *Re* Richardson & Cook, *Ex p.* Grimes (1902), 86 L. T. 690.

52. In chambers.]—Counsel not heard at chambers to oppose a summons for production of documents, under Ct. of Ch. Act, 1852 (c. 80), s. 26, but the hearing adjourned to the ct.—DIPPLE *v.* CORLES (1852), 22 L. J. Ch. 15; 1 W. R. 47.

53. —— King's Counsel.]—King's Counsel have a right to appear in chambers, but it is not usual for them to do so.—DICKSON *v.* HARRISON (1878), 9 Ch. D. 243; 47 L. J. Ch. 761; 38 L. T. 794, C. A.

Annotations:—**Mentd.** *Re* Elham Valley Ry. Co., Dickson's Case (1879), 12 Ch. D. 298; Heatley *v.* Newton (1881), 19 Ch. D. 326, C. A.; Holloway *v.* Cheston (1881), 30 W. R. 120.

54. Right of party other than counsel to represent litigant.] — The wife of a pltf. cannot manage the cause for him at *Nisi Prius*, he being absent & in custody; where the judge refused in such a case to hear the wife as advocate &, the husband not appearing in person or by attorney, a non-suit was directed, the ct. refused to set the non-suit aside.—COBBETT *v.* HUDSON (1850), 15 Q. B. 988; 16 L. T. O. S. 124; 14 Jur. 982; 117 E. R. 731.

Annotation:—**Folld.** Oldfield *v.* Cobbett (1851), 14 Beav. 28.

55. ——.]—Pltf.'s counsel being actually engaged in another ct. when a case was reached, pltf. asked the judge that the case might be commenced by himself or his solr. The judge reminded pltf. that his solr. had no right of audience; whereupon parties agreed to a postponement of the case.—ANON. (1885), 78 L. T. Jo. 286.

See, further, titles *passim*.

Right of litigant to appear in person.]—*See* titles *passim*.

C. Inferior Courts and Other Tribunals.

56. Before coroner—Only if demanded.]—The coroner should allow both counsel & witnesses on both sides as well for a *felo de se* as for the King if it be demanded.—BARCLEE'S CASE (1658), 2 Sid. 101; 82 E. R. 1279.

Annotations:—**Mentd.** R. *v.* Stanlake (1673), 1 Mod. Rep. 82; R. *v.* Clerk (1702), 1 Salk. 377; Cox *v.* Coleridge (1822), 1 B. & C. 37; R. *v.* Carter (1876), 13 Cox, C. C. 220.

57. Before under-sheriff—Right admitted.]—The under-sheriff is justified in not allowing any person to practise before him as an advocate, except a barrister or attorney.—TRIBE *v.* WINGFIELD (1836), 2 M. & W. 128; 2 Gale, 191; 6 L. J. Ex. 20; 150 E. R. 698.

58. On hearing of scheme by Charity Commissioners—Only in cases of exceptional difficulty.]—Counsel will only be heard on a scheme settled by the Charity Comrs. in cases of exceptional difficulty or importance, on the ground that it is necessary & proper to cut down as far as possible the expenses of settling the scheme.—BENTHALL *v.* KILMOREY (EARL) (1844), Tudor's Charitable Trusts, 4th ed., p. 599.

59. At quarter sessions—Four barristers present — By order of justices.]—Justices in quarter sessions may in their discretion make an order that barristers, provided as many as four attend, shall have exclusive audience in their ct., though, until such order was made, no barristers have attended the ct. except on special retainer, & the business of advocates has always been performed by attorneys only.—*Ex p.* EVANS (1846), 9 Q. B. 279; 115 E. R. 1280; *sub nom.* R. *v.* DENBIGHSHIRE JJ., 2 New Sess. Cas. 422; 15 L. J. Q. B. 335; 7 L. T. O. S. 256; 10 J. P. Jo. 371; 10 Jur. 542.

Annotation:—**Mentd.** R. *v.* L. G. Board, *Ex p.* Arlidge, [1914] 1 K. B. 160, C. A.

60. —— Pre-audience allowed — Exclusive right not admitted.]—Counsel conducting a prosecution at Lichfield Quarter Sessions protested against attorneys appearing as advocates, when there were two barristers present, who regularly attended the sessions. The recorder having communicated with Lord Denman, C.J., on the subject, decided that attorneys would be allowed to plead both for prosecutors & prisoners, & barristers would be allowed pre-audience, but not exclusive audience.—R. *v.* ARNOLD (1845), 4 L. T. O. S. 304.

61. —— Clerk of public body appearing on its behalf—Right not admitted.]—The provision in Valuation (Metropolis) Act, 1869 (c. 67), s. 62, that, on an appeal against a valuation list, "an assessment committee may appear by their clerk" does not give the clerk right to be heard on their behalf at quarter sessions for the purpose of consenting to an alteration in the list.—R. *v.* LONDON JJ., [1896] 1 Q. B. 659; 65 L. J. M. C. 120; 74 L. T. 523; 60 J. P. 420; 44 W. R. 485, C. A.

62. Insolvency jurisdiction of county court.]—Counsel are not entitled to exclusive audience in the insolvency jurisdiction of the county cts.—ANON. (1850), 14 L. T. O. S. 496.

SECT. 2, SUB-SECT. 1.—C.

56 i. *Before coroner.*]—A barrister cannot insist upon being present at a coroner's inquest, & upon examining & cross-examining witnesses, etc., & can maintain no action against the coroner for excluding him from the room.—AGNEW *v.* STEWART (1862), 21 U. C. R. 396.—CAN.

60 i. *At quarter sessions — Pre-audience.*]—Deft.'s attorney being about to address the jury in a case at quarter sessions, the senior member of the Bar present objected, contending that, while counsel were present claiming pre-audience, an attorney could not be permitted to do so, but, on the ct.'s suggestion, the objection was waived.—R. *v.* HAURAHAN (1846), 1 L. T. O. S. 391.—IR.

o. *At petty sessions.*] — Justices in

Sect. 2.—Rights and privileges of barristers: Sub-sects. 1, C. & D.; sub-sects. 2, 3, 4 & 5; sub-sect. 6, A. & B.]

63. Vice-Chancellor & heads of colleges.]—A party is not entitled to come attended by counsel or attorney before the Vice-Chancellor & Heads of Colleges.—*Ex p.* DEATH (1852), 18 Q. B. 647; 21 L. J. Q. B. 337; 19 L. T. O. S. 165; 17 Jur. 112; 118 E. R. 244.

64. Before arbitrators — Only by permission of arbitrator.]—*Held:* it was competent to arbitrators under Friendly Societies Act, 1855 (c. 63), to decline to hear counsel. *Semble:* all arbitrators have the like discretion.—*Re* MACQUEEN (1861), 9 C. B. N. S. 793; 142 E. R. 312.

Annotation:—**Refd.** R. *v.* St. Mary Abbotts Assmt. Com. (1891), Ryde's Rat. App. (1891–93), 276, C. A.

65. At hearing of charge of corrupt practices at municipal elections—Right not admitted.]—*Held:* Corrupt & Illegal Practices Prevention Act, 1883 (c. 51), s. 38, excluded the right of a person charged with any corrupt or illegal practice at a municipal election to be heard by his counsel or solr.—R. *v.* MANSEL JONES (1889), 23 Q. B. D. 29; 60 L. T. 860; 53 J. P. 739; 37 W. R. 508; *sub nom. Re* HEREFORD MUNICIPAL ELECTION PETITION, *Ex p.* GARROLD, 5 T. L. R. 411, D. C.

Annotation:—**Distd.** R. *v.* St. Mary Abbot's Kensington Assmt. Com. (1891), 60 L. J. M. C. 52, C. A.

66. *S. P.* R. *v.* MANSEL JONES (1889), Short & Mellor, Crown Office Practice, 2nd ed., p. 223, D. C.

67. Before chief gas examiner of metropolitan district—Only by permission of gas examiner.]—The chief gas examiner of the metropolitan district has a discretion as to whether he will or will not hear counsel upon an appeal to him under Gaslight & Coke & other Gas Companies Acts Amendment Act, 1880 (c. clxxxi), s. 12.—R. *v.* WILLIAMSON (1890), 59 L. J. Q. B. 493; 63 L. T. 276; 55 J. P. 101; 38 W. R. 769; 7 T. L. R. 534.

Annotations:—**Dbtd.** R. *v.* St. Mary Abbott's Kensington Assmt. Com. (1891), 64 L. T. 240, C. A. **Mentd.** Lawson *v.* Reynolds, [1904] 1 Ch. 718.

D. Courts outside England.

68. Before Courts of Province of Ontario—Only after admission by Law Society of Upper Canada.]—A member of the English Bar has no right to practise in the cts. of the Province of Ontario without having previously been admitted by the Law Society of Upper Canada. The Judicial Committee of the Privy Council have no power to issue a mandatory order.—DE SOUZA'S PETITION (1885), 1 T. L. R. 597, P. C.

69. At trial in Scotland—Only if trial held under special commission under Seal of United Kingdom.]—A special commission was issued under the Great Seal of the United Kingdom for the trial of H. & other persons charged with high treason in the counties of Stirling, Lanark, Dumbarton, Renfrew, & Ayr, the prisoners being indicted at Stirling (1) for treason by levying war against the King & (2) for conspiring to levy war against the King with intent by force or constraint to compel him to change his councils, etc., & to intimidate Parliament. The trial being under a special commission under the Seal of the United Kingdom, it was held in conformity with English procedure, & English counsel were permitted to appear.—R. *v.* HARDIE (1820), 1 State Tr. N. S. 609.

SUB-SECT. 2.—SIGNATURE OF INSTRUMENTS, PLEADINGS, DOCUMENTS, ETC.

70. Whether signature necessary—Special case.]—The signature of counsel to a special case is not now necessary.—HARE *v.* HARE (1876), 3 Char. Pr. Cas. 261.

71. —— Proceedings under Church Discipline Act, 1840 (c. 86), s. 7.]—*Held:* the approval & signature of the articles required under the above sect. on proceedings being taken against the party accused was the approval & signature of any barrister practising in the Arches Ct. of Canterbury.—MOUNCEY *v.* ROBINSON (1867), 37 L. J. Eccl. 8.

72. —— Statement of claim.]—*Held:* it was very desirable that every statement of claim should be signed by counsel, although, under R. S. C., 1875, Ord. 19, such signature was not obligatory.—DUCKITT *v.* JONES (1876), 33 L. T. 777.

See, now, R. S. C., Ord. 19, r. 4.

73. Who must sign—Appeal to House of Lords.]—Standing Order No. 58, directing that no person shall sign an appeal to the House of Lords unless he was of counsel in the same cause in the cts. below, or shall attend as counsel at the hearing at the Bar of the House, is not to be departed from, although there may be cases in which exceptions will be allowed.—PRICE *v.* SEELEY (1843), 10 Cl. & Fin. 28; 8 E. R. 651, H. L.

74. —— ——.]—An appeal which was informal as not being signed by two counsel stood over to be signed by counsel.—CLEAVER *v.* CLEAVER (1884), 9 App. Cas. 631, H. L.

75. —— Appeal to Privy Council.]—Where two Canadian counsel had signed resp.'s case, but neither was briefed at the hearing, the signature of an English counsel who would argue the case was required.—ANON. (undated), Preston, Privy Council Appeals, 170.

76. What is sufficient signature — Signature of draft pleadings.]—Where counsel's "hand" or

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petty sessions may allow any person to conduct a prosecution, although not a party or counsel or attorney.—RITTER *v.* CHARLTON (1904), 29 V. L. R. 558.—**AUS.**

SECT. 2, SUB-SECT. 1.—D.

p. *Before Supreme Court of Canada.*]—Counsel, residing in the State of New York, refused to be heard on behalf of applts. in an appeal pending before the above ct.—HALIFAX CITY RY. CO. *v.* M. (1884), Cas. Dig. 389.—**CAN.**

q. ——.]—A member of the Massachusetts Bar was heard on behalf of applts.—S.S. CALVIN AUSTIN *v.* LOVITT (1905), 35 S. C. R. 616.—**CAN.**

r. ——.]—Upon the application of counsel for applts. a member of the Massachusetts Bar was invited by the ct. to assist Canadian counsel.—S.S. HAMMOND *v.* COOLIN (1915), Cam. Prac., 2nd ed., Vol. 2, p. 103.—**CAN.**

s. *S. P.* S.S. BORGHILD *v.* D'EUTREMONT (1917), Cam. Prac., 2nd ed., Vol. 2, p. 103.—**CAN.**

t. *Before court of revision.*]—Cts. of revision created under Consolidated Assessment Act, 1892, are not obliged to hear counsel in support of an appeal against an assessment of property under that Act.—*Re* ROSBACH & CARLYLE (1892), 23 O. R. 37.—**CAN.**

u. *Before High Court of Bombay.*]—Counsel cannot claim as of right to be heard on a reference to the above ct. under Criminal Procedure Code, s. 296.—R. *v.* DEVAMA (1875), I. L. R. 1 Bom. 64.—**IND.**

w. *Before special tribunal under Criminal Law Amendment Act (XIV. of 1908).*]—Barristers have the right of exclusive audience before the above tribunal formed to try cases sent up for trial to the High Ct. under the above Act.—*Re* BARRISTERS & VAKILS (1909), 13 C. W. N. 605.—**IND.**

x. *Before Court for Land Cases Reserved.*]—Counsel will be heard in the above ct. in the order in which they are heard in the Ct. of Exch Chamber.—HOLT *v.* HARBERTON (LORD) (1872), 6 I. L. T. 1.—**IR.**

SECT. 2, SUB-SECT. 2.

70 i. *Whether signature necessary—Declaration.*]—Under C. L. P. Act, s. 99, R. S. O., 1877, c. 50, it is no objection to a declaration served that the attorney's name is not signed to it.—CROOKS *v.* DAVIES (1836), 5 O. S. 141.—**CAN.**

70 ii. —— *Petition of appeal.*]—*Qu.:* whether a petition of appeal was a pleading so as to necessitate its being signed by junior counsel.—CONNOLLY *v.* CONNOLLY (1867), 1 I. L. T. Jo. 279, C. A.—**IR.**

signature is affixed to the rough draft of pleadings, it is not necessary that the fair copy delivered of such pleadings shall also be signed by him *propriâ manu*, as a copy of his signature will suffice.—SALTER *v.* PONSFORD (1840), 4 Jur. 434.

77. —— Signature of bill & draft amendments.]—Where the counsel who signs the original bill signs also the draft amendments, & the amendments are such as not to make a new engrossment necessary, his name need not be twice signed on the record.—WEBSTER *v.* THRELFALL (1823), 1 Sim. & St. 135; 1 L. J. O. S. Ch. 109; 57 E. R. 55.

78. Effect of signature — Of special case—Evidence of facts stated.]—Where a verdict had been found subject to a special case, & a new trial had been directed:—*Held:* the special case, signed by the counsel on each side, was evidence of the facts there stated.—VAN WART *v.* WOLLEY (1823), Ry. & M. 4.

Annotation:—**Mentd.** Haller *v.* Worman (1861), 3 L. T. 741.

79. —— Of bill in Chancery—Voucher that case not fictitious.]—Formerly it was required that bills in Ch. should bear the signature of counsel, to which the ct. was in the habit of paying, as it ought to pay & as it always will be warranted in paying hereafter, as it has done heretofore, the greatest possible respect. The signature of counsel to the bill was to that extent a voucher that the case was not a mere fiction (JAMES, L.J.).—GREAT AUSTRALIAN GOLD MINING CO. *v.* MARTIN (1877), 5 Ch. D. 1; 46 L. J. Ch. 289; 35 L. T. 874; 25 W. R. 246, C. A.

Annotations:—**Mentd.** Fowler *v.* Barstow (1881), 51 L. J. Ch. 103, C. A.; Bree *v.* Marescaux (1881), 7 Q. B. D. 434, C. A.; New Chile Gold Mining Co. *v.* Blanco (1888), 4 T. L. R. 346; Worcester City & County Banking Co. *v.* Firbank, Pauling (1894), 70 L. T. 102.

80. Forged signature.]—Deft.'s solr., who had forged counsel's name, was fined £20 & committed until payment.—WHITLOCK *v.* MARRIOT (1686), 2 Rep. Ch. 386; Dick. 16; 21 E. R. 695.

81. —— Contempt of court.]—It is contempt of ct. to sign counsel's name to a pleading without his authority.—FAWCETT *v.* GARFORD (1789), Oswald on Contempt, 2nd ed., p. 62.

82. —— Bill dismissed.]—Bill dismissed, because the counsellor's hand was counterfeit.—GRISTING *v.* HORE (1579), Cary, 82; 21 E. R. 44.

SUB-SECT. 3.—CERTIFYING AS TO PROCEEDING IN FORMÂ PAUPERIS, SHORT CAUSE, URGENCY, AND OTHER MATTERS.

Certifying—As to proceeding in formâ pauperis — In House of Lords.]—*See* COURTS; PARLIAMENT.

—— —— Before Privy Council.]—*See* COURTS; DEPENDENCIES, COLONIES, & BRITISH POSSESSIONS.

—— —— In matrimonial suits.]—*See* HUSBAND & WIFE.

—— —— Generally.]—*See* PRACTICE & PROCEDURE.

—— As to setting down cause — As short cause.]—*See* PRACTICE & PROCEDURE.

—— As to joinder of causes of action.]—*See* PRACTICE & PROCEDURE.

—— As to effect of deeds — Payment out of funds in court.]—*See* PRACTICE & PROCEDURE; TRUSTS & TRUSTEES.

SUB-SECT. 4.—REPORTS OF CASES AUTHENTICATED BY BARRISTERS.

83. Jurist reports—Accepted by court as authorities.]—*Semble:* cases reported by barristers in *The Jurist* were receivable as authorities, & it was of such materials the law of England was made up, & the ct. would be denying itself much valuable assistance in ascertaining what the law was if it were to refuse to receive the citation of cases reported by barristers in such publications.—FRANCOME *v.* FRANCOME (1865), 5 New Rep. 289; 11 L. T. 757; 11 Jur. N. S. 123; 13 W. R. 355, L.C.

84. Times Law Reports — Accepted by court as authorities.]—*The Times Law Reports* being reports made by barristers with their names attached are authorities & may be cited in ct. (LORD ESHER, M.R.).—WEST DERBY UNION GUARDIANS *v.* ATCHAM UNION GUARDIANS (1889), 6 T. L. R. 5, C. A.

Annotation:—**Mentd.** Manchester Overseers *v.* Ormskirk Union Grdns. (1890), 24 Q. B. D. 678.

SUB-SECT. 5.—PRIVILEGES.

A. Service of Process, or Demand when attending Court.

85. Not void by reason of having been effected in court of justice.]—Pltf., a barrister, was the *prochein ami* of an infant who had been nonsuited; an order for costs was made against the *prochein ami*, & demand of payment made of him while he was attending at the Old Bailey as counsel for the prosecution in an indictment that was about to come on for trial. The demand was made while he was conversing with the prosecutor in a passage between the Old & New Cts.:—*Held:* the demand was not bad for having been made within the precincts of a ct. of justice, or for having been made upon the *prochein ami* whilst attending professionally such ct. *Semble:* the service of process in a ct. of justice is not void, but will subject the party to an attachment for a contempt.—NEWTON *v.* LONDON, BRIGHTON & SOUTH COAST RY. CO. & WOODCOCK (1849), 7 Dow. & L. 328; 19 L. J. Q. B. 12; 14 L. T. O. S. 206.

B. Freedom from Arrest when attending Court.

See, generally, SHERIFFS & BAILIFFS.

C. Immunity from Actions for Professional Utterances.

See LIBEL & SLANDER.

SUB-SECT. 6.—RIGHTS OF ACTION.

A. Proceedings for Defamation of Barrister by way of his Profession.

See LIBEL & SLANDER.

B. Place of Trial—Former right to Middlesex Venue.

86. Serjeant-at-law — Might be sued by original in any of the courts in Westminster Hall—Privilege only related to inferior courts.]—A serjeant-at-law might be sued by original in any of the cts. in Westminster Hall, for his right to practise was not confined to the Common Pleas, & his privilege

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SECT. 2, SUB-SECT. 7.—A.

a. *Practising barrister for less than two years—Appointment as stipendiary magistrate.*]—A person appointed a stipendiary magistrate in Prince Edward Island, who has not been a practising barrister for at least two years in that province before appointment, may be prevented from acting as such by writ of prohibition.—*Re* ALLEN (1914), 14 E. L. R. 271; *revsd.* (1914), 14 E. L. R. 505, on the ground that a writ of prohibition could only issue in the case of a legally qualified tribunal exceeding its jurisdiction, & only when there was no other sufficient relief at law.—**CAN.**

Sect. 2.—Rights and privileges of barristers; Sub-sects. 6, B.; sub-sects. 7 & 8. Sect. 3: Sub-sect. 1, A.]

only related to inferior cts.—HAMBLETON *v.* SCROGGS (1678), 2 Mod. Rep. 296; 86 E. R. 1082; *sub nom.* DEAKINS *v.* SCROGGS, 2 Lev. 129; *sub nom.* DAKINS *v.* SCROGS, 3 Keb. 440; *sub nom.* —— *v.* SCROGGS, 1 Freem. K. B. 389.

87. —— Suing as common person — Privilege lost.]—A serjeant suing as a common person lost his privilege, & venue changed.—GIRDLER *v.* WATTHEWS (1738), Cooke, Pr. Cas. 145; 125 E. R. 1013.

88. —— Privilege lost when sued with another.]—A serjeant sued jointly with another in the King's Bench could not plead his privilege, & *semble:* he had no privilege against the King's Bench, although he had against an inferior ct.— —— *v.* SCROGGS (1678), 1 Freem. K. B. 389; 89 E. R. 289; *sub nom.* DEAKINS *v.* SCROGGS, 2 Lev. 129; *sub nom.* DAKINS *v.* SCROGS, 3 Keb. 440; *sub nom.* HAMBLETON *v.* SCROGGS, 2 Mod. Rep. 296.

89. Barrister-at-law — Privilege lost when barrister sued with another.]—A barrister-at-law being joined with another, had no privilege to change the venue.—TOWNSEND *v.* BANKRUPTCY ASSIGNEE & COMRS. (1724), 8 Mod. Rep. 316; 88 E. R. 226.

90. Change of venue—Court would not on usual affidavits.]—A barrister might lay his venue in Middlesex, & the ct. would not change it on the usual affidavits.—WINGFIELD'S CASE (1670), 1 Mod. Rep. 64; 86 E. R. 734.

91. —— Rechange to Middlesex good if proved by affidavit.]—Motion to rechange the venue into Middlesex, because pltf. was a barrister, allowed to be good cause, if proved by affidavit, but not otherwise.—SPELMAN *v.* —— (1747), 1 Wils. 159; 95 E. R. 549; *sub nom.* SPELMAN'S CASE, 1 Wm. Bl. 19.

Annotation:—**Mentd.** Pye *v.* Leigh (1776), 2 Wm. Bl. 1065.

92. —— By defendant in action by barrister & wife for assault on wife—Plaintiff unable to restore by virtue of privilege as barrister.]—In an action by a barrister & wife for an assault on the wife, the venue, laid in Middlesex, was changed by deft.:—*Held:* pltf. could not restore it by virtue of his privilege as barrister.—NEWTON *v.* HARLAND (1838), 4 Bing. N. C. 406; 6 Scott, 186; 7 L. J. C. P. 217; 132 E. R. 843.

SUB-SECT. 7.—QUALIFICATIONS FOR AND EXEMPTIONS FROM CERTAIN OFFICES.

A. Qualifications for Judicial and other Offices.

93. Practising barrister — May be receiver.]—It is no objection to the appointment of a receiver that he is a practising barrister.—GARLAND *v.* GARLAND (1793), 2 Ves. 137; 30 E. R. 561.

Annotation:—**Mentd.** A.-G. *v.* Day (1817), 2 Madd. 246.

94. —— ——.]—On a petition to change a receiver, the circumstance of the person proposed being a practising barrister in town, though no absolute disqualification, is to be considerably regarded. Distinction between an auditor & a receiver with powers to let & manage, etc.—WYNNE *v.* NEWBOROUGH (LORD) (1808), 15 Ves. 283; 33 E. R. 761.

95. Barrister-at-law — Appointed committee of lunatic's estate.]—A barrister, appointed committee of a lunatic's estate, may receive a salary.—*Re* ERRINGTON, *Ex p.* FERMOR (1821), Jac. 404; 37 E. R. 903.

96. —— Commissioner appointed by court to examine witnesses need not be.]—It is not imperative that comrs. appointed by the ct. to examine witnesses in a suit should be barristers-at-law.—HENDERSON *v.* PHILIPSON (1853), 22 L. J. Ch. 1037; 17 Jur. 615.

97. Barrister of seven years' standing — Deputy county court judge must be—In claim in County Court exceeding £2.]—In an action brought in the county ct., where the claim exceeds £2, the county ct. judge has no power, even with the consent of the parties, to appoint as his deputy for the purpose of hearing the action in that capacity a person who is not a barrister of seven years' standing as required by County Cts. Act, 1888 (c. 43), s. 18.—MCINALLY *v.* BLACKLEDGE, [1911] 2 K. B. 432; 80 L. J. K. B. 882.

B. Exemptions from certain Offices.

98. Practising barrister—From serving in office of overseer.]—A practising barrister is exempt from serving in the office of overseer.—R. *v.* PROUSE (1635), 1 Bott, Poor Law Cases, 6th ed., 4.

99. Members of legal profession—From serving on jury.]—Members of the legal profession are exempt from serving on juries in order to enable them to be prompt & punctual in rendering their services to the community (WILLS, J.).—*Re* DUTTON, [1892] 1 Q. B. 486; *sub nom.* R. *v.* DUTTON, 61 L. J. Q. B. 190; 66 L. T. 324; 56 J. P. 455; 40 W. R. 270; 8 T. L. R. 214; 36 Sol. Jo. 218.

SUB-SECT. 8.—BARRISTERS' CLERKS.

100. Fees—Are mere gratuities—Jurisdiction of court against clerk in respect of.]—Fees to counsels' clerks are mere gratuities, for which they have no legal demand, & the ct. has no jurisdiction in respect of such fees as against the clerks. The sum allowed for clerk's fees on taxation does not limit the sum which may be spontaneously given, but it does limit the sum which the solr. can safely pay without the special direction or permission of the client. The regulation of Nov. 5, 1840, is not a General Ord. of the ct., giving the clerks a legal demand for the fees therein mentioned, but a mere intimation of opinion of the equity judges, that they may be properly allowed in taxation.

Petition against a clerk of counsel dismissed for want of jurisdiction, but without costs, on account of his improper conduct in the matter complained of.—*Ex p.* COTTON (1846), 9 Beav. 107; 6 L. T. O. S. 313; 10 Jur. 84; 50 E. R. 283.

See, now, R. S. C., Ord. 65, r. 27 (5).

101. —— Right to sue for.]—A barrister's clerk sued his late employer in the county ct. for 2*s.* 6*d.*, a "clerk's fee," which had been received by the barrister in respect of the settling of a statement of claim some days before the clerk left his employment. For pltf. it was argued that there had been not only a special contract to pay the clerk's fees, but that it was the universal custom for clerks to barristers to be paid the fees in question:—*Held:* pltf. was entitled to judgment for the amount claimed & costs, it being well known that fees paid to a barrister included fees to which the clerk was beyond all doubt entitled.—LYSTER *v.* SPEARMAN (1882), 72 L. T. Jo. 391.

SECT. 2, SUB-SECT. 7.—B.

b. *Practising barrister — From sitting & voting as member of legislature.*]—A barrister's fees being in the nature of an honorarium, acceptance of employment as counsel in an arbn. is not acceptance of such an office as to disqualify a member of legislature from sitting & voting.—BARNARD *v.* WALKEM (1880), 1 B. C. R., Pt. 1, 120.—**CAN.**

102. —— Embezzlement of by deceased clerk during lifetime—Action by barrister to recover—Statute of Limitations cannot be set up as defence to.]—To a suit by a barrister to recover out of the assets of his deceased clerk fees embezzled & retained by such clerk, Stat. Limitations cannot be set up as a defence.

Under a decree in an administration suit a barrister tendered his claim for an amount of fees embezzled & retained by the intestate, who had been his clerk. The chief clerk, by his certificate, disallowed the claim, on the ground that it was barred by Stat. Limitations. Claimant took no proceeding in the administration suit to vary the certificate, & a decree was soon afterwards made on further directions, under which the residuary estate was distributed amongst the parties beneficially interested. The barrister subsequently instituted another suit for the recovery of his demand out of the assets in the hands of the parties amongst whom they had been distributed :—*Held :* he was entitled to maintain such suit & to a decree for payment with costs.—TEED *v.* BEERE (1859), 28 L. J. Ch. 782 ; 33 L. T. O. S. 26 ; 5 Jur. N. S. 381 ; 7 W. R. 394.

SECT. 3.—RELATIONS BETWEEN COURT AND COUNSEL.

SUB-SECT. 1.—JURISDICTION OF COURT OVER COUNSEL.

A. Jurisdiction since 1800.

103. For dishonesty.]—Although in England the cts. do not disbar, I have no doubt they might prevent a barrister, who had acted dishonestly, from practising before them (LORD WYNFORD).—*Re* ANTIGUA JJ (1830), 1 Knapp, 267 ; 12 E. R. 321, P. C.

Annotation :—**Mentd.** *Re* Monckton (1837), 1 Moo. P. C. C. 455, P. C.

104. Over "officers" of the court—Whether barristers are "officers."]—*Qu :* whether barristers are officers of the ct.—WETTENHALL *v.* WAKEFIELD (1833), 10 Bing. 335 ; 3 Moo. & S. 805 ; 3 L. J. C. P. 75 ; 131 E. R. 934.

105. When threatening letter addressed to master.]—A barrister, who was also a Member of Parliament, appeared before a master as counsel in support of a petition presented by himself & others. He afterwards addressed a letter to the master, which was expressed in threatening terms, & the tendency of which was to induce the master to alter the opinion he was supposed to have formed upon the case, & he subsequently wrote a letter to the Lord Chancellor, in which he avowed the authorship of the letter to the master. The Lord Chancellor committed him to the Fleet, during pleasure.—LECHMERE CHARLTON'S CASE (1837), 2 My. & Cr. 316 ; 40 E. R. 661.

106. For tricky demurrers & frivolous pleas.]—I do marvel that gentlemen who would kick an attorney out of their chambers if he desired anything wrong in an ordinary way, will, nevertheless, consent to draw tricky demurrers & frivolous pleas. The practice degrades the counsel & special pleader, & makes them ministers of gross injustice, & parties to the frauds of other persons (COLERIDGE, J.).—ROWBOTTOM *v.* BULL (1846), 7 L. T. O. S. 117.

107. Making unfounded allegations to avoid demurrer.]—A counsel is not justified in introducing unfounded allegations into a bill merely to avoid a demurrer.—COLLINGWOOD *v.* RUSSELL (1864), 5 New Rep. 1, L.JJ.

108. Refusal to answer question—In county court.]—A barrister was in attendance as counsel at a county ct. The county ct. judge inquired of the barrister whether he was the author of a report of a trial which had been reported in a newspaper as having taken place in the county ct. The barrister requested to see the report, which the judge stated to be a refusal to answer the question. Afterwards a case was called on in which the barrister appeared as counsel ; the judge refused

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SECT. 3, SUB-SECT. 1.—A.

c. *Duty of counsel to attend—After first day of term.*]—After the first day of term barristers are not expected to be in attendance in ct. unless they have particular business.—SKINNER *v.* LANE (1853), James, 247.—**CAN.**

104 i. *Over English barrister — High Court of Allahabad.*]—The above ct. has power to suspend from practice a member of the English Bar who has been admitted to the roll of advocates of the ct.—*Re* SARBADHICARY (1906), 95 L. T. 894 ; 23 T. L. R. 180 ; 51 Sol. Jo. 144, P. C.—**IND.**

d. *For acting irregularly.*]—Circumstances in which an order suspending a barrister from practice for five years was set aside on the ground that, although there had been grave irregularlity, there was no *malus animus* to show an intention to commit a fraudulent act.—NEWTON *v.* NORTH WESTERN PROVINCES HIGH COURT JUDGE (1871), L. R. 4 P. C. 18 ; 8 Moo. P. C. C. N S. 202 ; 14 Moo. Ind. App. 237, P. C.—**IND.**

e. —— *For addressing court disrespectfully.*]—A barrister, engaged in his professional duty before the Supreme Ct. at Hong Kong, was, without being heard in defence, adjudged to have been guilty of several contempts of ct. in disrespectfully addressing the chief justice during the conduct of a cause, & was fined & suspended from practice until the fine was paid :—*Held :* none of the alleged offences amounted to a contempt of ct., & the order must be set aside.—*Re* POLLARD (1868), L. R. 2 P. C. 106 ; 5 Moo. P. C. C. N. S. 111, P. C.—**HONG KONG.**

f. *For advising client to sign agreement of doubtful validity.*]—Charges of professional misconduct were made against applt., an advocate, in that, knowing certain agreements to be invalid, he had allowed his clients to execute them, & had even attested them himself, without warning them that they were invalid. Applt. admitted that at the time the agreements were executed he thought them to be invalid. Applt. having been suspended from practice for four months :—*Held :* the charges could not be sustained, as it was a matter of opinion whether the agreements were invalid or not, & they were eventually held to be valid.—*Re* LUBECK (1905), I. L. R. 33 Calc. 151 ; 10 C. W. N. 57 : L. R. 32 Ind. App. 217, P. C.—**IND.**

g. *For altering subpœna.*]—*Re* TAYLOR (1912), 46 I. L. T. 58 ; 105 L. T. 974.—**IR.**

h. *For drawing scandalous & libellous answer to bill.*]—Application to prevent a barrister-at-law from practising or signing his name for the future to any pleadings on the ground that his personal answer to a bill filed in a Ch. cause was scandalous & libellous, & unwarrantably reflected upon the character of petitioner :—*Held :* (1) the answer must be taken off the file & a new answer filed immediately ; (2) in such cases the ct. would always leave barristers to be dealt with by the benchers of their inn.—*Re* O'CONNELL (1844), 4 L. T. O. S. 181.—**IR.**

k. *For making unfounded charges of misconduct—Right to call for instructions.*]—Where counsel makes charges of misconduct on alleged instructions, the ct. can call for the instructions for use after the trial to determine whether disciplinary action shall be taken against counsel by the full ct.—WESTON *v.* PEARY MOHAN DASS (1912) I. L. R. 40 Calc. 898.—**IND.**

l. *Pleader engaging in trade.*]—A pleader, who engages himself in trade but does not intimate the same to the High Ct., as required by the rules framed by the High Ct. under Legal Practitioners Act, is guilty of misconduct within s. 13 of the Act.—MUNI REDDI *v.* VENKATA ROW (1914), I. L. R. 37 Mad. 238.—**IND.**

m. *For publishing letter attacking judge—Exercising criminal jurisdiction alone.*]—A judge of the Ct. of Queen's Bench in Lower Canada, whilst sitting alone in the exercise of the criminal jurisdiction, has, under Consolidated Stat. of Canada, c. 77, s. 72, no power to pronounce a counsel in contempt for publishing letters reflecting upon the conduct of such judge, or to impose a fine.—*Re* RAMSAY (1870), L. R. 3 P. C. 427 ; 7 Moo. P. C. C. N. S. 263, P. C.—**CAN.**

o. *For publishing libellous report of proceedings.*]—Deft.'s counsel published in a newspaper a report of proceedings which was exaggerated, incorrect, & injurious, & contained unjustifiable imputations upon pltf. :—*Held :* though the publication might be libellous, yet the ct., not being satisfied that it was calculated to obstruct the free course of justice, ought not to commit him for contempt.—BIRCH *v.* WALSH (1846), 10 I. Eq. R. 93.—**IR.**

108 i. *Refusal to answer question—Put by judge.*]—A barrister practising in Sierra Leone was fined & struck off the roll of the ct. for contempt in refusing to answer in a particular form a question put to him by the chief judge :—*Held :*

Sect. 3.—Relations between court and counsel: Sub-sect. 1, A. & B.; sub-sect. 2, A. & B.]

to hear him as counsel, saying that he would not allow the barrister to practise before him until he had answered the question:—*Held:* (1) if these facts were proved, the judge had acted unlawfully in asking the question & then preventing the barrister from exercising his profession according to the law of the land; (2) such conduct amounted to a misdemeanour for which criminal proceedings would lie, but as the barrister had just applied to the Lord Chancellor to hold an inquiry into the conduct of the judge, he had chosen another remedy, & the ct. would not grant a criminal information.—R. *v.* MARSHALL (1855), 4 E. & B. 475; 24 L. J. Q. B. 242; 24 L. T. O. S. 210; 19 J. P. 451; 1 Jur. N. S. 676; 3 W. R. 170; 3 C. L. R. 676; 119 E. R. 174.

109. Insult to juryman—In court of quarter sessions.]—A ct. of quarter sessions has power to fine a barrister for contempt of ct., even though committed by him in what he believes to be the legitimate exercise of his professional duty. But if the ct. of quarter sessions fines for contempt of ct. without any reasonable ground, the Ct. of Queen's Bench will interfere.

Counsel has a right to, & may with propriety, complain of the appearance of partiality on the part of any of the jurymen, but to do so in violent & abusive language, or in a violent manner & for the purpose of insult, & in spite of admonition from the ct., is a contempt.—*Re* PATER, *Ex p.* PATER, R. *v.* MIDDLESEX JJ. (1864), 5 B. & S. 299; 4 New Rep. 147; 33 L. J. M. C. 142; 10 L. T. 376; 28 J. P. 612; 10 Jur. N. S. 972; 12 W. R. 823; 9 Cox, C. C. 544; 122 E. R. 842.

Annotations:—**Distd.** *Ex p.* Jolliffe (1873), 42 L. J. Q. B. 121. **Folld.** R. *v.* Jordan (1888), 36 W. R. 797, C. A.

110. For conspiring to make false affidavits—To commit to prison.]—M., a barrister & counsel for deft. A., conspired with others to deceive the ct.:—*Held:* (1) it was M.'s duty when he knew that affidavits were going to be used amounting, in M.'s words, to chicanery, to disclose the fact to the ct.; (2) M.'s fault did not consist in not throwing up his brief, but in having made himself a party to a fraud by conspiring with others in inducing A. to make these affidavits, which were used to delude the ct; (3) the ct. had jurisdiction to order M. to pay the costs of a motion to commit, & to be committed to prison until further order, & the documents to be impounded.—LINWOOD *v.* ANDREWS & MOORE (1888), 58 L. T. 612.

B. Former Jurisdiction.

111. Over pleader for frivolity.]—H. having put in for his client a long insufficient demurrer to a bill exhibited against his client, in which supposed demurrer were many matters of fact, & other things frivolous & vain, LORD EGERTON, C., awarded £5 costs against the party, & ordered that neither bill, answer, demurrer, nor any other plea, should from henceforth be received under the hand of H. —HILL'S CASE (1603), Cary, 27; 21 E. R. 15.

112. For scandalising the King or his government temporal or ecclesiastical.]—*Held:* if a counsellor at law in his argument should scandal the King or his govt., temporal or ecclesiastical, this was a misdemeanour & contempt to the ct.—FULLER'S CASE (1607), 12 Co. Rep. 41; Noy, 127; 77 E. R. 1322.

113. For giving verbal opinion.]—W. was prosecuted for giving a private verbal opinion as a barrister on a point of prerogative against the Crown to the then Treasurer of the Navy & a Vice-Admiral who had consulted W. on the legality of a commission issued by James I. for consideration of abuses in the navy. On humiliating himself, he was discharged, on terms of subscribing a submission.—WHITELOCKE'S CASE (1613), 2 State Tr. 765.

114. For signing scandalous answers to plaintiff's bill in Court of Exchequer.]—Counsel having signed two long frivolous & scandalous answers to pltf.'s bill in the Ct. of Exch.:—*Held:* reasonable answers should be put in & the counsel, who had signed the answers objected to, should thereafter be disabled from subscribing his name to any bill, answer or pleading in the ct. & should pay to pltf. costs unless he should show good cause to the contrary.—HICKMAN *v.* CLARKE (1615), Fowler's Exchequer Practice, 2nd ed., vol. 2, p. 407.

115. For deceit.]—In an action in the Star-chamber between the Master & Wardens of the Woodmongers & the carmen of London, Serjeant R. was retained by the carmen & said "that he did know of his own knowledge that the Co. of Woodmongers did set up engin cares" thereby intending to deceive the ct. Serjeant R. having been indicted under 3 Ed. 1, c. 29:—*Held:* (1) the stat. intended to punish not mere words spoken by pleader or Serjeant, but acts in the pleading on record; (2) there was no Ct. of Starchamber at the time of the stat., so that collusion & deceit in a new ct. was not within the intent of the stat.; (3) it would be hard to punish pleaders for words, even though false, because they received their instructions from their clients; the indictment must be quashed.—RICHARDSON'S CASE (1622), Palm. 287; 81 E. R. 1086.

116. For drawing & signing scandalous bills.]—W., the counsel for pltf., was ordered to pay £5 for drawing & signing scandalous bills. Subsequently,

there was nothing in what he had done affecting his character, & order striking the barrister off the roll set aside.—SMITH *v.* SIERRA LEONE JJ. (1848), 7 Moo. P. C. C. 174; 13 E. R. 846, P. C.—**SIERRA LEONE.**

r. *For serving judge with petition.*]—A barrister was party to the service on a judge, by the provost marshal of the ct., of a petition to the Queen to prevent the judge from proceeding to try an action in which he was interested:—*Held:* the act was not such a contempt as to warrant the order of the Supreme Ct. of British Guiana for suspending the barrister for six months for contempt.—*Re* DOWNIE & ARRINDELL (1841), 3 Moo. P. C. C. 414; 13 E. R. 168, P. C.—**BRITISH GUIANA.**

109 i. *For using insulting language—In county court.*]—A barrister, having used words capable of being considered insulting to the ct., & having refused to apologise, was fined for contempt:—*Held:* no excess of jurisdiction calling for interference by a superior ct.—*Ex p.* LEES (1874), 24 C. P. 214.—**CAN.**

s. *For using licentious language.*]—It is the duty of the ct. to interfere to check licentious & unwarrantable language on the part of an advocate.—R. *v.* KIERNAN (1855), 5 I. C. L. R. 171, 173, 174.—**IR.**

110 i. *For withholding evidence & attempting to influence witness.*]—Applt., a barrister & advocate of the Chief Ct. of Lower Burma, was charged with gross professional misconduct, in that (1) whilst employed as advocate for the prosecution in an abduction case he advised prosecutor's family to say nothing about letters having been received from his abducted daughter, & withheld from the police & the senior advocate for the prosecution the fact that such letters had been received, (2) whilst the trial was proceeding, he suggested or hinted to prosecutor that he should influence or attempt to influence by improper means a certain expert witness in handwriting to give evidence favourable to the prosecution in connection with certain letters produced. He was acquitted on the first charge, but convicted on the second & dismissed from his office as an advocate of the ct.:—*Held:* on the evidence, he must be acquitted on the second charge also.—BOMANJEE COWASJEE *v.* CHIEF JUDGE & JUDGES OF THE CHIEF COURT OF LOWER BURMA (1906), L. R. 34 Ind. App. 55; I. L. R. 34 Calc. 129, P. C.—**IND.**

SECT. 3, SUB-SECT. 1.—B.

w. *For appealing for purpose of delay.*]—The House of Lords will proceed against counsel whose names appear on appeals lodged for purposes of delay in the same manner as the English cts. do against counsel who sign or give countenance to frivolous & vexatious suits & actions.—GILCHRIST *v.* MACADAMS (1798), 4 Pat. App. 26.—**SCOT.**

x. ——.]—No counsel should advise bringing a writ of error for the sole purpose of delay.—REILLY *v.* —— (1801), Rowe, 675.—**IR.**

on the petition of pltf., stating that the bills had not been drawn by W. but by himself, & praying for the discharge of the order against W. :—*Held :* the party scandalised should show cause why W. should not be excused from paying the £5.—EMERSON *v.* DALLISON (1660), Sander's Chancery Orders, p. 293 ; 1 Rep. Ch. 194 ; 21 E. R. 547 ; *sub nom.* EMMERSON *v.* DALLISON, Dick. 7.

117. For detaining writings entrusted upon affidavit.]—Counsel who detain writings entrusted to them, upon affidavit of it, will be ruled to attend ct. & show cause for so doing.—BENSON'S CASE (1670), 1 Sid. 452 ; 82 E. R. 1212.

118. For appearing in actions in House of Lords contrary to privileges of House of Commons.]—*Semble :* counsel may be taken into custody for appearing in actions in the House of Lords which have been declared contrary to the privileges of the House of Commons, even though such appearance is by order of the House of Lords.—PRIVILEGE OF PARLIAMENT CASE (1675), 6 State Tr. 1146.

119. For endeavouring to persuade witness not to give evidence.]—R., a barrister, having been convicted (before justices of oyer & terminer by virtue of a special commission for that purpose granted) for endeavouring to persuade a witness against noblemen imprisoned in the Tower of London to forbear his prosecution of them, demanded that an information might be received against the comrs. who condemned him, & that the information might be filed :—*Held :* (1) he was in a wrong way to exhibit any information in such manner, & his words whereby he did accuse the comrs. of oppression should be recorded ; (2) his gown should be pulled over his ears in ct. ; (3) a fine of £500 which he had been ordered to pay the King should be remitted, but he must give a recognizance for his good behaviour.—REDDING'S CASE (1680), T. Raym. 376 n. ; Bac. Abr. Courts E., 7th ed., vol. 2, 399 ; 83 E. R. 196.

120. For encouraging false actions.]—If a counsellor at law encourage a man to bring false actions through malicē, & for the purposes of oppression, he may be indicted as a common barrator.—R. *v.* —— (1686), 3 Mod. Rep. 97 ; 87 E. R. 62.

121. For using reflecting words against respondent in appellants' printed case.]—The House of Lords took notice that in applts.' printed case there were reflecting words against resps., & being informed that B. had drawn the case & ordered it to be printed, B. was ordered to attend next day, & was then reprimanded by the Lord Keeper, according to the order of the House.—HYNDMARSH *v.* EVERARD (1702), Colles, 241 ; 1 E. R. 268.

122. For malpractice.]—A counsellor of law is a kind of minister of justice & right, & as such is punishable for misbehaviour in his profession.—ANON. (1704), 6 Mod. Rep. 137 ; 87 E. R. 895.

123. For signing illegal bill in equity.]—Two persons carried on business in partnership as highwaymen. One filed a bill against the other on the equity side of the Exchequer for an account of the partnership profits. The bill was dismissed with costs to be paid by the counsel who signed it ; pltfs.' solrs. were fined £50 each, & both pltf. & deft. were shortly afterwards hanged.—EVERET *v.* WILLIAMS (1725), Lindley on Partnership, 7th ed., p. 107, n ; Law Quarterly Review, vol. 9, p. 197.

Annotations :—**Mentd.** Sykes *v.* Beadon (1879), 11 Ch. D. 170 ; Thwaites *v.* Coulthwaite, [1896] 1 Ch. 496 ; Burrows *v.* Rhodes (1899), 68 L. J. Q. B. 545, D. C. ; La Soc. Anon. des Ancient Etablissements Panhard et Levassor *v.* Panhard Levassor Motor Co., [1901] 2 Ch. 513.

124. For bringing about marriage of ward in Chancery.]—A barrister had been committed to prison for contempt in bringing about the marriage of a ward of ct. ; he petitioned for his release & submitted to be restrained from acting as counsel. LORD HARDWICKE, C., directed that according to his own submission M. should be refrained from acting as a barrister till further order, being doubtful what was the proper course to remove M. from practising as a barrister. *Qu :* whether the proper course was for M. to be disbarred, or whether the ct. by its own power & authority would silence him for the future.—ANON. (1741), 2 Atk. 173 ; 26 E. R. 508.

Disbarring, *see, generally,* Nos. 18 *et seq., ante.*

125. For unnecessary long pleading.]—The ct. will censure an unnecessary length in pleading.—YATES *v.* CARLISLE (1761), 1 Wm. Bl. 270 ; 96 E. R. 150.

126. Over serjeant-at-law who pleads falsely.]—A false plea by a serjeant was set aside, & the serjeant was ordered to pay the costs of the motion to set aside the plea.—RICHARDSON *v.* SUTTON (1728), Cooke, Pr. Cas. 51 ; 125 E. R. 952.

SUB-SECT. 2.—APPOINTMENT OF COUNSEL BY THE COURT.

See, now, Poor Prisoners Defence Act, 1903 (c. 38), s. 1.

A. To the Prosecution.

127. General rule.]—A judge should not be required to act as prosecutor, instead of holding the scales even between the parties. Therefore prosecutions should always be conducted by counsel.—R. *v.* —— (1843), 1 Cox, C. C. 48 ; 1 L. T. O. S. 457.

128. *S. P.* R. *v.* HEZELL (1844), 1 Cox, C. C. 348 ; 2 L. T. O. S. 501.

129. —— Appointment of some counsel.]—All prosecutions in criminal cases ought to be conducted by counsel, & the ct. will in all cases direct the depositions to be handed to some counsel for that purpose.—R. *v.* PAGE (1847), 2 Cox, C. C. 221 ; 8 L. T. O. S. 495.

130. —— Duty when appointed.]—Where no counsel is engaged for the prosecution, & the depositions are handed, by direction of the ct., to a gentleman at the Bar, he should consider himself as counsel for the Crown, & act in all respects as he would if he had been instructed by the prosecutor, & should not consider himself merely as acting in assistance of the judge, by examining the witnesses.—R. *v.* LITTLETON (1840), 9 C. & P. 671.

131. —— Appointment of junior counsel.]—If the prosecutor have omitted to instruct counsel, the ct. will direct the depositions, with the fee indorsed, to be delivered to the junior counsel present, to conduct the prosecution.—R. *v.* ANON. (1843), 1 L. T. O. S. 457 ; 1 Cox, C. C. 48.

132. —— Who should be appointed.]—The practice in the Central Criminal Ct. was for the depositions to be given, when handed down by the ct., to the senior barrister present & not, as on circuit, to the junior counsel in ct.—R. *v.* LAWRENCE (1844), 3 L. T. O. S. 142 ; 1 Cox, C. C. 61.

B. For the Prisoner.

133. Prisoner unable to get counsel without assistance of court.]—Appct. having complained that he had offered to retain many men of his counsel, but that they had refused him, & that he could get none to be of counsel with him without the assistance of the ct., HYDE, C.J., said he should have what counsel assigned him he desired, for no offence should be taken against any man that should advise prisoner in his proceedings in law.—DARNEL'S (SIR THOMAS) CASE (1627), 3 State Tr. 1.

Annotations :—**Mentd.** Burdett *v.* Abbot (1811), 14 East, 1 ; R. *v.* Halliday, [1917] A. C. 260, H. L.

Sect. 3.—Relations between court and counsel: Sub-sect. 2, B. Sect. 4: Sub-sect. 1.]

134. Criminal information for seditious speeches in Parliament.]—Although the alleged offences were committed in Parliament, a higher ct. than that in which the information was brought; nevertheless:—*Held:* the matter not being necessarily treason, the ct. had jurisdiction; & defts. were ruled to plead further; & counsel was assigned to them.—ELLIOT'S CASE (1629), 3 State Tr. 293.

135. Treason.]—Where counsel formerly assigned to a deft. on trial in the High Ct. of Justice for treason refused to plead for him, new counsel was assigned to him.—HOLLAND'S (EARL) CASE (1649), 4 State Tr. 1195.

136. —— For matters of law only.]—On a trial at Guildhall by a commission of oyer & terminer on an indictment under Acts making it high treason to declare unlawful the authority of the "Parliament," prisoner allowed counsel for matter of law, but not for matter of fact. It is the duty of the judges to be of counsel with the prisoner at the Bar before them.—LILBURNE'S CASE (1649), 4 State Tr. 1270.

137. *S. P.* LOVE'S CASE (1651), 5 State Tr. 43, 135, 205.

Annotation:—**Consd.** Bowman *v.* Secular Soc. (1917), 86 L. J. Ch. 568, H. L.

138. —— Impeachment.] — On the impeachment of Lord M. by the Commons:—*Held:* counsel should be allowed to the accused in all cases of impeachment.—MORDAUNT'S (LORD) CASE (1666), 6 State Tr. 785.

139. ——.]—The ct., on the request of the accused person, assigned counsel for the defence.—R. *v.* LYNCH (1902), Official Transcript of Shorthand Notes, p. 7.

140. Outlawry in treason—Not until prisoner has shown material error.]—The ct. will not assign counsel on an outlawry in treason, until the prisoner has shown material error.—R. *v.* GRIFFIN (LORD) (1708), 11 Mod. Rep. 168; 88 E. R. 967.

141. Libel in Star Chamber.]—Counsel assigned to defts. on an information for libel in the Star Chamber.—PRYNN'S CASE (1633), 3 State Tr. 562, 572.

142. *S. P.* LILBURN & WHARTON'S CASE (1637), 3 State Tr. 1316, 1347.

143. Murder—To argue special verdict.]—Counsel assigned, on the prayer of a prisoner, to argue a special verdict on an indictment for murder.—R. *v.* KEAT (1696), 5 Mod. Rep. 287; 87 E. R. 661.

Annotations:—**Mentd.** R. *v.* Huggins (1730), 2 Stra. 883; R. *v.* Burridge (1735), 3 P. Wms. 439; Conway & Lynch *v.* R. (1845), 5 L. T. O. S. 458; Campbell *v.* R. (1847), 17 L. J. M. C. 89, Ex. Ch.

144. —— Not without prisoner's consent.]—On a trial for murder, the ct. refused to allow counsel to appear for a prisoner without his expressed assent.—R. *v.* YSCUADO (1854), 6 Cox, C. C. 386.

145. Accessory to felony before the fact—To argue questions of law.]—On a special verdict being found in an indictment against prisoners for being accessories to a felony before the fact, counsel were appointed by the judges to argue the questions of law arising on the verdict.—MCDANIEL'S CASE (1755), 19 State Tr. 789.

146. Contempt—No leave required—Court of Chancery Act, 1860 (c. 149).]—It was not necessary, under s. 5 of the above Act, that special leave should be obtained from the ct. to have counsel & solr. assigned to a prisoner in custody for contempt. After the report of the gaoler or the keeper of the prison had been sent to the L. C., & its truth ascertained by the solr. to the Suitors' Fund, an order for the assignment of counsel & solr. was drawn up as of course.—LAYTON *v.* MORTIMORE (1860), 2 De G. F. & J. 353; 30 L. J. Ch. 34; 4 L. T. 567; 45 E. R. 657, L.C.

See, now, Courts of Justice (Salaries & Funds) Act, 1869 (c. 91); CONTEMPT OF COURT, ATTACHMENT, & COMMITTAL.

147. Rape.]—In cases of difficulty, *e.g.*, rape, counsel should be asked or instructed to defend a prisoner.—R. *v.* GEORGE (1909), 2 Cr. App. Rep. 318, C. C. A.

148. ——.]—Prisoners charged with rape should always be defended by counsel.—PRACTICE NOTE, [1910] W. N. 206, C. C. A.

149. Plea of autrefois convict.]—The ct. will not reject a plea of *autrefois convict* on account of the informal manner in which it is handed in by the prisoner, but will assign counsel to put it into a formal shape, & postpone the trial, to give time for its preparation.—R. *v.* CHAMBERLAIN (1833), 6 C. & P. 93.

150. Plea of insanity.]—On an application for leave to appeal it appeared that prisoner was undefended at the trial, & that there was evidence, which was not before the judge, to show that he was a man, if not insane, yet "of inferior stock," & that two or three members of his family were insane; upon a statement by the prisoner that he believed he was insane he was allowed solr. as well as counsel that there might be formal proof.—R. *v.* ATKINS (1908), 1 Cr. App. Rep. 45; 24 T. L. R. 807; 72 J. P. Jo. 340, C. C. A.

151. In error upon judgment of Court of Assize.]—Where pltf. in error upon a judgment of a Ct. of Assize is in custody, he must be brought into ct. & assign the errors in person when counsel will be assigned to him.—MANSELL *v.* R. (1857), 8 E. & B. 54; 8 State Tr. N. S. 831; Dears. & B. 375; 26 L. J. M. C. 137; 29 L. T. O. S. 155; 21 J. P. 309; 3 Jur. N. S. 558; 5 W. R. 554; 120 E. R. 20; *affd.*, 8 E. & B. 85, Ex. Ch.

Annotations:—**Mentd.** *Re* Anderson (1861), 7 Jur. N. S. 122; *Re* Fernandes (1861), 6 H. & N. 717; R. *v.* Giorgetti (1865), 4 F. & F. 546; R. *v.* Winsor (1865), 10 Cox, C. C. 276, Ex. Ch.; Levinger *v.* R. (1870), L. R. 3 P. C. 282, P. C.

152. In Court of Crown Cases Reserved.] — *Semble:* the Ct. for Crown Cases Reserved would in its discretion assign counsel for a prisoner. — R. *v.* BURDETT (1855), Dears. C. C. 431; 24 L. J. M. C. 63; 3 C. L. R. 440; 6 Cox, C. C. 458, C. C. R.

Annotations:—**Mentd.** Parnell *v.* G. W. Ry. Co. (1876), 34 L. T. 126; Allen *v.* Allen, [1894] P. 248, C. A.; R. *v.* Hadwen, [1902] 1 K. B. 882, C. C. R.

153. Under Poor Prisoners' Defence Act, 1903 (c. 38).]—Legal aid under the above Act can only be afforded to poor prisoners who set up a defence, either by way of evidence given or statement made by them, before the committing magistrate. If deft. does not say anything at the police ct., or reserves his defence, there is no power under the Act to give him any assistance. There is apparently no power under the Act to appoint a counsel only, without a solr., to defend a poor prisoner. The Act does not contain any provisions showing how the judge is to satisfy himself that the prisoner's means are insufficient for him to obtain legal aid.—R. *v.* NUNZIO CALIENDO (1904), 68 J. P. 47.

154. ——.]—The ct. can assign counsel to defend a poor prisoner under the above Act, without assigning a solr.—R. *v.* HART (1904), 68 J. P. 72.

SECT. 3, SUB-SECT. 2.—B.

143 i. *Murder.*]—A judge may with propriety call on a barrister to give his honorary services to a prisoner who is unable to employ one, & where prisoner, who was unable to employ attorney or counsel, was charged with murder, the ct. asked a member of the bar to undertake the defence.—R. *v.* FOGARTY (1851), 17 L. T. O. S. 10; 5 Cox, C. C. 161.—IR.

151 i. *In error after conviction for felony.*]—On a writ of error after conviction of deft. in error for stealing calves & feloniously receiving same: *Semble:* the ct. would not, of its own motion, assign counsel.—R. *v.* FRITH (1857), 9 Ir. Jur. 367.—IR.

155. —— Court for Crown Cases Reserved.]—When a prisoner was defended under the above Act, & a case was reserved for the consideration of the Ct. for Crown Cases Reserved:—*Held:* counsel ought to be instructed to appear for prisoner there.—R. *v.* PAYNE (1905), 69 J. P. 440.

156. At what stage of proceedings.]—After the Crown case had closed, the accused desired to have the assistance of counsel upon a matter of law arising from the evidence, & the ct., though of opinion that the application should have been made at an earlier stage of the proceedings, assigned counsel to argue the points involved, & heard his arguments.—LOVE'S CASE (1651), 5 State Tr. 43, 205.

157. Grounds for refusing to appoint counsel.]—In the course of a trial for piracy, one of the jurymen inquired why, in such a serious case, the prisoners were undefended, at the same time offering to bear the expense, if any barrister would undertake the case. LORD ABINGER, C.B., said he did not think that any barrister could accept the offer of the juryman as it was impossible for any counsel, thus retained in the middle of a case, to do justice to the prisoners. He could know none of the facts & circumstances upon which they relied for their defence, & it was much better for the prisoners themselves that they should be allowed to tell their own tale to the jury, & explain away, after their own fashion, the facts alleged against them.—R. *v.* M'GREGOR & LAMBERT (1844), 1 Car. & Kir. 429; 2 L. T. O. S. 501; 1 Cox, C. C. 346.

Effect of appointment of counsel.]—*See* CRIMINAL LAW & PROCEDURE.

SECT. 4.—RULES OF PRECEDENCE AND OTHER RELATIONS AMONGST BARRISTERS.

SUB-SECT. 1.—RULES OF PRECEDENCE.

158. Two counsel called on same day.]—If two counsel are called to the Bar on the same day at different Inns of Ct., the one whose name has been longest on the books of the Inn of Ct. to which he belongs is the senior.—ABBOTT & PEAKE'S CASE (1796), 6 C. & P. 637, n.

159. Attorney-General of England—Lord Advocate of Scotland.]—The A.-G. of England has precedence over the Lord Advocate of Scotland in all matters in which they may appear as counsel at the bar of the House of Lords.—A.-G. *v.* LORD ADVOCATE (1834), 2 Cl. & Fin. 481; 6 E. R. 1236, H. L.

160. —— When heard first—Matters relating to business of Queen.]—*Held:* in matters relating to the business of the Queen, the A.-G. had a right to be heard first.—R. *v.* EXETER (BP.) (1840), 7 M. & W. 188; 10 L. J. Ex. 92; 5 Jur. 102; 151 E. R. 733.

161. Junior counsel—Right to move on last day of term.]—The right of juniors on the last day of term to move before King's Counsel is now abolished.—ANON. (1875), 1 Char. Pr. Cas. 39.

162. —— —— Senior counsel should not evade rule.]—*Held:* the rule of practice that on the last day of term the counsel in the outer row of the bar should be called on to move first was established for the benefit of the junior bar, & must not be evaded by senior counsel taking their stations there.—SHARP *v.* SHERWOOD (1857), 3 Jur. N. S. 92.

163. In Bail Court.]—The practice of the Bail Ct. on the last day of term was to commence by calling on the Bar in the back rows twice round, not alone in motions of course & rules *nisi*, but in all motions whatsoever.—ANON. (1843), 7 Jur. 725.

164. On motions—By seniority.]—Where several counsel state that they have respectively pressing motions to make, the ct. calls on the senior counsel. *Semble:* on the last day of term, only unopposed motions by the Outer Bar take precedence.—SOLTAU *v.* DE HELD (1851), 15 Jur. 1151.

165. Civil proceedings—Several defendants separately represented.]—On the trial of a cause it is in the discretion of the judge to say in what order the counsel for different defts., having different interests, shall cross-examine & address the jury. The order of seniority is not imperative.—FLETCHER *v.* CROSBIE (1842), 2 Mood. & R. 417.

166. Criminal trial—Several prisoners separately represented.]—Where counsel for several prisoners cannot agree as to the order in which they are to address the jury, the ct. will call upon them, not in the order of their seniority, but in the order in which the names of the prisoners stand in the indictment; but where the counsel for one prisoner has witnesses to fact to examine, the counsel for another cannot be allowed to postpone his address to the jury, until after those witnesses have been examined.—R. *v.* BARBER (1844), 1 Car. & Kir. 434; 8 J. P. 644.

Annotation:—**Mentd.** R. *v.* Rowlands (1851), 5 Cox, C. C. 436.

167. —— ——.]—When several prisoners are defended by different counsel, the order of their defences is not to be determined by the seniority of their counsel at the bar, but on the precise offence charged against each; & in a well-drawn indictment, the order in which the prisoners should be called on for their defence usually coincides with the order of their names in the indictment.—R. *v.* MEADOWS (1856), 2 Jur. N. S. 718.

168. —— ——.]—In a criminal trial, a discussion arose as to the order in which counsel for defts. should cross-examine witnesses & address the jury:—*Held:* in the absence of other agreement among counsel themselves, the practice

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SECT. 4, SUB-SECT. 1.

a. *King's Counsel — Patents of even date.*]—In the case of Queen's Counsel in Manitoba, where their patents are of even date, in the absence of any express provision as to their respective priority of rank contained in the patents, & of any other guide in determining the question, the order of precedence which they had as members of the Bar in Manitoba before the patents were issued & irrespective of them must prevail.—*Re* QUEEN'S COUNSEL (1892), 8 Man. L. R. 155.—**CAN.**

b. —— *Right of Lieutenant-Governor of Ontario to appoint.*]—The Lieutenant-Governor in Council has the right to appoint members of the Bar of Ontario to be Queen's Counsel, & to give such members the right of pre-audience in the cts. of the Province.—*Re* QUEEN'S COUNSEL (1896), 23 A. R. 792; *affd., sub nom.* A.-G. FOR DOMINION OF CANADA *v.* A.-G. FOR PROVINCE OF ONTARIO, [1898] A. C. 247; 67 L. J. P. C. 17; 77 L. T. 539; 14 T. L. R. 106, P. C.—**CAN.**

d. —— *Precedence over senior not King's Counsel.*]—R. having been appointed Queen's Counsel under a commission from the Governor-General of Canada, his precedence was questioned by W., his senior at the Bar of Nova Scotia, but held no appointment as Queen's Counsel either from the Governor-General or the Lieutenant-Governor. W. moved to have his cause entered on the docket prior to that of R. The motion was dismissed.—LORDLY *v.* KIELY (1875), 9 N. S. R. 506.—**CAN.**

e. *Appeal from decision giving precedence.*]—An appeal from a ruling of the Supreme Ct. of Nova Scotia awarding rank & precedence at the Bar to counsel will lie to the Supreme Ct. of Canada.—LENOIR *v.* RITCHIE (1879), 3 S. C. R. 575.—**CAN.**

f. *Solicitor-General.*] — A patent from the Crown appointing a barrister Queen's Counsel, directed that he should take precedence next after another Queen's Counsel who was subsequently appointed A.-G.:—*Held:* such patent did not then entitle him to precedence before the Solr.-General.—*Re* BOULTON (1845), 1 U. C. R. 317.—**CAN.**

Sect. 4.—Rules of precedence and other relations amongst barristers: Sub-sects. 1, 2 & 3. Sect. 5: Sub-sect. 1, A. (a), (b), (c), (d) & (e).]

followed at the Central Criminal Ct. was the most convenient course, namely, that counsel should have priority according to the order of the names in the indictment.—R. *v.* BALFOUR (1895), *Times*, Oct. 29.

SUB-SECT. 2.—KING'S COUNSEL AND JUNIORS.

169. King's Counsel—May act alone—Action in formâ pauperis.]—On the trial of an action brought *in formâ pauperis*, a King's Counsel may appear for pltf. alone, without a junior.—JAMES *v.* HARRIS (1835), 7 C. & P. 257.

170. —— Cannot plead against Crown.]—A King's Counsel cannot plead against the Crown.—SMITH *v.* WHEELER (1670), 1 Mod. Rep. 38; 86 E. R. 714.

Annotations:—**Mentd.** Englefield's Case (1591), 7 Co. Rep. 11 b; R. *v.* Cotton (1751), Park. 112; Nicloson *v.* Wordsworth (1818), 2 Swan. 365; Small *v.* Marwood (1829), 9 B. & C. 300; Siggers *v.* Evans (1855), 5 E. & B. 367; Standing *v.* Bowring (1885), 31 Ch. D. 282, C. A.; London & County Banking Co. *v.* London & River Plate Bank (1888), 21 Q. B. D. 535, C. A.; Mallott *v.* Wilson, [1903] 2 Ch. 494.

171. —— —— Unless by licence.]—Where a Queen's Counsel was instructed to argue a criminal case for a deft. on a point reserved for the consideration of the fifteen judges, but at the time fixed for the argument had not obtained a licence from her Majesty to argue against the Crown, but only a certificate from the Secretary of State's office, the ct. directed the argument to stand over for such licence to be obtained.—R. *v.* JONES (1840), 9 C. & P. 401.

172. —— —— ——.]—On the trial of a criminal information, a Queen's Counsel ought not to be of counsel for deft., without a licence from the Queen, or at the least a letter from the Secretary of State; & it is not enough that an application for a licence has been sent to the Secretary of State from an assize town in the country to which no answer has been received at the time of the case being tried.—R. *v.* BARTLETT (1847), 2 Car. & Kir. 321; 2 Cox, C. C. 245.

173. ——Differing in opinion from Junior.]—If the leading counsel at *Nisi Prius* takes one line of case, contrary to the opinion of his junior counsel, the ct. will not permit the junior counsel to obtain a new trial upon the ground that he was prepared with evidence to support another line of case, which his leader repudiated.—PICKERING *v.* DOWSON (1813), 4 Taunt. 779; 128 E. R. 537.

Annotations:—**Mentd.** Kain *v.* Old (1824), 2 B. & C. 627; Dobell *v.* Stevens (1825), 5 Dow. & Ry. K. B. 490; Small *v.* Attwood (1832), You. 407; Freeman *v.* Baker (1833), 5 B. & Ad. 797; Cornfoot *v.* Fowke (1840), 6 M. & W. 358; Taylor *v.* Bullen (1850), 16 L. T. O. S. 154.

174. Junior counsel becoming King's Counsel during case—Proper procedure.]—In a suit, commenced under the old practice, the bill was drawn by Mr. Webb, & having been called within the Bar before the answer was put in, the bill was subsequently amended by Mr. Davenport, while on the hearing Mr. Dickinson, Q.C., & Mr. Webb, Q.C., were instructed for plft., but no junior counsel. Hall, V.-C., having intimated that the proper practice in the circumstances was that a junior counsel should be instructed for pltf., Mr. Davenport was instructed & appeared with Mr. Dickinson, Q.C., & Mr. Webb, Q.C.—RAYMENT *v.* DIMBLEBY, [1877] W. N. 67.

SUB-SECT. 3.—OTHER CASES.

175. Partnership between barristers—Etiquette of barristers.]—An agreement between English barristers to practise in partnership is improper & contrary to the etiquette of the English Bar.—HOME *v.* DOUGLAS (1912), *Times*, Nov. 15.

SECT. 5.—RELATION BETWEEN COUNSEL AND CLIENT.

SUB-SECT. 1.—EMPLOYMENT OF COUNSEL.

A. In General.

(a) In what Proceedings and for what Purposes necessary.

Application for — Writ of attachment.] — *See* CONTEMPT OF COURT, ATTACHMENT, & COMMITTAL.

—— **Criminal information.**]—*See* CRIMINAL LAW & PROCEDURE; CROWN PRACTICE.

—— **Habeas corpus.**]—*See* CROWN PRACTICE.

—— **Rules under Justices Protection Act, 1848 (c. 44).**]—*See* CROWN PRACTICE.

—— **Mandamus.**]—*See* CROWN PRACTICE.

—— **Striking solicitor off Rolls.**] — *See* SOLICITORS.

To give undertaking as to damages.] — *See* INJUNCTION.

(b) What Litigants must employ Counsel.

Company.] — *See* COMPANIES; PRACTICE & PROCEDURE.

Next friend of infant.] — *See* INFANTS & CHILDREN; PRACTICE & PROCEDURE.

Prosecutor.]—*See* CRIMINAL LAW & PROCEDURE.

SECT. 4, SUB-SECT. 2.

g. *King's Counsel — Also clerk of Crown—May appear for Crown.*]—A clerk of the Crown being a Queen's Counsel is not debarred from appearing in open ct. & conducting a case on behalf of the Crown.—R. *v.* LEBŒUF (1865), 9 L. C. J. 197; 15 L. C. R. 291.—**CAN.**

169 i. —— *Should be assisted by junior counsel.*]—The Ct. of Ch. Regulation Act, 1850 (c. 89), was not intended to do away with the former advantageous practice of having junior counsel in all cases; the ct., however, will not lay down a rule on the subject, & the practice must be settled by the bar.—RUSSEL *v.* BEAVAN (1851), 16 L. T. O. S. 444.—**IR.**

173 i. —— *Differing in opinion from junior.*]—Junior counsel are not at liberty to take positions in argument which conflict with the positions taken by their leaders. — INTERNATIONAL BRIDGE CO. *v.* CANADA SOUTHERN RY. Co. (1882), 7 A. R. 226; 19 C. L. J. N. S. 358.—**CAN.**

173 ii. —— ——.]—The attitude of senior counsel must be taken as representing the true attitude of the client.—ATKINSON *v.* PACIFIC STEVEDORING, ETC., CO. & U. S. STEEL PRODUCTS CO. (1915), 32 W. L. R. 154; 24 D. L. R. 400; 22 B. C. R. 109; 8 W. W. R. 1339.—**CAN.**

h. *Junior counsel — Argument on special verdict.*]—Junior counsel must appear on the argument of a special verdict.—CONDON *v.* KINGSTON (1855), 7 Ir. Jur. 247.—**IR.**

k. —— *Argument on special case.*]—On the argument of a special case, junior counsel must open the argument on both sides.—ELLIS *v.* O'NEILL (1855), 4 I. C. L. R. 467.—**IR.**

l. —— *Argument on certiorari.*]—In the argument on a *certiorari* & return, junior counsel should be retained; but counsel may arrange among themselves which of them shall argue the case, & in what order.—R. *v.* HAMILTON (1861), 6 Ir. Jur. 154.—**IR.**

m. —— *Opening pleadings.*]—At the hearing of a cause the pleadings should be opened by counsel at the outer bar.—M'ASKIE *v.* M'CAY (1868), I. R. 2 Eq. 447; 16 W. R. 1187.—**IR.**

n. —— —— *Cause at Rolls.*]—When a cause is heard at the Rolls the pleadings on both sides must be opened by junior counsel.—RUSSELL *v.* BEAKEY (1845), 8 I. Eq. R. 563.—**IR.**

o. *One barrister recommending another—Junior holding brief for senior.*]—The practice for seniors to name their juniors, or for juniors to nominate their seniors, is contrary to the traditions of the profession & its best interests, & such a practice ought to be discouraged; but it is legitimate for a senior to ask a junior to hold a brief for him when he is temporarily unable to attend a case.—*Re* AN ADVOCATE (1917), I. L. R. 44 Calc. 741.—**IND.**

(c) *Who entitled to Assistance of Counsel.*

Party examined under—Companies Acts.]—*See* COMPANIES.

—— **Court of Probate Act, 1857 (c. 77), s. 26.**]—*See* EXECUTORS & ADMINISTRATORS.

—— **Bankruptcy Acts.**]—*See* BANKRUPTCY & INSOLVENCY.

Poor persons.]—*See* PRACTICE & PROCEDURE.

Prisoners.]—*See* CRIMINAL LAW & PROCEDURE.

Trustee supporting appeal by tenant for life—Petition under Settled Land Acts.]—*See* SETTLEMENTS; TRUSTS & TRUSTEES.

Juryman fined for contempt.]—*See* CONTEMPT OF COURT, ATTACHMENT, & COMMITTAL; JURIES.

Defendant at petty sessions.]—*See* MAGISTRATES.

(d) *Whether Counsel must be instructed through Solicitors.*

176. Prevailing custom.]—The usage which has prevailed at the Bar, that counsel, unless in some excepted cases, should take their instructions from attorneys only, is beneficial, & ought to be maintained.—DOE *v.* HALE (1850), 15 Q. B. 171; 19 L. J. Q. B. 353; 15 L. T. O. S. 136; 14 Jur. 830; 117 E. R. 423.

"Dock defence" — In criminal law.] — *See* CRIMINAL LAW & PROCEDURE.

In Parliamentary proceedings.] — *See* PARLIAMENT.

In inquiries under Local Government Acts.]—*See* LOCAL GOVERNMENT.

In inquiries under Public Health Acts.] — *See* PUBLIC HEALTH & LOCAL ADMINISTRATION.

In inquiries under Light Railways Acts, 1896 (c. 48).]—*See* TRAMWAYS & LIGHT RAILWAYS.

177. By patent agents.]—In an action by patent agents to recover a sum for services rendered, two items were objected to on the ground that they were properly solrs.' charges. One of these was for a case for the opinion of counsel:—*Held:* (1) counsel's receipt of the fee was a breach of the unwritten rules which as between solrs. & counsel govern their dealings; (2) having regard to all the circumstances, there was no evidence that pltfs. had acted as solrs., but they would be deprived of costs, as the custom that counsel in civil cases should be instructed by solrs. only was so notorious that it must have been within pltfs', knowledge, & their instructing counsel direct was an invasion of the just privileges of solrs.—THOMPSON *v.* MASKERY (1882), 73 L. T. Jo. 401.

See, further, PATENTS & INVENTIONS.

178. What is "instructing counsel."]—"Instructing counsel" means giving him proper instructions so as to enable him to conduct the cause entrusted to him, & merely delivering a brief is not instructing him, in the proper sense of the word.—HAWKINS *v.* HARWOOD (1849), 4 Exch. 503; 7 Dow. & L. 181; 19 L. J. Ex. 33; 14 L. T. O. S. 273; 154 E. R. 1312.

Solicitors' authority to employ counsel.] — *See* SOLICITORS.

(e) *Employment by Retainer.*

179. Extent of counsel's duties when retained.]—A barrister who accepts a retainer is bound to give his counsel, but not to sign the pleadings in the cause of his client.—MINGAY *v.* HAMMOND (1618), Cro. Jac. 482; 79 E. R. 411.

Annotation:—**Consd.** Kennedy *v.* Broun (1863), 13 C. B. N. S. 677.

180. —— Whether terminated by becoming King's Counsel.]—*Qu.:* whether the retainer of a counsel in a cause ceases upon his being appointed Queen's Counsel.—LUCAS *v.* PEACOCK (1844), 8 Beav. 1; 50 E. R. 1.

181. Retainers taken from opposing parties—Jurisdiction of Chancellor.]—M. received a retainer from L., with the usual fee of one guinea, & repeatedly acted under that retainer of L.'s against bkpt. The meetings were adjourned from time to time. In the interval, after one of the adjournments, a general retainer was left on behalf of bkpt. At the next meeting, of which L.'s solrs. had notice, they did not send any brief. Bkpt. did send a brief, &, as a right, claimed M.'s assistance, & M. attended before the comrs. as counsel for bkpt. On a petition to restrain him from so acting LORD ELDON, C., expressed his clear decided opinion that he, sitting in bkpcy., had no jurisdiction whatever to interfere with a barrister in the exercise of his discretion as to the client upon whose retainer he might think proper to act, but said that as *amicus curiæ* he was ready to hear the petition & declared that M. was bound, in the circumstances of the case, to act as counsel for bkpt.—*Ex p.* LLOYD (1822), Mont. 70, n.

182. —— Non-interference of court.]—The ct. will not interfere in questions arising upon the practice of retainer. A motion for an injunction to restrain a particular counsel, who had acted for defts., from acting, at a subsequent stage of the proceedings, on behalf of pltfs., from whom he had received a retainer, was refused.—BAYLIS *v.* GROUT (1835), 2 My. & K. 316; 4 L. J. Ch. 78; 39 E. R. 964.

183. Fact of retainer—Not privileged communication.]—The fact of the retainer of counsel is not a privileged communication (PARKE, B.).—FORSHAW *v.* LEWIS (1855), 10 Exch. 712; 1 Jur. N. S. 263; 156 E. R. 626.

Annotation:—**Mentd.** Thompson *v.* Robson (1857), 26 L. J. Ex. 367.

See, also, Nos. 255, 256, *post.*

184. Effect as evidence as to on whose behalf counsel appeals.]—A workman met with an accident. He applied to his approved society &

SECT. 5, SUB-SECT. 1.—A (d).

176 i. *Agreement with client without intervention of solicitor—Unprofessional conduct.*]—An advocate of the High Ct. made an arrangement to do professional work for his client, without the intervention of a solr., for half the usual charge; & he also wrote to the same client to the effect that he had an offer to work professionally against her, & unless she paid him ten gold mohurs (five times the usual fee) for refusing the brief offered, he would take up the case against her:—*Held:* the advocate was guilty of highly unprofessional conduct.—*Re* S. K. H. (AN ADVOCATE) (1907), I. L. R. 34 Calc. 72.—**IND.**

176 ii. *Rule that counsel should be instructed through solicitor—Is beneficial.*]—The rule that counsel should take instructions only from an attorney in respect of any professional work on the original side of the High Ct. is beneficial from the public standpoint & that of the bar &, though founded upon no rule of law, ought to be maintained.—*Re* AN ADVOCATE (1917), I. L. R. 44 Calc. 741.—**IND.**

SECT. 5, SUB-SECT. 1.—A. (e).

p. *Where counsel likely to appear as witness on counsel's conduct likely to be impugned.*]—The resolutions of the Bar Council on the above matters (see Annual Statements of General Council of the Bar for 1911, p. 11, & 1912, p. 11) approved.—WESTON *v.* PEARY MOHAN DASS (1912), I. L. R. 40 Calc. 898.—**IND.**

q. *By agent without express authority.*]—Deft. retained H. to act for him in proceedings before justices. After an appeal had been perfected from the justices, H., who had no authority from deft. for that purpose, retained pltf. to act as counsel on the appeal. Pltf. never had any dealings with deft. directly or by letter:—*Held:* the employment of pltf. by H. was a delegation of duty which H. himself could perform, & for which he alone was personally liable.—HEARN *v.* MCNEIL (1899), 32 N. S. R. 210.—**CAN.**

r. *Court will not decide question on practice of retainer.*]—The ct. will not entertain a question arising upon the practice of retainer, but will leave it to be decided by the counsel retained, or by the members of the bar generally.—TAYLOR *v.* CLARKE (1862), 8 Ir. Jur. 35; 13 I. C. L. R. 571.—**IR.**

s. *Duty to accept brief.*]—A pleader is not bound to accept a brief offered to him, nor to state his reasons for refusing to accept it.—*Re* NABIN CHANDRA DAS GUPTA (1908), 12 C. W. N. 381.—**IND.**

Sect. 5.—Relation between counsel and client: Sub-sect. 1, A. (e), (f) & (g), B. (a) & (b); sub-sect. 2.]

was paid sick pay of 10*s.* a week, which was the maximum amount he would have received under Workmen's Compensation Act, 1906 (c. 58). He signed a notice of the accident, on the form provided by the society, & they wrote to the employer to ask him to admit liability. The employer having refused to admit liability, the society instructed the workman to see their local solrs., who informed him that on signing a retainer authorising them to act on his behalf they would make a claim for him. At the hearing the correspondence, showing the course adopted by the approved society, was put in evidence together with the retainer signed by the workman. The cty. ct. judge asked counsel, who opened the case on behalf of the workman, whether the application was made by the workman himself or by the approved society in the name of the workman. This question counsel, relying on the retainer & his brief, said he should not be called upon to answer, & the judge thereupon dismissed the application with costs:—*Held:* the retainer was *primâ facie* evidence that the application was being made by the workman on his own behalf, & the judge should have heard the workman's evidence upon the matter before dismissing the application. Case remitted.—ALLEN *v.* FRANCIS, [1914] 3 K. B. 1065; 83 L. J. K. B. 1814; 112 L. T. 62; 30 T. L. R. 695; 58 Sol. Jo. 753; 7 B. W. C. C. 779, C. A.

Annotations:—**Mentd.** Bobbey *v.* Crosbie (W. M.) (1915), 84 L. J. K. B. 856, C. A.; Burnham *v.* Hardy (1915), 84 L. J. K. B. 714, C. A.

Powers of counsel under retainer.]—*See* Nos. 276 *et seq., post.*

(f) Who may be employed as Counsel.

185. Not particular counsel when definite instructions not to employ him—Etiquette of Bar not binding on client.]—A solr. cannot brief a counsel whom his client has instructed him not to brief, even if the counsel is entitled to a brief under the rules of professional etiquette. The solr.'s proper course in such circumstances is either to explain the rule to the client & say that he must state the facts to any other counsel whom he briefs, & that such counsel may probably return the brief, or to say that he is himself so clearly governed by the rules & etiquette of the profession that if he is not allowed to brief the counsel in question he must throw up his retainer.—*Re* HARRISSON, [1908] 1 Ch. 282; 77 L. J. Ch. 143; 97 L. T. 902; 24 T. L. R. 118; 52 Sol. Jo. 79.

186. Not different counsel—Where infant litigant comes of age during case.]—An infant pltf. coming of age during the progress of the cause, & disapproving of the proceedings, cannot appear in the proceedings by counsel other than those who appear for pltfs. generally; he can only complain of or repudiate the proceedings by making them the subject of a special application.—BALLARD *v.* WHITE (1843), 2 Hare, 158; 1 L. T. O. S. 76; *sub nom.* BALEARD *v.* WHITE, 7 Jur. 506; 67 E. R. 66.

(g) Conflict of Duty.

187. Party proposing employment—Proceeding against Bencher of same Inn.]—*Held:* it was one of the customs of the Inns of Ct. that none of the same society should be of counsel against a Bencher of the same society, unless he were assigned by the ct., & then also he should excuse himself.—HITCHAM & NAUNTON'S CASE (1622), 2 Roll. Rep. 235; 81 E. R. 770.

188. —— Proceeding against previous client.]—If counsel has acted for a client, he ought not to accept a brief against his client if he knows anything as counsel that may be prejudicial to the former client, though the client refuses to retain him.—CHOLMONDELEY (EARL) *v.* CLINTON (LORD) (1815), 19 Ves. 261; Coop. G. 80; 34 E. R. 515.

Annotations:—**Apld.** Horsley *v.* Cox (1869), L. R. 7 Eq. 464. **Consd.** *Re* Holmes, *Re* Electric Power Co. (1877), 25 W. R. 603. **Apld.** Little *v.* Kingswood Collieries Co. (1882), 20 Ch. D. 733, C. A. **Refd.** Bricheno *v.* Thorp (1821), Jac. 300, L.C.; Griffiths *v.* Griffiths (1843), 2 Hare, 587, V.-C. **Mentd.** Beer *v.* Ward (1821), Jac. 77; Johnson *v.* Marriott (1833), 2 Cr. & M. 183; Turquand *v.* Knight (1836), 2 M. & W. 98; Dietrichsen *v.* Cabburn (1846), 2 Ph. 52, L.C.; Pearse *v.* Pearse (1846), 1 De G. & Sm. 12; Parratt *v.* Parratt (1848), 2 De G. & Sm. 258; Hutchinson *v.* Newark (1850), 3 De G. & Sm. 727; Manser *v.* Dix (1855), 1 K. & J. 451; Campbell *v.* A.-G. (1867), 2 Ch. App. 571, L.JJ.; Rakusen *v.* Ellis, Munday & Clarke, [1912] 1 Ch. 831 C. A.

189. Defendant to bill signed by same counsel on behalf of other side.]—A counsel who draws & signs the bill may sign the answers & act as counsel for the other parties to the suit, unless retained for pltf.—ANON. (1839), 8 L. J. Ch. 319; 3 Jur. 603.

190. Interest of party proposing employment—Possibly conflicting with those of parties by whom already employed.]—Counsel appeared for an exor. in an action, in which questions arose as to the construction of a will, the ct. having intimated that in such cases a trustee or exor. could not appear by the same counsel as a beneficiary interested in arguing the case.—*Re* RICHARDS, UGLOW *v.* RICHARDS (1901), 50 W. R. 90; 46 Sol. Jo. 50.

191. —— ——.]—On a summons to determine whether a sum of money paid to the trustees of B.'s will by way of bonus on certain stock in a limited co. was to be treated as capital or income, pltf. being a trustee without any beneficial interest, & defts. being the life tenant, who was the other trustee, & the remaindermen, counsel appeared for the neutral trustee & the life tenant:—*Held:* that was irregular, as it was the duty of the trustee's counsel to assist the ct., & he ought not to argue on behalf of a beneficiary, & the summons must stand over.—*Re* BURTON, DANBY *v.* BURTON, [1901] W. N. 202.

192. —— —— Special case.]—Although in a claim parties may appear by the same solr., the interests of infants must be protected by a separate counsel.—WRIGHT *v.* WOODHAM (1851), 17 L. T. O. S. 293.

193. —— —— ——.]—The same counsel may sign a special case, not only for pltf., but for defts. —*Ex p.* CRAIG (1851), 20 L. J. Ch. 136; 16 L. T. O. S. 481; 15 Jur. 762.

194. Counsel elevated to Bench.]—Where counsel, who was engaged in a case, was raised to the

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SECT. 5, SUB-SECT. 1.—A. (g).

1. *Appearance as amicus curiæ.*]—It is irregular for one holding a brief or retainer for a party to appear as *amicus curiæ.*—*Ex p.* MCEVOY (1868), 7 S. R. N. S. W. 145.—**AUS.**

190 i. *Interest of party proposing employment—Possibly conflicting with those of parties by whom already employed.*]—Counsel for pltf., moving pursuant to the general allocation report, ought not to hold a brief on behalf of a third person whose claims are inconsistent with the reported rights of a creditor, though pltf. may not be in any way interested in the question.—DAY *v.* PONSONBY (1842), 5 I. Eq. R. 24.—**IR.**

190 ii. —— ——.]—A pleader who has appeared for a party in proceedings under Criminal Procedure Code (Act V. of 1898), s. 145, must, before appearing for the opposite party in a subsequent civil suit flowing out of such proceedings, satisfy the ct. that in acting in those proceedings he did not as a fact obtain from his then client any knowledge which would be of use to his present clients, or that if he did obtain any such knowledge, then such knowledge is now, so to speak, public property available to any pleader who can obtain inspection of the record of the proceedings in the magistrate's ct. If he fails to do so it cannot be said that the ct. has wrongly exercised its discretion in refusing him audience.—SRINIVASA RAU *v.* PICHAI PILLAI (1913), I. L. R. 38 Mad. 650.—**IND.**

Bench, & the same case came before him, he gave no opinion.—LEWIS *v.* BRANTHWAITE (1831), 2 B. & Ad. 437; 9 L. J. O. S. K. B. 263; 109 E. R. 1205.

Annotations:—**Mentd.** Keyse *v.* Powell (1853), 2 E. & B. 132; Bowser *v.* Maclean (1860), 2 De G. F. & J. 415, L. C.; Eardley *v.* Granville (1876), 3 Ch. D. 826.

195. ——.]—A judge will not try a cause on which he had been formerly engaged as counsel, but will order it to be made a *remanet.*—DOE d. WOOD *v.* ELIAS (1846), 1 New Pract. Cas. 474; 7 L. T. O. S. 45, N. P.

196. ——.]—A counsel in a cause, being afterwards raised to the Bench, is not thereby precluded from taking part in the hearing & discussion of that cause, but he may properly (unless his doing so would entail great inconvenience & expense on the parties, or perhaps from his being, as in Ch., the sole judge of the ct., amount to a denial of justice) decline to take part in such hearing & decision.—THELLUSSON *v.* RENDLESHAM (1859), 7 H. L. Cas. 429; 28 L. J. Ch. 948; 33 L. T. O. S. 379; 5 Jur. N. S. 1031; 7 W. R. 563; 11 E. R. 172, H. L.

Annotations:—**Folld.** Di Sora *v.* Phillips (1863), 33 L. J. Ch. 129, H. L. **Mentd.** Richards *v.* Davies (1862), 13 C. B. N. S. 69; Rhodes *v.* Rhodes (1882), 7 App. Cas. 192, P. C.; *Re* Northen's Estate, Salt *v.* Pym (1884), 28 Ch. D. 153; R. *v.* Sunderland JJ. (1901), 85 L. T. 183, C. A.

B. Where Party conducts his own Case.

(a) For what Purposes Counsel may be employed.

197. To argue points of law.]—A party appearing in person must examine the witnesses, as well as address the jury. Counsel can only be heard to assist him on legal objections.—SHUTTLEWORTH *v.* NICHOLSON (1833), 1 Mood. & R. 254.

198. —— Not to address court.]—*Semble:* in a civil case, if a party conduct his own cause, & examine the witnesses, he cannot be allowed to have the assistance of counsel to argue points of law.

If a gentleman at the bar appears, he ought to take the command. It is much better that cases should be conducted by gentlemen at the bar (ALDERSON, B.).—MOSCATI *v.* LAWSON (1835), 7 C. & P. 32; 1 Mood. & R. 454.

Annotation:—**Distd.** Doe *v.* Hale (1850), 15 Q. B. 171.

199. —— To examine witnesses—Party reserving right to address jury.]—On the trial of a misdemeanour, deft. cannot have the assistance of counsel to examine the witnesses, & reserve to himself the right of addressing the jury; but if he conducts his defence himself, & any point of law arises which he professes himself unable to argue, the ct. will hear this argued by his counsel.—R. *v.* WHITE (1811), 3 Camp. 98, N. P.

200. —— —— ——.]—On a trial for a misdemeanour in King's Bench deft. is not entitled to the assistance of counsel to cross-examine witnesses when he reserves to himself the right of addressing the jury; but counsel may argue for him any point of law that arises, & suggest the questions to be put to the witness.—R. *v.* PARKINS (1824), 1 C. & P. 548; Ry. & M. 166, N. P.

201. To cross-examine witness—To address jury—Instructions through solicitor unnecessary.]—There is no rule of law requiring that counsel appearing in ct. for a party who pleads in person should be instructed by an attorney; & where a judge at *Nisi Prius* had ruled that counsel appearing for such party, & not instructed by an attorney, could not cross-examine or address the jury, the ct. granted a new trial.—DOE *v.* HALE (1850), 15 Q. B. 171; 19 L. J. Q. B. 353; 15 L. T. O. S. 136; 14 Jur. 830; 117 E. R. 423.

202. To reply—Party having previously addressed court.]—At the close of resp.'s argument applt., who had opened her case in person, was told that the House of Lords would hear her counsel in reply, but that if she began, she must finish, as the House would not allow her to break off & then hear her counsel.—LONGWORTH (OR YELVERTON) *v.* YELVERTON (1867), L. R. 1 Sc. & Div. 218, H. L.

Annotation:—**Mentd.** Dysart Peerage Case (1881), 6 App. Cas. 489, H. L.

Where litigant a barrister.]—*See* Sect. 7, *post.*

(b) Effect of employing Counsel.

203. On party's right to examine witnesses & address jury.]—If prisoner employs counsel to examine or cross-examine witnesses, he will not be allowed to do so himself in addition; but it will be at his option whether he or his counsel address the jury.—R. *v.* REDHEAD (1795), 25 State Tr. 1003, 1021.

204. On party's right to appear— & claim to be nonsuited.]—Where counsel, regularly retained, appear for pltf. in a penal action, & claim to proceed, pltf. himself cannot appear & claim to be nonsuited.—MARKS *v.* BENJAMIN (1839), 2 Mood. & R. 225; 3 J. P. 405.

Annotations:—**Mentd.** Hall *v.* Green (1853), 9 Exch. 247; Rednall *v.* Crystal Palace Co. (1858), 22 J. P. 321; Pease *v.* Coates (1866), 14 L. T. 886; Garrett *v.* Messenger (1867), 10 Cox, C. C. 498; Syers *v.* Conquest (1873), 28 L. T. 402; Milnes *v.* Bale, Milnes *v.* Lea (1875), L. R. 10 C. P. 591; Terry *v.* Brighton Aquarium Co. (1875), L. R. 10 Q. B. 306; Martin *v.* Benjamin, [1907] 1 K. B. 64; Vecsey *v.* Smith (1916), 86 L. J. K. B. 249.

205. On party's right to object to proceedings—Writ of error refused.]—On a trial for murder, the prisoner objecting to be defended by counsel, but in the result allowing counsel to act for him, he was not afterwards allowed to raise any objection to the proceeding, & a fiat for a writ of error was refused.

A prisoner & his counsel cannot conduct the case together. If he declines the assistance of counsel, the ct. cannot permit him afterwards to interfere. A prisoner must make his election.—R. *v.* SOUTHEY (1865), 4 F. & F. 864.

Where litigant a barrister.]—*See* Sect. 7, *post.*

SUB-SECT. 2.—COUNSEL AND HIS FEES.

206. Contract by client to pay fees—Not binding.]—A promise made by a client to pay money to a counsel for his advocacy, whether made before or during or after the litigation, has no binding effect. The relation of counsel & client renders the parties mutually incapable of making any contract of hiring & service concerning advocacy in litigation.—KENNEDY *v.* BROUN (1863), 13 C. B. N. S. 677;

SECT. 5, SUB-SECT. 1.—B. (a).

a. *General rule.*]—Where pltf. in person argues his own cause before the ct., he cannot also be heard by counsel.—GILBERT *v.* RAYMOND (1879), 19 N. B. R. 315; N. B. Dig. 106 (7).—**CAN.**

SECT. 5, SUB-SECT. 2.

206 i. *Contract by client to pay fees—Whether binding.*]—A barrister cannot sue his client for fees upon any implied contract for their payment, but they are recoverable by express contract.—HOBART *v.* BUTLER (1859), 9 I. C. L. R. 157; 4 Ir. Jur. 137.—**IR.**

206 ii. —— ——.]—A barrister & his client are mutually incapable of entering into a binding contract of hiring with respect to the services of the former as an advocate.—ROBERTSON *v.* MACDONOGH (1880), 6 L. R. Ir. 433.—**IR.**

206 iii. —— ——.]—Neither a barrister nor a pleader may contract with a client as to fees.—ACHAMPARAMBATH CHERIA KUNHAMMU *v.* GANTZ (1881), I. L. R. 3 Mad. 138.—**IND.**

206 iv. —— ——.]—The relation of counsel & client creates mutual incapacity to make a binding contract of hiring & service, either express or implied, but there must be the relation of advocate & client to give rise to the incapacity, & the incapacity is strictly confined to

Sect. 5.—Relation between counsel and client: Subsect. 2.]

1 New Rep. 275 ; 32 L. J. C. P. 137 ; 7 L. T. 626 ; 9 Jur. N. S. 119 ; 11 W. R. 284 ; 143 E. R. 268.

Annotations :—**Distd.** Graham *v.* Johnson (1869), 17 W. R. 810. **Apprvd.** Mostyn *v.* Mostyn (1870), 5 Ch. App. 457, L.J. **Consd.** R. *v.* Doutre (1884), 9 App. Cas. 745, P. C. **Apprvd.** *Re* Le Brasseur & Oakley, [1896] 2 Ch. 487, C. A. **Refd.** Gibbon *v.* Budd (1863), 9 Jur. N. S. 525 ; Wells *v.* Wells, [1914] P. 157, C. A. **Mentd.** Newall *v.* Elliott & Glass (1864), 4 New Rep. 429 ; Evans (Joseph) *v.* Heathcote, [1918] 1 K. B. 418, C. A.

207. —— —— Even when barrister pleads in courts where fees may be sued for.]—A member of the Bar of England, in accordance with the law of that country and the rules of the profession to which he belongs, renders, & professes to render, services of a purely honorary character. If, in his professional capacity as an English barrister, he accepted a retainer to appear & plead before comrs. or arbitrator in a foreign country, by whom law counsel practising in its regular cts. were permitted to have suit for their fees, that would not give him a right of action for his honoraria. His client would have a conclusive defence to such an action, on the ground that he was employed as a member of the English Bar, & by necessary implication upon the same terms as to remuneration upon which members of that Bar are understood to practise (LORD WATSON).—R. *v.* DOUTRE (1884), 9 App. Cas. 745 ; 53 L. J. P. C. 85 ; 51 L. T. 669, P. C.

208. —— Binding where services not rendered as barrister—Returning officer.]—A barrister may maintain an action for work & labour done as returning officer on an election of guardians of a union, under an express contract for remuneration at so much per day, the professional character of pltf. not affecting his rights under the special contract.—EGAN *v.* KENSINGTON UNION GUARDIANS (1841), 3 Q. B. 935, n. ; 114 E. R. 767.

Annotations :—**Distd.** Kennedy *v.* Broun (1863), 13 C. B. N. S. 677. **Refd.** Veitch *v.* Russell (1842), 3 Q. B. 928.

209. Rule for prepayment of fees.]—Counsel are to be paid beforehand, because they are not to be left to the chance whether they shall ultimately get their fees or not ; & it is for the purpose of promoting the honour & integrity of the Bar that it is expected all their fees should be paid at the time when their briefs are delivered. That is the reason why they are not permitted to maintain an action. It is their duty to take care, if they have fees, that they have them beforehand, & the law will not allow them any remedy if they disregard their duty in that respect (BAYLEY, J.).—MORRIS *v.* HUNT (1819), 1 Chit. 544.

Annotations :—**Refd.** Kennedy *v.* Broun (1863), 13 C. B. N. S. 677. **Mentd.** A.-G. *v.* Munro (1849), 1 H. & Tw. 457.

210. ——.]—The old rule was that no barrister should take a brief, unless the fee was paid at the time. If, however, he did so, he had nothing but the solr.'s honour to look to. He had no right to apply to the client in any way (BRETT, M.R.).—*Re* COCKAYNE (1884), 19 L. J. N. C. 500, C. A.

211. —— Nature of obligation to pay fees.]—Fees are payable as a matter of honour. The solr. can, if so required by counsel, be compelled either not to retain him or to pay his fee with the brief. That is the remedy of counsel, & he has it in his own hands. If he does not choose to insist on payment of his fees with the brief, the payment becomes a matter of honour, not of legal obligation (LINDLEY, L.J.).—*Re* LE BRASSEUR & OAKLEY, [1896] 2 Ch. 487 ; 65 L. J. Ch. 763 ; 74 L. T. 717 ; 45 W. R. 87, C. A.

Annotations :—**Refd.** General Council of the Bar *v.* I. R. Comrs., [1907] 1 K. B. 462 ; Wells *v.* Wells, [1914] P. 157, C. A. **Mentd.** Harbin *v.* Gordon, [1914] 2 K. B. 577.

212. Responsibility for fees—Solicitor cannot contract to render client liable.]—A solr. has no implied authority to pledge his client's credit to his counsel by an express promise to pay his fees, whether they relate to litigation or not, so as to enable the counsel to sue the client for them.—MOSTYN *v.* MOSTYN (1870), 5 Ch. App. 457 ; 39 L. J. Ch. 780 ; 22 L. T. 461 ; 18 W. R. 657, L.J.

213. —— Solicitor, not client.]—By the established custom of the profession counsel looks to the solr. for his fees, not to the client.—*Re* SEAL, *Ex p.* CRICKETT (1893), 37 Sol. Jo. 685, 842, C. A.

214. —— London, not country solicitor.]—If counsel is instructed by a London agent of a country solr., the London agent, not the country solr., is responsible to counsel for his fees.—*Re* NELSON, SON & HASTINGS (1885), 30 Ch. D. 1 ; 54 L. J. Ch. 998 ; 53 L. T. 415 ; 33 W. R. 645 ; 1 T. L. R. 423.

Annotations :—**Mentd.** *Re* Johnson & Weatherall (1888), 37 Ch. D. 433, C. A. ; *Re* Romer & Haslam, [1893] 2 Q. B. 286, C. A. ; *Re* Massey (1910), 54 Sol. Jo. 50.

215. Receipt of fees—From whom acceptable—Client.]—A counsellor may take fees of his client, but he may not lay out or expend money for him.—GAGE *v.* JOHNSON (1622), Win. 53 ; 124 E. R. 45.

216. —— —— —— Pauper petitioner in divorce.]—*Semble :* a barrister may receive fees from a pauper petitioner in divorce proceedings.—RICHARDSON *v.* RICHARDSON, [1895] P. 276 ; 64 L. J. P. 93 ; 73 L. T. 135 ; 11 T. L. R. 469 ; *affd.*, [1895] P. 346, C. A.

Annotations :—**Apprvd.** *Re* Raphael, *Ex p.* Salomon, [1899] 1 Ch. 853. **Mentd.** White *v.* White, [1898] P. 124.

See, now, R. S. C., Ord. 16.

217. Amount of fees—Not to depend on event of cause.]—A counsellor-at-law cannot contract for payment of his fees of litigation by a gross sum payable upon the event of the cause.—PENRICE *v.* PARKER (1673), Cas. *temp.* Finch, 75 ; 23 E. R. 40.

218. —— ——.]—The emoluments of counsel are not to depend upon the event of the cause, but their compensation is to be equally the same whether the event be successful or unsuccessful.—MORRIS *v.* HUNT (1819), 1 Chit. 544.

Annotations :—**Refd.** Kennedy *v.* Broun (1863), 13 C. B. N. S. 677. **Mentd.** A.-G. *v.* Munro (1849), 1 H. & Tw. 457.

219. —— Not to be marked after end of litigation.]—The only fee which a solr. is bound to pay a counsel is to be marked on the brief when it is accepted. There always must have been a difficulty in the idea that a counsel could take a fee afterwards ; because I think that the great majority of counsel never would have accepted a fee not marked when the brief was accepted, & would not have allowed it to be marked subsequently. It could only have been by accident that any counsel ever allowed a fee to be marked after the work was

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contracts relating to service as an advocate in litigation & matters ancillary to such service.—KISHTNA ROW *v.* MUTTUKISTNA (1869), 4 Mad. 244.—**IND.**

206 v. —— —— *Interest.*]—Pltf., a member of the Newfoundland Bar, attended a Commission in 1877, as counsel for the Newfoundland Govt., upon an agreement that he was to receive for his services "the same allowance as counsel for the other Provinces." The claim having been finally settled in 1885, pltf. sued to recover a sum proportionate to the value of his services, with compound interest thereon from the date of the sittings of the Commission :—*Held :* he was bound by the above agreement & could not recover on a *quantum meruit*, & he could not recover compound interest or simple interest.—WHITEWAY *v.* NEWFOUNDLAND GOVT. (1900), 8 Nfld. L. R. 414.—**NFLD.**

b. *Receipt of fees — Before payment.*]—The conduct of a barrister, who receipted fees before they were paid, & then brought a civil bill against the solr. for them, under which he got a decree & had him arrested, disapproved of.—*Re* HICKIE (1868), 1 I. L. T. Jo. 795.—**IR.**

done. At all events, it was a fee which by no professional rule a solr. is bound to pay, & a pauper pltf. is never liable to pay such a fee (BRETT, M.R.). —CARSON *v.* PICKERSGILL (1885), 14 Q. B. D. 859; as reported in 33 W. R. 589, C. A.

Annotations :—**Mentd.** Richardson *v.* Richardson, [1895] P. 346, C. A.; *Re* Raphael, *Ex p.* Salomon, [1899] 1 Ch. 853.

220. —— Not to be altered after end of litigation —Action by counsel to vindicate character.]—An action was brought by a Ch. barrister in practice in Liverpool to recover damages from a solr., in respect of a statement by the latter that the fee marked upon the barrister's brief had been altered in his chambers to a larger one subsequent to the determination of the case. The solr. recognising he had made a mistake, expressed regret & unreservedly withdrew the statement. Upon this, the action was settled by judgment being entered for pltf. On the question of costs :—*Held :* though probably the barrister did not care anything about the costs, the ct. was bound to enforce a verdict which could carry them in order to show that there was not the slightest stain attaching to his character—SNOW *v.* ETTY (1887), 22 L. Jo. 292.

221. Recovery of fees—From solicitor collecting same from client—Jurisdiction of court.]—The ct. has no jurisdiction to compel a solr., whose bill has been taxed & ordered to be paid, to pay fees to counsel included in such bill.—*Re* MAY (1858), 4 Jur. N. S. 1169; 7 W. R. 126.

Annotation :—**Refd.** Kennedy *v.* Broun (1863), 13 C. B. N. S. 677.

—— —— Disciplinary powers of court over solicitors.]—*See* SOLICITORS.

222. —— —— Not by suit in equity.]—A suit in equity does not lie against a solr. for fees due to counsel.—MOOR *v.* ROW (1629), 1 Rep. Ch. 38; 21 E. R. 501.

223. *S. P. Re* MAY (1858), 4 Jur. N. S. 1169; 7 W. R. 126.

224. —— —— Not by motion to show cause.]—On a motion for a rule calling upon an attorney to show cause why it should not be referred to the master to ascertain what sums of money he had received for & on account of a certain counsel, the attorney having received certain counsel's fees, which he had failed to pay over, & the facts depending chiefly upon the statement of the clerk to the attorney, who had been subsequently convicted of felony :—*Held :* without laying down any rule that the ct. would not interfere in such a case, the grounds laid were not sufficient to induce the ct. to interfere by summary process, the chief facts resting on the statement of a party whose word was open to suspicion.—*Ex p.* —— (1852), 18 L. T. O. S. 247.

225. —— —— ——.]—The ct. will not, on motion, interfere to compel an attorney to pay counsel's fees.—*Re* ANGELL, ANGELL *v.* OODEEN (1860), 29 L. J. C. P. 227; 6 Jur. N. S. 1373.

226. —— —— Not by action.]—I doubt whether anything short of a bond would enable counsel to sue a solr. for his fees (LINDLEY, L.J.).—*Re* LE BRASSEUR & OAKLEY, [1896] 2 Ch. 487; 65 L. J. Ch. 763; 74 L. T. 717; 45 W. R. 87, C. A.

Annotations :—**Mentd.** General Council of the Bar *v.* I. R. Comrs., [1907] 1 K. B. 462; Harbin *v.* Gordon, [1914] 2 K. B. 577; Wells *v.* Wells, [1914] P. 157, C. A.

227. —— —— Right to prove in solicitor's bankruptcy.]—On the bkpcy. of a firm of solrs. a barrister may prove for fees received by them prior to the bkpcy. from the lay client.—*Re* HALL, *Ex p.* —— (1856), 28 L. T. O. S. 72; 2 Jur. N. S. 1076.

Annotations :—**Expld. & Dbtd.** *Re* Le Brasseur & Oakley, [1896] 2 Ch. 487, C. A. **Dbtd.** Wells *v.* Wells, [1914] P. 157, C. A.

228. —— —— —— Reference to registrar to ascertain sum due.]—On application by a barrister for an order that the trustee in bkpcy. of a solr. might be directed to pay certain counsel's fees alleged to have been received by him in respect of bkpt.'s bill of costs as a solr. in certain matters, it was contended that payments had been made by bkpt. to appct. on general account which included the fees claimed, & also that an agreement had been come to between the trustee & the client, whereby a lump sum was accepted in settlement of the bill of costs, exclusive of fees to counsel :—*Held :* the matter must be referred to the registrar to inquire what fees had been received by the trustee & whether any of such fees had been paid by bkpt. to appct., either specifically or generally.—*Re* CLIFT, *Ex p.* COLQUHOUN (1890), 38 W. R. 688.

Annotation :—**Expld. & Distd.** Wells *v.* Wells, [1914] P. 157, C. A.

229. —— —— Set-off of fees.]—A barrister's fees are not the subject of an action, & not the subject of set-off (PATTESON, J.).—WISE *v.* NEWTON (1846), 7 L. T. O. S. 138.

230. Attachment or garnishee of fees.]—Fees owing to counsel are not "debts" & cannot be attached or garnisheed as such.

A wife commenced proceedings for a divorce against her husband, a barrister, & obtained an order for payment of alimony *pendente lite.* That order not having been obeyed :—*Held :* fees due to the husband, which had been received by a firm of solrs. & not paid over, were not debts & could not be attached under a garnishee order obtained by the wife against the solrs.—WELLS *v.* WELLS, [1914] P. 157; 83 L. J. P. 81; 111 L. T. 399; 30 T. L. R. 545; 58 Sol. Jo. 555, C. A.

231. Stamp on receipt for fees.]—When counsel, after payment of a fee of £2 or upwards, places his initials or name against the fee on his brief or at

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221 i. *Recovery of fees—By action—British Columbia.*]—Counsel may maintain an action for their fees.—BRITISH COLUMBIA LAND & INVESTMENT AGENCY, LTD. *v.* WILSON (1903), 9 B. C. R. 412.—**CAN.**

221 ii. —— —— *New Brunswick.*]—A barrister has no legal remedy to recover remuneration for his services.—*Re* BAYARD (1849), 1 All. 359.—**CAN.**

221 iii. —— —— ——.]—A barrister cannot maintain an action against his client for professional services.—KERR *v.* BURNS (1860), 4 All. 604.—**CAN.**

221 iv. *S.P.* MCLEOD *v.* VAUGHAN (1892), 31 N. B. R. 134.—**CAN.**

221 v. *S.P.* COOKSON *v.* DRISCOLL (1916), 27 D. L. R. 488.—**CAN.**

221 vi. —— —— *Ontario.*]—Counsel can sue for fees within 2 Geo. 4, c. 2, but not for fees generally.—BALDWIN *v.* MONTGOMERY (1844), 1 U. C. R. 283.—**CAN.**

221 vii. —— —— ——.]—Counsel's fees are recoverable from the client & not from the solr. retaining him, except by special agreement or in special circumstances.—ARMOUR *v.* KILMER (1897), 28 O. R. 618.—**CAN.**

221 viii. —— —— ——.]—Counsel can maintain an action for their fees.—MCDOUGALL *v.* CAMPBELL (1877), 41 U. C. R. 332.—**CAN.**

221 ix. —— —— *Ireland.*]—The remuneration of counsel, being in the nature of an honorarium, is not recoverable.—LOWRY *v.* KILMAINHAM DISTRICT COUNCIL (1899), 33 I. L. T. Jo. 514.—**IR.**

221 x. —— —— *North-West Provinces.*]—An English or Irish barrister who, in virtue of his call to the Bar, is enrolled as an advocate in the High Ct. of Judicature for the North-Western Provinces, & thereby is authorised to practise as an advocate in that ct. & in the cts. subordinate thereto, is, in respect of fees paid to him by a client for professional service, in exactly the same position as if he were practising in England or Ireland, *i.e.*, the fees received by him for professional services are mere honoraria, & he can neither sue for the recovery of, nor be sued for the return of, such fees.—ROSS ALSTON *v.* PITAMBER DAS (1903), I. L. R. 25 All. 509.—**IND.**

227 i. —— —— *Right to prove in solicitor's bankruptcy.*]—A solr. received money from a client wherewith to pay counsel's fees, failed to pay same to counsel, & became bkpt. :—*Held :* proof by counsel for the fees should not be admitted.—*Re* NEVILLE, *Ex p.* PIKE (1896), 17 N. S. W. B. 24.—**AUS.**

d. *Contract to share fees with solicitor.*]—A country solr. had an agreement with a barrister for a division of counsel's fees earned by the latter on business given him by the solr. :—*Held :* the arrangement was improper.—KNOCK *v.* OWEN (1904), 35 S. C. R. 168.—**CAN.**

Sect. 5.—Relation between counsel and client: Subsects. 2, 3 & 4.]

the foot of a statement of fees, the document is liable to the stamp duty of 1*d.* as a receipt within Stamp Act, 1891 (c. 39), s. 101, & the heading "Receipt" in Sched. I.—GENERAL COUNCIL OF THE BAR (ENGLAND) *v.* INLAND REVENUE COMRS., [1907] 1 K. B. 462; 76 L. J. K. B. 212; 96 L. T. 267; 71 J. P. 117; 51 Sol. Jo. 159.

232. —— Old rule.]—It was not necessary to affix the penny receipt stamp on a brief where counsel signed his name acknowledging the payment of the fee.—*Re* BEAVAN (1854), 5 De G. M. & G. 40; 23 L. J. Ch. 536; 22 L. T. O. S. 313; 2 W. R. 299; 43 E. R. 784.

Annotation:—**Consd.** General Council of the Bar *v.* I. R. Comrs., [1907] 1 K. B. 462.

Return of fees.]—*See* No. 268, *post.*

SUB-SECT. 3.—GIFTS, BARGAINS AND TRANSACTIONS BETWEEN COUNSEL AND CLIENT.

233. Gift to counsel—In respect of services.]—K., a barrister, acted professionally on behalf of S., then a widow, & by his services gained for her very large estates. Soon after the litigation was finally determined in her favour, & while the parties continued still on the most friendly terms, S. executed a deed whereby, in consideration of K.'s services, she conveyed to him all the estates to which her title had been thus established, to hold same to him & his heirs to the use of her, the grantor, for her life, & after her death, to the use of him, his heirs & assigns, subject to a charge of such debts as she might owe at her decease not exceeding £10,000, & of £10,000, which was to be subject to her appointment. The lady married again, & differences having arisen between herself & K., she filed her bill to have the deed set aside & the reversion reconveyed:—*Held:* a decree must be made according to the prayer, with costs.—BROUN *v.* KENNEDY (1864), 4 De G. J. & Sm. 217; 33 L. J. Ch. 342; 9 L. T. 736; 10 Jur. N. S. 141; 12 W. R. 360; 46 E. R. 901, L.JJ.

Annotations:—**Distd.** Graham *v.* Johnson (1869), 17 W. R. 810. **Apld.** Mostyn *v.* Mostyn (1870), 5 Ch. App. 457, L.J. **Apprvd.** R. *v.* Doutre (1884), 9 App. Cas. 745, P. C. **Apld.** Wells *v.* Wells, [1914] P. 157, C. A. **Mentd.** Gibbon *v.* Budd (1863), 9 Jur. N. S. 525; Newall *v.* Elliott & Glass (1864), 4 New Rep. 429; *Re* Le Brasseur & Oakley, [1896] 2 Ch. 487, C. A.; Evans (Joseph) *v.* Heathcote, [1918] 1 K. B. 418, C. A.

234. Bond taken by counsel—For half estate recovered in litigation.]—A counsel took a bond from his client, to convey one half of his estate to him for recovering the other half. This bond was set aside, & to secure no more than what was actually laid out in recovering the estate.—SKAPHOLME *v.* HART (1680), Cas. *temp.* Finch, 477; 1 Eq. Cas. Abr. 86; 23 E. R. 257.

235. Grant to barristers of stewardship in fee of manor—Failure to explain effect of "in fee"—Additional interest in mortgage.]—Pltf. granted to deft., a barrister, the stewardship in fee of a manor. Deft. did not explain to pltf. the effects of the words "in fee":—*Held:* the grant must be set aside, as defts. as counsel ought to have told pltf. the effect of the words.

Deft. took a mtge. from pltf. & took from him an advance of six months' interest over & above what was due, in consideration of services formerly rendered by him as counsel:—*Held:* the sum must be refunded with interest.—THORNHILL *v.* EVANS (1742), 2 Atk. 330; 9 Mod. Rep. 331; 26 E. R. 601.

Annotations:—**Apprvd.** Kennedy *v.* Broun (1863), 13 C. B. N. S. 677. **Mentd.** Blackburn *v.* Warwick (1836), 2 Y. & C. Ex. 92.

236. Settlement prepared by barrister—In view of his marriage with settlor.]—An elderly lady married a barrister, who had for some years been her confidential friend & adviser. Before the marriage a lengthened correspondence took place between them, in which she insisted that her personal estate should be settled so as to be "hers as if unmarried," & hers "to give, to use & to will." He assented to this, & undertook to prepare the settlement. By the marriage he acquired, under her father's will, a life interest, expectant on her decease, in a considerable sum of stock:—*Held:* (1) having undertaken to prepare the settlement, he was bound to prepare such a one as in the circumstances a conveyancer would have drawn or the ct. would have sanctioned; (2) such settlement would have given him no interest in her absolute property in default of appointment by her, &, she having died without making any disposition in his favour, he was a trustee of her personal estate for her next of kin.—CORLEY *v.* STAFFORD (LORD), CAMPBELL *v.* CORLEY (1857), 1 De G. & J. 238; 26 L. J. Ch. 865; 30 L. T. O. S. 77; 3 Jur. N. S. 1225; 5 W. R. 646; 44 E. R. 714, L.JJ.

Annotations:—**Apld.** Hastie *v.* Hastie (1875), 24 W. R. 242. **Folld.** Clark *v.* Girdwood (1877), 7 Ch. D. 9, C. A.

237. Counsel purchasing client's securities—After termination of employment.]—The employment of counsel as confidential legal adviser disables him from purchasing for his own benefit charges on his client's estates without his permission; & although the confidential employment ceases, the disability continues as long as the reasons on which it is founded continue to operate.

C., a barrister, who had been for several years confidential & advising counsel to P., & had, by reason of that relation, acquired an intimate knowledge of his property & liabilities, & was particularly consulted as to a compromise of securities given by P. for a debt which C. considered not to be recover-

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SECT. 5, SUB-SECT. 3.

e. *Agreement for counsel to receive damages recovered—Void.*]—An agreement whereby a barrister binds himself to bring an action in damages & not to charge the client anything, in case he does not succeed, provided that the damages shall go to him, is void & the barrister has no right to any fee upon the action.—LEBLANC *v.* BEAUPARLANT (1889), 18 R. L. 20.—**CAN.**

234 i. *Bond taken by counsel—For past & future services.*]—Though the taking by a barrister of a bond for past & future professional services is to be condemned, the bond will not be relieved against on grounds of public policy. In administering the obligor's assets, the bond was decreed to stand as a voluntary bond.—LESLIE *v.* VERSCHOYLE (1815), Beat. 535.—**IR.**

g. *Will containing no disposition of personalty—Prepared by barrister appointed executor.*]—Personal estate not disposed of by a will, drawn by the confidential counsel (the sole exor.) without informing testator of the legal effect of the will:—*Held:* a trust for the next of kin.—SEGRAVE *v.* KIRWAN (1828), Beat. 157.—**IR.**

237 i. *Counsel purchasing client's property—After termination of employment.*]—At a sale in execution of a decree against pltfs., the pleader who had acted for pltfs. purchased their property with his own money, but in the name of his mohurrir & for a very inadequate sum:—*Held:* the pleader could not retain for his own benefit the property so purchased by him.—AGHORE NATH CHUCKERBUTTY *v.* RAM CHURN CHUCKERBUTTY (1896), I. L. R. 23 Calc. 805.—**IND.**

237 ii. *Counsel purchasing "actionable claim"—Misconduct.*]—Purchase of an "actionable claim" by a pleader renders a pleader guilty of unprofessional conduct within Legal Practitioners Act, s. 13. It is gross misconduct on the part of the pleader, if the purchase be speculative, especially if it is made, just when the claim is ripe for judgment & when the seller is his own client unable to judge of the result of the suit.—MUNI REDDI *v.* VENKATA ROW (1914), I. L. R. 37 Mad. 238.—**IND.**

able to the full amount, purchased these securities for less than their nominal amount, without notice to P., after ceasing to be his counsel :—*Held :* C.'s purchase, while the compromise proposed by P. was feasible, was in trust for P. ; & C. was entitled only to the sum he had paid, with interest according to the course of the ct.—CARTER *v.* PALMER (1841), 8 Cl. & Fin. 657 ; 8 E. R. 256, H. L.

Annotations :—**Apld.** Nelson *v.* Booth (1859), 3 Jur. N. S. 951 ; Macleod *v.* Jones (1884), 32 W. R. 660. **Consd.** Luddy's Trustee *v.* Peard (1886), 33 Ch. D. 500.

Contracts & bargains as to fees.]—*See* subsect. 2, *ante*.

SUB-SECT. 4.—COUNSEL AND THEIR CLERKS AS WITNESSES, AFFIDAVITS AND STATEMENTS BY COUNSEL, EXAMINATION OF COUNSEL.

238. Whether counsel may be made to give evidence as witness—General rule.]—Every person, except counsel & attorneys, is compellable to reveal what he may have heard ; & counsel & attorneys are only excepted, because it is absolutely necessary, for the sake of their clients, that communications to them should be protected.—R. *v.* SHAW (1834), 6 C. & P. 372.

239. —— Not in same cause.]—Counsel of the parties in a cause is not to be examined in the same cause.—LEE *v.* MARKHAM (1568), Toth. 48 ; 21 E. R. 120.

240. *S. P.* THIMBLETHORPE *v.* THIMBLETHORPE (1631), Toth. 48 ; 21 E. R. 120.

241. —— —— Unless after withdrawing from case—Election petition.]—In the course of the hearing of an election petition it appeared that M., one of resp.'s counsel, had professionally given the latter an opinion as to his signing the declaration about the return of his election expenses. When that matter came to be investigated it was thought desirable to call M., & he accordingly retired from the case, & was called as a witness.—CORK, EASTERN DIVISION, CASE (1911), 6 O'M. & H. 318.

242. —— Not in subsequent cause.]—If any matter be disclosed to a counsel in a cause, he cannot be permitted to give it in evidence in that or any other action. The privilege never ceases at any period of time.—WILSON *v.* RASTALL (1792), 4 Term Rep. 753 ; 100 E. R. 1283.

Annotations :—**Folld.** Falmouth *v.* Moss (1822), 11 Price, 455. **Consd.** Greenough *v.* Gaskell (1833), 1 My. & K. 98 ; Calley *v.* Richards (1854), 19 Beav. 401. **Mentd.** Brook *v.* Middleton (1808), 10 East, 268 ; Gainsford *v.* Grammar (1809), 2 Camp. 9 ; Cromack *v.* Heathcote (1820), 2 Brod. & Bing. 4 ; Doe d. Strode *v.* Seaton (1834), 4 L. J. K. B. 13 ; Gregory *v.* Tuffs (1834), 4 Tyr. 820 ; Preston *v.* Collins (1838), 2 Jur. 329 ; Pearce *v.* Foster (1885), 15 Q. B. D. 114, C. A. ; Sharp *v.* Wakefield, [1891] A. C. 173, H. L. ; R. *v.* West Riding Yorks. County Council (1896), 60 J. P. 550.

243. —— —— Unless with consent of client.]—B., counsel for S., having been called as a witness in a case, submitted that it was impossible for him to answer, as he knew nothing beyond what he knew as counsel, & that it was his professional duty not to answer, but, S. absolving him from any engagement of secrecy, as did A., from whose counsel B. had acquired the greater part of his knowledge, B. was sworn at the Bar.—BAILLIE'S CASE (1788), 21 State Tr. 340.

244. —— Not as to knowledge acquired professionally.]—Counsel are not liable to be examined upon any matter which came to their knowledge in their professional capacity.—CREED *v.* TRAP (1578), Ch. Cas. in Ch. 121 ; 21 E. R. 74.

245. —— ——.]—Where a barrister was called to prove the death of a particular person :—*Held :* he was not bound to make answer for things which might disclose the secrets of his client's cause, & the ct. refused to allow him to be examined as a witness on matters whereof he had been made privy as of counsel in the cause.—WALDRON *v.* WARD (1654), Sty. 449 ; 82 E. R. 853.

246. —— ——.]—Bill to discover an ancient deed of entail supposed to be in deft.'s hands, & that he had perused it, & that in discourse he had acknowledged such deed, & other like charges. Deft. pleaded that he was a counsellor with B. ; that on a reference between the parties it was agreed that nothing that passed then should be made use of on either side, or be disclosed :—*Held :* what deft. knew only as counsellor, or under such contract of silence, he should not be put to answer.—BULSTRODE *v.* LECHMORE (1676), 1 Cas. in Ch. 277 ; Freem. Ch. 5 ; 22 E. R. 799.

247. —— —— Subpœna refused.]—Pltf. sought to have O., a barrister, examined touching a matter in variance, wherein he had been of counsel :—*Held :* he should not be compelled by subpœna, or otherwise, to be examined upon any matter concerning same, wherein he was of counsel, either by the indifferent choice of both parties, or with either of them by reason of any annuity or fee.—DENNIS *v.* CODRINGTON (1579), Cary, 100 ; 21 E. R. 53.

248. —— —— Knowledge acquired before employment as counsel.]—One who had been counsel for deft. excused from giving the whole truth in evidence, & only required to reveal such things as were within his own knowledge before he became counsel.—SPARKE *v.* MIDDLETON (1663), 1 Keb. 505 ; 83 E. R. 1079.

249. —— Not as to statements made by him in previous motion.]—A barrister cannot be called as a witness to prove what was stated by him on a motion before the ct.—CURRY *v.* WALTER (1796), 1 Esp. 456, N. P. ; *further proceedings*, 1 Bos. & P. 525 ; 126 E. R. 1046.

Annotations :—**Distd.** R. *v.* Carlisle (1819), 3 B. & Ald. 167 ; Duncan *v.* Thwaites (1824), 3 B. & C. 556. **Folld.** Lewis *v.* Levy (1858), E. B. & E. 537. **Apld.** Usill *v.* Hales, Usill *v.* Brearley, Usill *v.* Clarke (1878), 3 C. P. D. 319. **Mentd.** Knobell *v.* Fuller (1797), Peake, Add. Cas. 139 ; Carr *v.* Jones (1806), 3 Smith, K. B. 491 ; Stiles *v.* Nokes (1806), 7 East, 493 ; R. *v.* Creevey (1813), 1 M. & S. 273 ; Stockley *v.* Clement (1827), 12 Moore, C. P. 376 ; Smith *v.* Thomas (1835), 2 Scott, 546 ; Stockdale *v.* Hansard (1839), 9 Ad. & El. 1 ; Kimber *v.* Press Assocn., [1893] 1 Q. B. 65, C. A.

250. —— Not to prove evidence at former trial.]—A barrister should not be called to prove the evidence at a former trial, at which he appeared as counsel, of a witness since dead, especially if such barrister is engaged also in the present trial.—KINNING *v.* BUCHANAN (1850), Cox, M. & H. 375 ; 15 L. T. O. S. 305.

251. —— Knowledge obtained in course of former trial.]—The rule as to privileged communications between counsel or attorney & client does not extend to facts of which the counsel or attorney of himself obtains knowledge in the course of trial.

Counsel attended before a magistrate on behalf of a person charged with embezzlement, & a book was produced by the prosecutor, in which it was the duty of the person charged to have entered a sum of money received by him, & there was no such entry. On a second examination the book was again produced, when the entry was found. The party charged having brought an action for a malicious prosecution :—*Held :* the counsel might give evidence as to whether the entry was in the book at the time of the first examination, since the

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SECT. 5, SUB-SECT. 4.

238 i. *Whether counsel may be made to give evidence as witness—As to knowledge acquired professionally.*]—An advocate, being garnishee in a case, cannot refuse to declare what money or effects he has in his hands belonging to deft., his client, on the ground that his doing so would be a betrayal of professional confidence.—MCKENZIE *v.* MCKENZIE & MCKENZIE (1864), 9 L. C. J. 87.—**CAN.**

Sect. 5.—Relation between counsel and client: Subsects. 4, 5 & 6.]

state of the book was not information communicated to him by his client, but knowledge which he acquired by his own observation.—BROWN *v.* FOSTER (1857), 1 H. & N. 736; 26 L. J. Ex. 249; 28 L. T. O. S. 274; 21 J. P. 214; 3 Jur. N. S. 245; 5 W. R. 292; 156 E. R. 1397.

Annotation:—**Consd.** Kennedy *v.* Lyell (1883), 23 Ch. D. 387, C. A.

252. Whether counsel in case should give evidence.]—Where a party makes a speech & conducts a case as an advocate, he cannot afterwards give evidence as a witness in the same cause.—STONES *v.* BYRON (1846), 4 Dow. & L. 393; 1 Saund. & C. 248; 16 L. J. Q. B. 32.

Annotations:—**Distd.** R. *v.* Morgan (1852), 6 Cox, C. C. 107. **Consd.** Cobbett *v.* Hudson (1852), 1 E. & B. 11; R. *v.* Tooke (1884), 48 J. P. 661. The dicta in cases like *Stone* v. *Byron* to the effect that a party to a case or his advocate could not be a witness were overruled in a considered judgment of Lord Campbell's in *Cobbett* v. *Hudson* (HUDDLESTON, B.). **Refd.** Dunn *v.* Packwood (1847), 8 L. T. O. S. 371. **Mentd.** Deane *v.* Packwood (1847), 4 Dow. & L. 395, n.

253. *S. P.* DUNN *v.* PACKWOOD (1847), 1 Saund. & C. 312; 8 L. T. O. S. 321, 371; *sub nom.* DEANE *v.* PACKWOOD, 11 Jur. 242; 4 Dow. & L. 395, n.

Annotations:—**Mentd.** Cobbett *v.* Hudson (1852), 1 E. & B. 11; R. *v.* Tooke (1884), 48 J. P. 661.

254. Counsel's clerk—May not be examined.]—Counsel's clerk is not to be examined in a cause.—BREAME *v.* BREAME (1571), Toth. 48; 21 E. R. 120.

255. —— —— As to time when counsel retained.]—A party will not be allowed to go into evidence of the time when the counsel for the opposite party was retained, either by calling the counsel's clerk or otherwise, as the retaining of counsel falls within the rule respecting confidential communications.—FOOTE *v.* HAYNE (1824), 1 C. & P. 545; Ry. & M. 165.

Annotations:—**Mentd.** Young *v.* Hutchinson (1843), 1 L. T. O. S. 59; Kinning *v.* Buchanan (1850), 15 L. T. O. S. 305.

256. —— —— As to from whom he received brief.]—A barrister's clerk cannot be asked from whom he received a certain brief for his master.—KINNING *v.* BUCHANAN (1850), 7 Dow. & L. 169; Cox, M. & H. 375; 18 L. J. C. P. 332; 15 L. T. O. S. 305.

See, also, No. 183, *ante.*

257. Affidavits by counsel—As to what took place in court.]—It is not proper or usual for a barrister to make an affidavit of anything that takes place in ct.—BARNES *v.* NICHOLSON (1843), 2 L. T. O. S. 154, 155.

258. —— ——.]—When a question arises as to what happened between counsel at the trial, the practice of the Ct. of Appeal is not to allow an affidavit by counsel as to matters that occurred within his knowledge as counsel to be read, but to request counsel to attend & to state to the ct. what occurred.—KEMPSHALL *v.* HOLLAND (1895), 14 R. 336, C. A.

Annotations:—**Folld.** Hickman *v.* Berens, [1895] 2 Ch. 638, C. A. **Refd.** Neale *v.* Gordon Lennox, [1902] 1 K. B. 838, C. A.

259. —— Necessity for—Between counsel.]—*Semble:* no affidavit is necessary to substantiate between counsel what terms were offered or accepted by them on the hearing of a cause.—IGGULDEN *v.* TERSON (1834), 2 Dowl. 277; 4 Tyr. 309.

260. Examination of counsel—On oath—In robes at Bar.]—At the trial of an action pltf. & the managing clerks of the solrs. of both pltf. & defts. gave evidence, as well as the two counsel who had appeared for pltf. on the hearing of a former action. BYRNE, J., was willing to receive counsel's unsworn statement, but as, in the event of the case going before a higher tribunal, such evidence might be rejected, they were eventually duly sworn, & they were examined & cross-examined standing up in their robes in their places at the Bar.—WILDING *v.* SANDERSON (1897), 76 L. T. 346.

261. —— Acting as juryman—On juryman's oath.]—At a trial at Bar one of the jurymen was a

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252 i. *Whether counsel in case should give evidence.*] — Though the practice of counsel in a cause giving evidence is most objectionable, yet a judge at *Nisi Prius* has no authority to refuse it, if offered.—BANK OF B. N. A. *v.* MCELROY (1875), 15 N. B. R. (Pug.) 462.—**CAN.**

252 ii. ——.]—One of defts.' counsel, after having been examined as a witness for them, addressed the jury on their behalf, & a verdict was returned for defts.:—*Held:* examining a party's counsel as a witness for him was an improper practice, & new trial granted.—SHIELDS *v.* MCGRATH (1847), 3 Kerr, 398.—**CAN.**

252 iii. ——.]—Counsel cannot, at the trial of a cause, act both as an advocate & a witness.—BENEDICT *v.* BOULTON (1847), 4 U. C. R. 96.—**CAN.**

252 iv. ——.]—One counsel had been a witness at the trial & had appeared as counsel for applt. without objection in the cts. below, & in the distribution of their argument it was proposed that the other counsel for applt. alone should discuss the evidence:—*Held:* it was not desirable that the first counsel should take a part in the argument.—OCEAN ACCIDENT & GUARANTEE CO. *v.* LAROSE (1918), Cam. Prac., 2nd ed., vol. 2, p. 103.—**CAN.**

252 v. ——.]—It is extremely undesirable that counsel should exercise his strict right of offering himself as a witness, where that course can possibly be avoided.—LETT *v.* LYE (1907), 6 W. L. R. 484.—**CAN.**

252 vi. ——.]—Counsel, upon stating to the jury the facts he himself could prove, was reminded by the judge that he could not act both as an advocate & a witness. He then immediately sat down, ceased to act as counsel, & gave evidence in the cause. The ct. refused to set aside the verdict.—CAMERON *v.* FORSYTH (1847), 4 U. C. R. 189.—**CAN.**

252 vii. ——.]—The senior counsel for pltf. at the trial offered himself as a witness for pltf., but was rejected, the judge saying that he must choose between the positions of advocate & witness, & must cease to act as counsel if he desired to give evidence:—*Held:* he was a competent witness, & could not properly be rejected.—DAVIS *v.* CANADA FARMERS' MUTUAL INSURANCE CO. (1876), 39 U. C. R. 452.—**CAN.**

252 viii. ——.]—Although it is not customary for a barrister on the docket to offer testimony in favour of the party he represents, yet the ct. cannot refuse it; he is a competent witness, & the action may be dismissed on his testimony alone.—LARKIN *v.* INGLIS (1889), 12 L. N. 211.—**CAN.**

252 ix. ——.]—Although it is objectionable on many grounds that the same person should be counsel & witness at the trial of a cause, the trial judge, in the absence of legislation or rule of ct. permitting him to do so, has no right to refuse to allow counsel who is conducting a cause before him to give testimony in the witness box, & where counsel was debarred from testifying, a new trial was ordered.—BELL ENGINE & THRESHER CO., LTD. *v.* GAGNE (1914), 29 W. L. R. 322; 7 W. W. R. 62; 7 Sask. L. R. 154.—**CAN.**

252 x. ——.]—Counsel who has advised prosecutor to institute a charge of criminal trespass is a competent witness.—C. E. VICTOR S. COREA *v.* HENRY JOSEPH PEIRI (1909), 14 C. W. N. 86.—**IND.**

252 xi. ——.]—It is a rule of professional ethics of almost universal application that having taken up the position of an advocate, a counsel should refrain from testifying on a trial which is being conducted by him.—PEARY MOHAN DAS *v.* WESTON (1911), 16 C. W. N. 145.—**IND.**

252 xii. ——.]—There is nothing necessarily unprofessional in counsel giving evidence in a case in which he appears as such. As a general practice, however, it is undesirable, when the matter to which counsel depose is other than formal, that they should testify either for or against the party whose case they are conducting. Under Evidence Act, s. 118, counsel, although they may be engaged in the case, are competent to testify whether the facts in respect of which they give their evidence occur before or after their retainer.—WESTON *v.* PEARY MOHAN DASS (1912), I. L. R. 40 Calc. 898.—**IND.**

252 xiii. ——.]—A barrister may give evidence of what a witness said upon a former trial in which he was counsel for prisoner; &, to refresh his memory, may make use of the notes which he made upon the back of his brief on that occasion.—GUINEA'S CASE (1841), I. Ch. R. 167.—**IR.**

260 i. *Examination of counsel—Liable to cross-examination.*]—Where counsel in a cause is by consent allowed to go upon the stand to prove a particular fact, he becomes a witness in the cause generally, & may be cross-examined upon any fact in the cause.—GILBERT *v.* CAMPBELL (1870), 2 Han. 55.—**CAN.**

barrister, who had been at a trial of the same cause more than twenty years before in the Exchequer, where evidence had been adduced to the effect that a certain deed was fraudulent, which was now the issue. He asked the ct. whether he should tell his fellow-jurymen of the evidence he had heard or whether he should conceal it or tell it in open ct. :—*Held :* he should come into open ct. & give his evidence only upon his oath as a juryman without being sworn as a witness.—DUKE *v.* VENTRIS (1656), Duncomb, Trials per Pais, 6th ed., c. 12, p. 209.

262. Counsel as interpreter—Must be sworn.]—*Semble :* a barrister who acts as an interpreter must be sworn.—R. *v.* KELLY & MALONEY (1848), 3 Cox, C. C. 75.

263. Counsel as witness—Not entitled to compensation for loss of time.]—A witness, examined in chief, having refused to attend to undergo examination upon interrogatories unless he was paid a compensation for loss of time as a barrister :—*Held :* a barrister was not entitled to such compensation, which was confined to physicians & attorneys.—FRASER *v.* FRASER (1845), 4 Notes of Cases, 319.

SUB-SECT. 5.—COUNSEL'S PROPERTY IN AND LIEN OVER DOCUMENTS.

264. Property in draft documents.]—Counsel have a right to drafts as precedents, but not to detain them where either party may have a benefit from the inspection of them. — STANHOPE *v.* ROBERTS (1741), 2 Atk. 214 ; 26 E. R. 532.

Annotations :—**Refd.** Richards *v.* Jackson (1812), 18 Ves. 472 ; Knight *v.* Waterford (1836), 2 Y. & C. Ex. 22 ; Pearse *v.* Pearse (1846), 1 De G. & Sm. 12.

265. Lien—No right of.]—A certificated conveyancer is not entitled to a lien upon deeds delivered to him, & " with & in respect of " which he has done business, the business not having been done upon the deeds, or their value thereby increased.—STEADMAN *v.* HOCKLEY (1846), 15 M. & W. 553 ; 15 L. J. Ex. 332 ; 7 L. T. O. S. 211 ; 10 Jur. 819 ; 153 E. R. 969.

Annotation :—**Refd.** Castellain *v.* Thompson, Thompson *v.* Castellain (1862), 32 L. J. C. P. 79.

266. —— Right of action.]—Certain documents were in the chambers of counsel, who declined to part with them until his fees were paid. The documents were taken to be in the constructive possession of the solr., & an order having been made on him to deliver up all documents in his custody or power, he was imprisoned for six months for failing to deliver the documents :—*Held :* the only mode in which the solr. could recover the deeds was by action, & the order committing the solr. to prison was wrong.—*Re* WILLIAMS (1861), 3 De G. F. & J. 104 ; 30 L. J. Ch. 610 ; 4 L. T. 103 ; 25 J. P. 484 ; 7 Jur. N. S. 323 ; 9 W. R. 393 ; 45 E. R. 818, C. A.

Annotation :—**Folld.** North *v.* Huber (1861), 30 L. J. Ch. 666.

267. —— For fees on commission.]—A barrister has a lien for fees on a commission, & is entitled to decline to produce the evidence taken by him under a commission, until his fees are paid.—SMITH *v.* HALLEN (1861), 2 F. & F. 678, N. P.

SUB-SECT. 6.—LIABILITY OF COUNSEL FOR NEGLIGENCE AND MISCONDUCT.

268. For non-attendance—Action to recover fee.]—No action lies to recover back a fee given to a barrister to argue a cause which he did not attend.—TURNER *v.* PHILIPPS (1792), Peake, 166.

Annotations :—**Folld.** Swinfen *v.* Chelmsford (1860), 5 H. & N. 890. **Mentd.** Kennedy *v.* Broun (1863), 13 C. B. N. S. 677.

269. —— Duty of counsel when unable to attend.]—It is the duty of counsel, if unable to attend to a case in which he has a brief, to have his brief read by some other counsel beforehand, who might conduct the case for him.—*Re* ANON. (1885), 78 L. T. Jo. 285.

See, further, Nos. 408 *et seq.*, *post.*

270. For negligence & lack of skill.]—*Semble :* an action cannot be supported against a certificated special pleader for negligence or unskilful advice in the course of his profession.

Such an action is certainly not maintainable against a barrister, & there is no distinction between the case of a barrister & that of a certificated special

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SECT. 5, SUB-SECT. 6.

k. *Duty when pleading Statute of Frauds.*]—It is the duty of deft.'s legal adviser, before placing on the record a defence based upon Stat. Frauds, to explain fully such defence to his client, & point out its full meaning & effect, & the probable consequences of the defence in case the event turns upon a question of credibility.—CHARLICK *v.* FOLEY BROTHERS, LTD. (1916), 21 C. L. R. 249.—**AUS.**

l. *Duty to see rule properly entered in minutes.*]—It is the duty of counsel to see that rules obtained by them are properly entered in the minutes of the ct.—*Ex p.* GLASS (1850), 2 All. 88.—**CAN.**

268 i. *For non-attendance—Return of fees.*] — Counsel accepted a brief to appear at C. & was paid the consultation fee & the fee for attending the trial. Counsel attended the consultation & subsequently left C. to attend to an urgent professional call, having previously returned the brief to the attorney, but not the fees :—*Held :* counsel should have returned both the consultation fee & the fee for attending the trial.—*Re* AN ADVOCATE (1917), I. L. R. 44 Calc. 741.—**IND.**

268 ii. —— *Action of damages.*] — A statement of claim for damages set forth that pltf., being returned for trial on a criminal charge, entered into a special contract with deft., a barrister, to defend him at the trial & attend on each day of pltf.'s trial, & deft. was paid a special fee, larger than the ordinary fee, or *honorarium*, paid to counsel for so attending, yet deft. neglected to attend after the first day of the trial, by reason whereof pltf. was convicted, & suffered damage :—*Held :* the claim was bad, as no valid contract could be entered into between counsel & client.—ROBERTSON *v.* MACDONOGH (1880), 6 L. R. Ir. 433 ; 14 Cox, C. C. 469.—**IR.**

268 iii. —— *& negligence.*]—An action against a barrister for negligence or non-attendance on a trial is not maintainable.—MULLICAN *v.* M'DONAGH (1860), 2 L. T. 136 ; 5 Ir. Jur. 101.—**IR.**

268 iv. —— *After receipt of fees — Misconduct.*] — Wilful neglect by a pleader to appear without any justification whatever & conduct a case after receipt of full fees, is unprofessional conduct, for which the pleader can be punished under Legal Practitioners Act, s. 13.—MUNI REDDI *v.* VENKATA ROW (1914), I. L. R. 37 Mad. 238.—**IND.**

269 i. —— *Duty of counsel when unable to attend.*]—The rule of allowing the costs of two counsel on each side in taxation has always been supplemented by the unwritten rule of the Bar that one or other counsel must return his brief in good time, if there is a chance of neither being able to attend when the case is called on, & that in case of dispute it is the duty of the junior to return the brief or to make arrangement for some other counsel to attend until he can come in. — ESMAIL EBRAHIM *v.* HAJI JAN MAHOMED (1908), I. L. R. 33 Bom. 475.—**IND.**

270 i. *For negligence & lack of skill — Ontario.*]—*Qu. :* whether, considering the union of the profession in the Province of Ontario, & the right of counsel in some cases to recover fees, the same exemption from liability for negligence can be claimed there as in England, even when the same person does not act in both capacities.—LESLIE *v.* BALL (1863), 22 U. C. R. 512.—**CAN.**

270 ii. —— *Quebec.*]—To deprive an advocate of his fees it is necessary to prove that he has acted with fraud or with gross ignorance of the duties of his profession, & where the law permits an action to be taken before either the Superior Ct. or the Circuit Ct., the advocate cannot be deprived of his fees because, without instruction to the contrary, he took it before the Superior Ct.—DAVIDSON *v.* LAURIER (1881), Q. R. 1 Q. B. 366.—**CAN.**

270 iii. —— *India.*]—*Semble :* if a barrister receives instructions to appeal or make an application, & the client loses his right to appeal or make the application as the result of the negligence of the barrister to appeal or apply within time, such barrister will be liable to his client in a ct. of law.—BUDDHU *v.* DIWAN (1915), I. L. R. 37 All. 267.—**IND.**

Sect. 5.—Relation between counsel and client: Subsects. 6, 7, A. B. & C. (a), (b), (i.).]

pleader (LORD ABINGER, C.B.).—PERRING *v.* REBUTTER (1842), 2 Mood. & R. 429.

271. ——.]—The professional adviser has never been supposed to guarantee the soundness of his advice. Against the barrister in England, & the advocate in Scotland, no action can be maintained (LORD CAMPBELL).—PURVES *v.* LANDELL (1845), 12 Cl. & Fin. 91 ; 8 E. R. 1332, H. L.

Annotation :—**Mentd.** Stokes *v.* Trumper (1855), 2 K. & J. 232.

272. —— Excess of authority & failure to obey instructions.]—No action lies against a counsel who, employed to conduct a cause at *Nisi Prius*, enters into a compromise & withdraws a juror, even though contrary to his client's instructions, provided it is done *bonâ fide*. If a counsel employed in a cause, contrary to the instructions of his client, acting *bonâ fide*, enters into a compromise of the suit, which is a nullity because it embraces matters in respect of which the counsel had no authority, though his client is put to expense in resisting legal proceedings taken by the other side to enforce such compromise, the counsel is not liable to an action, because (1) subjecting a person to legal proceedings without malice is not a cause of action, (2) there is no legal damnification, inasmuch as the ct. in which the proceedings to enforce the compromise are taken will award such costs to the successful party as the law allows. *Semble :* an advocate is not responsible for ignorance of law or any mistake of fact, or being less eloquent or less astute than he was expected to be ; &, if he is acting with perfect good faith & with a single view to the interests of his client, he is not responsible for any mistake or indiscretion or error of judgment of any sort ; & if he imagines he has an authority to compromise a case when in reality he has not, it is a mistake either in law or fact, or if, in spite of instructions, he enters into a compromise, believing that it is the best course, & that the interest of his client requires it, it is but an indiscretion or error of judgment if done honestly.—SWINFEN *v.* CHELMSFORD (LORD) (1860), 5 H. & N. 890 ; 29 L. J. Ex. 382 ; 2 L. T. 406 ; 6 Jur. N. S. 1035 ; 8 W. R. 545 ; 157 E. R. 1436.

Annotations :—**Consd.** Kennedy *v.* Broun (1863), 13 C. B. N. S. 677. **Mentd.** Strauss *v.* Francis (1866), L. R. 1 Q. B. 379 ; Matthews *v.* Munster (1887), 20 Q. B. D. 141, C. A. ; Connecticut Fire Insce. *v.* Kavanagh, [1892] A. C. 473, P. C. ; Neale *v.* Gordon Lennox, [1902] 1 K. B. 838 ; Nocton *v.* Ashburton, [1914] A. C. 932, H. L. ; Goldrei, Foucard *v.* Sinclair & Russian Chamber of Commerce in London, [1918] 1 K. B. 180, C. A.

273. Unskilfully drawing pleadings.]—An action will not lie against a barrister for unskilfully drawing pleadings.—FELL *v.* BROWN (1791), Peake, 131, N. P.

Annotation :—**Refd.** Swinfen *v.* Chelmsford (1860), 5 H. & N. 890.

274. Misconduct—Collusion.]—*Held :* the ct. would not set aside a decree obtained by consent of counsel on both sides, but it would be a different thing if collusion on the part of counsel could be proved.—HARRISON *v.* RUMSEY (1752), 2 Ves. Sen. 488 ; 28 E. R. 312, L.C.

275. —— Taking fees from other side—Indictment.]—A counsellor was indicted for betraying his client's cause & taking fees from the other side. —R. *v.* WALKER (*circ.* 1668), Tremaine's Pleas of the Crown, 261 ; 2 Hawk. P. C. II., c. 22, s. 30.

SUB-SECT. 7.—AUTHORITY OF COUNSEL.

A. Derivation of Authority.

276. To plead—Mere retainer insufficient—Brief necessary.]—A mere retainer to counsel will not authorise him to plead for the party in ct. He must be instructed, & a brief must be delivered.—DOE d. SWINTON *v.* SINCLAIR (1836), 5 L. J. C. P. 185.

277. To withdraw record—Mere retainer insufficient—Brief necessary.]—A retainer in a cause, without a brief, does not authorise counsel to withdraw a record at *Nisi Prius*.—AHITBOL *v.* BENEDETTO (1810), 3 Taunt. 225 ; 128 E. R. 89.

278. —— —— ——.]—A counsel to whom a retainer in a cause has been given, no brief having been delivered, cannot withdraw the record.—DOE d. CRAKE *v.* BROWN (1832), 5 C. & P. 315.

279. To show cause—Appeal against conviction of one justice under Turnpike Roads Act, 1823 (c. 95) —Instructions from other trustees.]—Upon an application for a *mandamus* to justices, to enter continuances and hear an appeal against a conviction of one justice under the above Act :—*Held :* it was no objection to counsel appearing to show cause that they were instructed by the attorney for the trustees of the roads whereon the offence complained of was committed, & not by the convicting justice, or the informer, to whom the rule was addressed.—R. *v.* MIDDLESEX JJ. (1843), 7 J. P. 240 ; 7 Jur. 396.

Annotations :—**Refd.** Rowberry *v.* Morgan (1854), 9 Exch. 730. **Mentd.** R. *v.* Peacock (1858), 4 C. B. N. S. 264 ; *Ex p.* Simpkin (1859), 2 E. & E. 392 ; R. *v.* Leicestershire JJ. (1859), 8 W. R. 66.

B. How evidenced.

280. Statement by counsel.]—Where a doubt is suggested as to the authority of counsel to consent to an order, his instructions not being given by the solr. formerly employed in the case, it is for counsel to consider whether he is authorised, & if he does, the ct. will act upon it, & the client will be bound by it.—MOLE *v.* SMITH (1820), 1 Jac. & W. 665, 673 ; 37 E. R. 522.

Annotations :—**Distd.** Thomas *v.* Hewes (1834), 3 L. J. Ex. 158. **Refd.** Swinfen *v.* Swinfen (1856), 18 C. B. 485 ; Chambers *v.* Mason (1858), 5 C. B. N. S. 59.

281. ——.]—Upon the question of the extent of the authority given by a client to his counsel to com-

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SECT. 5, SUB-SECT. 7.—A.

m. *To appear — Retainer in former trial.*]—Where no notice of trial was given by pltf., & counsel, retained in a former trial, in ignorance of such fact appeared without authority, deft. being absent, & defended, a verdict for pltf. was set aside.—DOHERTY *v.* DESBRISAY (1869), 1 Han. 494.—**CAN.**

n. *To appear on execution of judgment—Authority to represent client in action.*]—The barrister, who is authorised by a party to represent him in an action, has no need of a special authority in order to continue to represent him upon the execution of the judgment obtained by him & upon the distribution of the moneys raised ; & there is no ground for discontinuance when the party has not been damnified by the proceedings of the barrister.—FOISY *v.* WURTELE (1889), 18 R. L. 577.—**CAN.**

o. *To relinquish part of case — Express authority necessary.*]—It is not within the ordinary scope of a pleader's duties to relinquish any portion of his client's case without express authority from the client, who is not bound by such relinquishment, unless it was authorised by himself.—GOUR PERSHAD DOSS *v.* SOOKDEB RAM DEB (1869), 12 W. R. 279.—**IND.**

SECT. 5, SUB-SECT. 7.—B.

280 i. *Statement by counsel.*]—When counsel appears & states he is instructed, the ct. should not inquire further as to his authority.—MURPHY *v.* RICHARDSON (1850), 13 I. L. R. 430 ; 2 Ir. Jur. 255.—**IR.**

280 ii. —— *Production of authority unnecessary.*]—*Re* HUNTER (1867), 1 Han. 233.—**CAN.**

p. *Client present in court without dissent.*]—Where a person, for whom counsel states he appears, is present in ct., allows him to appear, & adopts his advocacy, that adoption renders it impossible for such person to dispute the retainer of counsel & of the solr. instructing him.—*Re* McL. (1903), 3 S. R. N. S. W. 388.—**AUS.**

promise litigation to which the client is a party, the ct. will accept the statement of counsel, if made from his place at the Bar, without requiring it to be made on oath.—HICKMAN *v.* BERENS, [1895] 2 Ch. 638; 64 L. J. Ch. 785; 73 L. T. 323; 12 R. 602, C. A.

Annotations:—**Consd.** Neale *v.* Gordon Lennox, [1902] 1 K. B. 838, C. A. **Mentd.** Ainsworth *v.* Wilding, [1896] 1 Ch. 673; Wilding *v.* Sanderson, [1897] 2 Ch. 534, C. A.

282. Two counsel appearing.]—When two counsel instructed by different solrs. appeared upon a petition for the same party, the ct. directed the petition to stand over & the authorities under which the solrs. acted to be verified by affidavit.—BUTTERWORTH *v.* CLAPHAM (1820), 1 Jac. & W. 673, n.; 37 E. R. 525.

283. ——.]—Two official managers of a co. were appointed under Joint Stock Cos. Winding-up Act, 1848 (c. 45). Upon a motion in ct. by way of appeal from an order of the master, counsel appeared on behalf of both official managers, & other counsel also appeared upon different instructions for one of them. The ct. stopped the cause until it had ascertained which counsel was instructed by the actual authority of that official manager; & upon his personally appearing in ct. & stating which counsel he had individually authorised the ct. heard that counsel only on his behalf.—*Re* LONDON & MANCHESTER DIRECT INDEPENDENT RY. CO., BASS'S CASE (1849), 1 De G. & Sm. 722; 18 L. J. Ch. 245; 13 L. T. O. S. 278; 13 Jur. 552; 63 E. R. 1267.

C. Extent of Authority.

(a) General Authority in conducting Cases.

284. General scope of authority.]—In ct. counsel has the whole conduct of the cause & has the power to act without asking his client what he shall do. He has no master but is the conductor & regulator of the whole thing (BRETT, M.R.).—R. *v.* GREENWICH COUNTY COURT REGISTRAR (1885), 15 Q. B. D. 54; 54 L. J. Q. B. 392; 53 L. T. 902; 33 W. R. 671; 1 T. L. R. 479; 2 Morr. 175, C. A.

285. In regard to calling witnesses.]—A client is bound by the conduct of his advocate, & the ct. will not grant a new trial on the ground that the witnesses were not examined by counsel, according to the request of the attorney.—HALL *v.* STOTHARD (1816), 2 Chit. 267.

286. ——.]—It is in general a matter entirely within the discretion of counsel for the prosecution, whether all the witnesses at the back of the bill should be called on behalf of the Crown or not; & although the judge has the power to interfere, he will only exercise it in extreme cases.—R. *v.* EDWARDS, UNDERWOOD & EDWARDS (1848), 11 L. T. O. S. 50; 12 J. P. 795; 3 Cox, C. C. 82.

287. ——.]—In all cases counsel having the conduct of the case in ct. are responsible for the calling or not calling of witnesses.—HATCH *v.* LEWIS (1861), 2 F. & F. 467; 7 Jur. N. S. 1085, N. P.

Annotations:—**Mentd.** Hinde *v.* Sheppard (1871), L. R. 7 Exch. 21; Strachey *v.* Osborne (1874), L. R. 10 C. P. 92.

288. ——.]—Counsel's authority at the trial (unless limited by express instructions) includes a discretion as to calling or not of any witnesses.—WALLACE *v.* COOK (1903), *Times*, June 15.

289. To omit evidence in brief.]—A new trial will not be granted because the counsel thought it prudent to omit evidence which they had in their briefs.—SPONG *v.* HOG (1772), 2 Wm. Bl. 802; 96 E. R. 472.

290. To select between inconsistent defences.]—If counsel is instructed to set up two inconsistent defences he is entitled to use his discretion which he will put forward.—R. *v.* DENOEL (1916), 85 L. J. K. B. 1756; 114 L. T. 1215; 32 T. L. R. 473; 25 Cox, C. C. 429; 12 Cr. App. Rep. 49, C. C. A.

(b) To Consent, Compromise, or Refer.

(i.) In General.

291. General rule.]—A counsel has no authority to refer an action against the wishes of his client, or upon terms different from those which his client has authorised. If he does so refer it, the reference may be set aside, although the limit put by the client on his counsel's authority is not made known to the other side when the reference is agreed upon. The ct. before whom the question of setting aside the reference comes, is not bound to sanction an arrangement made by counsel which is not, in the opinion of the ct., a proper one.—NEALE *v.* GORDON LENNOX, [1902] A. C. 465; 71 L. J. K. B. 939; 87 L. T. 341; 66 J. P. 757; 51 W. R. 140; 18 T. L. R. 791; 46 Sol. Jo. 319, H. L.

Annotations:—**Distd.** Little *v.* Spreadbury, [1910] 2 K. B. 658. **Consd.** Welsh *v.* Roe (1918), 87 L. J. K. B. 520. **Mentd.** *Re* Newen, Carruthers *v.* Newen, [1903] 1 Ch. 812.

292. Agreement binding without order of court.]—An agreement come to in ct., the memorandum of which is signed by counsel for the parties, is a binding agreement independently of any order of ct.—PORTER *v.* COOPER (1834), 1 Cr. M. & R. 387; 4 Tyr. 456; 3 L. J. Ex. 330; 149 E. R. 1130.

Annotations:—**Mentd.** R. *v.* Taylor (1835), 5 Tyr. 800; Lemere *v.* Elliott (1861), 6 H. & N. 656.

293. Signature binding.]—AITKEN *v.* BACHELOR; *see* ARBITRATION, Vol. II., No. 25.

294. Power presumed—Counsel apparently properly instructed—Proctor present without protest.]—The appearance of counsel who had been previously engaged at the hearing of a cause, on the cause coming on again upon the reserved question of costs, the proctor who originally instructed him being present, & not objecting to his taking part in the proceedings, & the opposite party being thereby led to suppose he was properly instructed to agree to a final decree:—*Held:* binding on the party for whom he originally appeared, so as to perempt an appeal previously lodged against the former decree.—CLIFTON (THE SHIP) (1835), 3 Knapp, 375; 12 E. R. 695, P. C.

Annotations:—**Mentd.** Loughnan *v.* Haji-Joosub Bhulladina (1851), 5 Moo. Ind. App. 137, P. C.; The Brinhilda (1881), 45 L. T. 389, P. C.

295. Consent of counsel binding.]—Parties are bound by the consent of their counsel, & a petition to restore a petition, dismissed by consent, upon the ground that no authority had been given to counsel to consent, was dismissed with costs.—*Re* HOBLER (1844), 8 Beav. 101; 4 L. T. O. S. 152; 50 E. R. 40.

Annotations:—**Folld.** Swinfen *v.* Swinfen (1857), 24 Beav. 549. **Distd.** Swinfen *v.* Swinfen (1857) 1 C. B. N. S. 364. **Refd.** Chambers *v.* Mason (1858), 5 C. B. N. S. 59.

296. Within ordinary authority.]—The client is absolutely & conclusively bound by what the counsel on her behalf assented to. It would be most fatal to the due administration of justice, if we were to allow the authority of counsel to be thus questioned. And there is not any hardship or inconvenience in this; for, if the client or the attorney has reason to think that the counsel is taking a course that will prejudice his interests, he

SECT. 5, SUB-SECT. 7.—C. (a).

q. *To accept as final shorthand reporter's notes.*]—On proceedings before a magistrate on a charge of selling liquor contrary to Liquor License Act, R. S. O. 1897 (c. 245), counsel for deft., in the absence of the latter, has authority to bind him by an agreement that the shorthand reporter's notes shall have the same force & effect as if taken down by the magistrate, & read over to & signed by each witness.—R. *v.* DEGAN (1908), 17 O. L. R. 366; 12 O. W. R. 1047.—CAN.

Sect. 5.—Relation between counsel and client: Sub-sect. 7, C. (b), (i.), (ii.) & (iii.).]

may withdraw his brief, & so put an end to his authority to represent the client before the ct. But if counsel, duly instructed, take upon himself to consent to a compromise which he, in the exercise of a sound discretion, judges to be for the interest of his client, the ct. will not inquire into the existence or the extent of his authority (CRESSWELL, J.).—SWINFEN *v.* SWINFEN (1856), 18 C. B. 485; 25 L. J. C. P. 303; 27 L. T. O. S. 220; 139 E. R. 1459; *subsequent proceedings* (1857), 1 C. B. N. S. 364.

Annotations:—**Apld.** Chambers *v.* Mason (1858). 5 C. B. N. S. 59. **Consd.** Prestwich *v.* Poley (1865), 18 C. B. N. S. 806. So far as the common law cts. are concerned, the rule seems to have been laid down (in *Swinfen* v. *Swinfen*) in wider terms than are necessary here (BYLES, J.). In the Ct. of Ch. the case of *Swinfen* v. *Swinfen* was treated as one resting on very peculiar grounds (KEATING, J.). Strauss *v.* Francis (1866), L. R. 1 Q. B. 379. The case of *Swinfen* v. *Swinfen* was peculiar; in *Prestwich* v. *Poley* (1865), 18 C. B. N. S. 806, the members of the ct. treat it as an anomalous case (BLACKBURN, J.). **Refd.** Harding *v.* Chowne (1863), 1 New Rep. 284; Neale *v.* Gordon-Lennox, [1902] 1 K. B. 838, C. A. **Mentd.** Thomas *v.* Rawlings (1859), 28 L. J. Ex. 347.

297. ——.]—Where a jury had awarded damages which the ct. considered excessive, & the ct. recommended a compromise:—*Held:* counsel had authority to consent to such a compromise in the absence of the clients, such consent being clearly within their ordinary authority.—THOMAS *v.* HARRIS (1858), 27 L. J. Ex. 353.

298. Action for seduction & breach of promise—Proof of authority.]—Pltf. consulted a counsel residing in the country upon the subject of her rights for seduction & breach of promise of marriage against deft. The counsel himself then wrote to deft., but, as terms could not be effected, the counsel recommended her to an attorney to bring the actions, & what was required to be done by an attorney was done in his office by his clerks. Pltf. never spoke to the attorney himself. At the assizes when the causes were ready for trial pltf. & her mother, in a conversation upon terms of settlement, told the managing clerk to settle on the best terms he could. The counsel who had sent her to the attorney was her junior counsel in the case. Terms of settlement were come to in ct., when he was present, & these terms indorsed on the briefs of the leading counsel for pltf. & deft. Afterwards she refused to be bound thereby, & repudiated the terms come to, saying she had not authorised them:—*Held:* there must be a new trial in the circumstances, her attorney to pay the costs of the trial, & of the rule. If she authorised the terms, then she would pay those costs. If she did not, they would properly fall upon her then attorney.—BROOKS *v.* COX, BROOKS *v.* COX (1857), 30 L. T. O. S. 288.

299. Action for breach of promise.]—In an action for breach of promise of marriage, counsel for pltf. compromised the suit contrary to the wishes of his client. The ct. set aside the compromise & ordered a new trial.—STOKES *v.* LATHAM (1888), 4 T. L. R. 305, C. A.

300. Within apparent general authority.]—On the trial of an action for malicious prosecution deft.'s counsel, in the absence of deft. & without his express authority, assented to a verdict for pltf. for £350 with costs upon the understanding that all imputations against pltf. were withdrawn:—*Held:* this settlement was a matter within the apparent general authority of counsel & was binding on deft.—MATTHEWS *v.* MUNSTER (1887), 20 Q. B. D. 141; 57 L. J. Q. B. 49; 57 L. T. 922; 52 J. P. 260; 36 W. R. 178; 4 T. L. R. 102, C. A.

Annotations:—**Distd.** Lewis's *v.* Lewis (1890), 45 Ch. D. 281. **Apld.** Neale *v.* Gordon-Lennox, [1902] 1 K. B. 838, C. A. **Refd.** Rhodes *v.* Swithinbank (1889), 5 T. L. R. 253.

301. No authority to compromise out of court.]—Counsel have no authority to bind their clients in the suit to the terms of a compromise made out of ct. Such compromise, if enforceable at all, must be the subject of a separate suit for specific performance.—GREEN *v.* CROCKETT, CROCKETT *v.* GREEN (1865), 6 New Rep. 368; 34 L. J. Ch. 606; 12 L. T. 749; 13 W. R. 1052, L. C.

302. Effect of agreement—When proof of consent necessary.]—To support an action against a party, founded on an undertaking (entered into by him after having appeared & pleaded to an indictment for an assault) to do an act in consideration of the prosecutor consenting to a nominal fine only being imposed on him, the indorsement to that effect of the terms of the agreement between the parties on the briefs signed by the counsel on both sides:—*Held:* not sufficient to be left to the jury without proving the assent of deft., & a nonsuit directed.—ELWORTHY *v.* BIRD (1824), 13 Price, 222; M'Cle. 69; 147 E. R. 972.

303. Remedy of client — When counsel & attorney refer contrary to instruction.]—An express agreement was entered into by counsel & attorney to refer a cause to arbn.; the client had expressly forbidden the attorney to consent to any reference:—*Held:* the client's remedy was by action against the attorney.—FILMER *v.* DELBER (1811), 3 Taunt. 486; 128 E. R. 192.

Annotations:—**Expld.** Stanhope *v.* Firmin (1837), 4 Scott, 39. **Consd.** Swinfen *v.* Swinfen (1857), 1 C. B. N. S. 364. **Refd.** Chambers *v.* Mason (1858), 5 C. B. N. S. 59.

See, further, SOLICITORS.

(ii.) *In what Causes.*

304. Rights of infant concerned.]—Upon the trial of an issue between an infant & an adult terms of compromise were signed by their counsel, & the cause was withdrawn. The agreement, though such as the ct. would have sanctioned, was not binding on the infant. The adult afterwards refused to be bound by the arrangement. A new trial was directed, & the adult party was ordered to pay so much of the costs of the issue as had been rendered fruitless & could not be rendered available on the subsequent trial.—HARGRAVE *v.* HARGRAVE (1850), 12 Beav. 408; 19 L. J. Ch. 261; 15 L. T. O. S. 540; 14 Jur. 212; 50 E. R. 1117.

Annotation:—**Refd.** Swinfen *v.* Swinfen (1857), 1 C. B. N. S. 364.

305. ——.]—An order having been made approving on behalf of infant defts. a compromise which

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SECT. 5, SUB-SECT. 7.—C. (b), i.

300 i. *Within apparent general authority.*]—Counsel has authority over the cause to compromise it, if he thinks the interest of his client would be best served by such a course. *Semble:* if the client or his attorney refuses to agree to a compromise, he ought not to proceed with it, though his brief has not been withdrawn.—MANSON *v.* MAFFRA (SHIRE OF) (1881), 7 V. L. R. 364.—**AUS.**

300 ii. ——.]—Counsel, unless his authority to act for his client is revoked, & such revocation is notified to the opposite side, has, by virtue of his retainer & without need of further authority, full power to compromise a case on behalf of his client, & the ct. will not disturb a compromise so entered into, unless it appears that it was entered into under a mistake & that some palpable injustice has been thereby caused to the client.—JANG BAHADUR SINGH *v.* SHANKAR RAI (1890), I. L. R. 13 All. 272.—**IND.**

300 iii. ——.]—NUNDO LAL BOSE *v.* NISTARINI DASSI (1900), I. L. R. 27 Calc. 428; 4 C. W. N. 169.—**IND.**

r. *Counsel instructed by person without authority to bind client.*]—When a case is compromised by counsel on the instruction of a person who watches the case on behalf of the party, even if the person instructing has no authority to bind the party, the compromise is binding on the latter if he ratifies the acts & the compromise.

When a counsel enters into a compromise on behalf of his client, a presumption arises that he has done so with his client's assent.—BHUT NATH SIRCAR *v.* RAM LALL SIRCAR (1900), 6 C. W. N. 82.—**IND.**

was objected to by their guardian & opposed by their counsel :—*Held :* the ct. had no jurisdiction to enforce a compromise against infants against the opinion of their advisers, & the order must be discharged.—*Re* BIRCHALL, WILSON *v.* BIRCHALL (1880), 16 Ch. D. 41 ; 44 L. T. 113 ; 29 W. R. 27, C. A.

Annotation :—**Refd.** *Re* Allan, Havelock *v.* Havelock (1881), 44 L. T. 168.

306. ——.]—It is not right for counsel to agree that an action for rectification of a settlement involving the interests of infants should be tried on affidavit evidence.—LAWSON *v.* QUARE (1887), 32 Sol. Jo. 24.

307. ——.]—Pltf., an infant, brought an action by her next friend in the cty. ct. to recover damages for personal injuries sustained by her through the alleged negligence of deft. At the trial a judgment of nonsuit was pronounced, & it was suggested that if there was no appeal deft. would not ask for costs. Pltf.'s counsel agreed to this, & the judgment was entered without costs. Pltf. was without means. On an application on her behalf for a new trial :—*Held :* the agreement was of no benefit to the infant, & was not binding on her.—RHODES *v.* SWITHINBANK (1889), 22 Q. B. D. 577 ; 58 L. J. Q. B. 287 ; 60 L. T. 856 ; 37 W. R. 457 ; 5 T. L. R. 352, C. A.

308. Right of married woman involved—No separate representation.]—*Held :* the consent of a married woman through counsel, she having no counsel distinct from her husband, was valueless. —TURNER *v.* TURNER (1852), 2 De G. M. & G. 28 ; 21 L. J. Ch. 422 ; 19 L. T. O. S. 15 ; 42 E. R. 781, L.JJ.

Annotation :—**Mentd.** Watson *v.* Marston (1853), 4 De G. M. & G. 230, L.JJ.

309. Matrimonial suit.]—So long as the suit remains on the ct. book, the ct. cannot consider as binding any agreement to compromise made by counsel of parties to a matrimonial suit, but is bound to hear such suit, if either party desires it, after such agreement made.—HAYWARD *v.* HAYWARD (1859), 1 Sw. & Tr. 333; *sub nom.* ANON., 32 L. T. O. S. 262.

Annotations :—**Distd.** Hooper *v.* Hooper (1860), 1 L. T. 522. **Consd.** Hall *v.* Hall & Richardson (1879), 27 W. R. 664.

310. —— Agreement to accept separation deed —Reference to adjust terms.]—Before the trial of certain issues arising out of a wife's petition for judicial separation by reason of her husband's cruelty an arrangement was entered into & a memorandum signed by the counsel of both parties before the jury were sworn, enabling a referee to settle the terms of a separation by deed, with full power over the question of income. Subsequently the wife moved to re-enter the record & set the case down for hearing :—*Held :* the wife was bound by the agreement that the proceedings should be stayed, & the suit not moved, so long as she could show no breach of the terms of the agreement by the other party, & the motion must be refused.—HOOPER *v.* HOOPER (1860), Sea. & Sm. 156 ; 1 Sw. & Tr. 602 ; 30 L. J. P. M. & A. 49 ; 1 L. T. 522 ; 8 W. R. 319.

Annotations :—**Refd.** Hall *v.* Hall & Richardson (1879), 27 W. R. 664. **Mentd.** Newsome *v.* Newsome (1871), L. R. 2 P. & D. 306 ; Phillips *v.* Barnet (1876), 45 L. J. Q. B. 277.

311. —— —— Subsequent suit.]—On a wife's petition for dissolution of marriage, certain issues of cruelty & adultery came on for trial on Mar. 12, 1861, when an agreement was signed by the respective counsel of the parties, by which (*inter alia*) a separation deed was to be executed, & petitioner agreed not to take further proceedings. Petitioner moved the ct. to set down the case again for trial, on the ground that the agreement was not signed by counsel with her consent, but the motion was rejected. In 1863 petitioner filed a fresh petition, alleging the same acts of adultery as in the former petition, certain other acts previous to Mar., 1861, which she alleged had only come to her knowledge in the early part of 1863, certain other acts of adultery since Mar., 1861, & various acts of cruelty, some alleged to be different from those contained in the former petition :—*Held :* petitioner was bound by the agreement of Mar., 1861, not to take proceedings in the ct. in respect of any matter before that date, & as the subsequent acts of adultery, to which the agreement did not extend, would not of themselves support the wife's petition for dissolution, no directions as to the mode of trial could be given.—ROWLEY *v.* ROWLEY (1864), 3 Sw. & Tr. 328 ; 33 L. J. P. M. & A. 54 ; 9 L. T. 846 ; 10 Jur. N. S. 253 ; 12 W. R. 809 ; *affd.* (1866), L. R. 1 Sc. & Div. 63, H. L.

Annotations :—**Refd.** McGregor *v.* McGregor (1887), 20 Q. B. D. 529 : A. *v.* M. (1888), 58 L. J. P. 8. **Mentd.** Brown *v.* Brown (1868), L. R. 7 Eq. 185 ; Newsome *v.* Newsome (1871), L. R. 2 P. & D. 306 ; Hall *v.* Hall & Richardson (1879), 27 W. R. 664 ; Besant *v.* Wood (1879), 12 Ch. D. 605 ; Rose *v.* Rose (1883), 8 P. D. 98, C. A. ; Wood *v.* Wood (1887), 36 W. R. 33 ; McGregor *v.* McGregor (1888), 21 Q. B. D. 424, C. A. ; Aldridge *v.* Aldridge (1888), 13 P. D. 210 ; Gooch *v.* Gooch, [1893] P. 99 ; Balcombe *v.* Balcombe, [1908] P. 176.

312. —— Agreement as to amount of damages.] —The ct. is not at liberty to recognise an agreement made between the counsel of petitioner & co-respondent in respect of the amount of damages to be paid, but is bound by the assessment of the jury.—CALLWELL *v.* CALLWELL & KENNEDY (1860), 3 Sw. & Tr. 259.

Annotations :—**Mentd.** Le Sueur *v.* Le Sueur (1876), 1 P. D. 139 ; Niboyet *v.* Niboyet (1878), 4 P. D. 1, C. A. ; Blandford *v.* Blandford (1892), 67 L. T. 392.

313. —— Agreement as to amending petition.]—*Qu. :* whether the counsel for the co-respondent can, upon his own authority, consent to a petition being amended by the insertion of the amount of damages claimed.—SPEDDING *v.* SPEDDING & SMITH (1862), 31 L. J. P. M. & A. 96.

Annotation :—**Mentd.** Pegler *v.* Pegler & Russell (1901), 18 T. L. R. 13.

314. Rule for information in nature of quo warranto—Consent to rule absolute in first instance.] —On a motion for a rule to show cause why an information in the nature of a *quo warranto* should not be exhibited against a party :—*Held :* in the circumstances such party's counsel might consent to the rule being absolute in the first instance.—*Re* TAYNTON (1858), 22 J. P. Jo. 703.

(iii.) *In regard to what Matters.*

315. All matters in dispute in cause.]—On the trial of an issue the common law counsel entered into an arrangement as to all the matters in dispute in the cause :—*Held :* the matters were not so distinct as to be beyond his authority.—HARGRAVE *v.* HARGRAVE (1850), 12 Beav. 408 ; 19 L. J. Ch. 261 ; 15 L. T. O. S. 540 ; 14 Jur. 212 ; 50 E. R. 1117.

Annotation :—**Consd.** Swinfen *v.* Swinfen (1857), 1 C. B. N. S. 364.

SECT. 5, SUB-SECT. 7.—C. (b), iii.

s. *Matters outside scope of suit.*] — A consent by the vakil of a party to a decree being made binding on property other than what the parties to the suit may have an interest in, is a consent to what is beyond the scope of the suit, & can neither be binding on the party nor acted upon by the ct.—AVUL KHADAR *v.* ANDHU SET (1865), 2 Mad. 423.—**IND.**

t. ——.] — Agreements & admissions judicially made by counsel in an action of accounting :—*Held :* not binding, as matter of agreement between the parties, in an action subsequently raised between the same parties, as the action in which such agreements & admissions had been made did not include the matters to which they related beyond a certain date.—WAUCHOPE *v.* N. B. RY. CO. (1863), 2 Macph. (Ct. of Sess.) 326 ; 36 Sc. Jur. 158.—**SCOT.**

Sect. 5.—Relation between counsel and client: Sub-sect. 7, C. (b), (iii.), (iv.).]

316. Matters within scope of suit.]—A counsel has full authority either to compromise or abandon the claims of his client, provided it be in a matter within the scope of the suit. *Secus* in a collateral matter.—*Re* WOOD, *Ex p.* WENHAM (1872), 21 W. R. 104.

317. Matter arising in action.]—The power of counsel to enter into a compromise so as to bind their clients is confined to matters arising in the action. With regard to such matters counsel have & must have power to do what they consider best in the interests of their clients; otherwise they could not conduct their cases.—ELLENDER *v.* WOOD (1888), 4 T. L. R. 680; 32 Sol. Jo. 628, C. A.

318. Not collateral matters.]—A compromise by consent affecting matters collateral to an action will not bind the client, unless he expressly consents.—KEMPSHALL *v.* HOLLAND (1895), 98 L. T. Jo. 489; 14 R. 336, C. A.

Annotations:—**Folld.** Hickman *v.* Berens, [1895] 2 Ch. 638, C. A. **Refd.** Neale *v.* Gordon Lennox, [1902] 1 K. B. 838, C. A.

319. —— Nonsuit on objection that deed not stamped.]—In an action on a bill of exchange it was objected that it ought to be stamped. Pltfs.' counsel said he feared the objection was fatal, & the judge expressed an opinion that a stamp was necessary, & put pltfs.' counsel to his election whether he would consent to a nonsuit or have the verdict against him, & pltfs. were nonsuited:—*Held:* pltfs. were not precluded from moving to set the nonsuit aside by the acquiescence of counsel in the validity of the objection at the trial.—SHARPLES *v.* RICKARD (1857), 26 L. J. Ex. 302; 29 L. T. O. S. 201; 5 W. R. 568.

Annotation:—**Mentd.** Griffin *v.* Weatherby (1868), L. R. 3 Q. B. 753.

(iv.) *Grounds for Setting aside Compromise, Reference or Consent.*

320. Not on summary application.]—T., the tenant of F., was pltf. in an action of trespass against F.'s land agent for taking possession of T.'s farm, held under F. H. acted as F.'s attorney in several suits pending between T. & F., & also for the land agent in the action of trespass which was substantially defended by F.'s counsel, who held his general retainer, being claimed in that action by the attorney H. At the trial, H. having advised with deft.'s counsel, consented to an order of *Nisi Prius* imposing certain terms on F. It was afterwards moved to set aside the order, which had been made a rule of ct. on affidavits of H. & F. that F. never gave authority to consent to settle any action or matter in difference between them, but the ct. refused to interfere in favour of F. in a summary way.—THOMAS *v.* HEWES (1834), 2 Cr. & M. 519; 4 Tyr. 335; 3 L. J. Ex. 158; 149 E. R. 866.

Annotations:—**Consd.** Lewis *v.* Nicholson (1852), 18 Q. B. 503; Swinfen *v.* Swinfen (1857), 1 C. B. N. S. 364. **Refd.** Wilson *v.* Barthorp (1837), Murp. & H. 81; Collen *v.* Wright (1857), 8 E. & B. 647, Ex. Ch.

321. ——.]—An appeal from a decree made in the Ct. of Ch., by consent was brought on the ground that applt. never consented to such decree, nor his counsel either; or that if they did, it was without his authority, & applt. made affidavit of it, but the appeal was dismissed.—DOWNING *v.* CAGE (1699), 1 Eq. Cas. Abr. 165; 21 E. R. 961.

Annotations:—**Consd.** Bradish *v.* Gee (1754), 1 Keny. 73; Swinfen *v.* Chelmsford (1860), 5 H. & N. 890.

322. Client present & not dissenting—Failure to understand proceedings.]—Before the trial of an action deft., his attorney & his counsel, conferred together with reference to terms of compromise which had been offered by pltf. & rejected by deft., & counsel, on leaving deft., said that "he would do his best for him," & deft. expressed no dissent. The action was immediately afterwards settled in ct., deft. being present, & expressing no dissent; & an order of *Nisi Prius* was drawn up accordingly. The ct. refused to set aside such order, although deft. made an affidavit that the action was settled without his authority, & that, although present in ct., he did not understand what was going on.—CHAMBERS *v.* MASON (1858), 5 C. B. N. S. 59; 28 L. J. C. P. 10; 5 Jur. N. S. 148; 141 E. R. 23.

Annotations:—**Refd.** Chown *v.* Parrott (1863), 14 C. B. N. S. 74; Wytcherley *v.* Andrew (1871), 35 J. P. 552.

323. Express instructions given privately.]—Where a verdict by consent was taken against deft., who was present in ct., against his express instructions & directions given privately in ct. to his counsel, but he did not openly assert or communicate his refusal to the other side, the ct. refused to interfere.—WRIGHT *v.* SORESBY (1834), 2 Cr. & M. 671; 4 Tyr. 434; 3 L. J. Ex. 207; 149 E. R. 930.

Annotation:—**Refd.** Neale *v.* Gordon Lennox, [1902] 1 K. B. 838, C. A.

324. Client present & dissenting at time.]—It is within the general authority of counsel retained

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318 i. *Not collateral matters.*]—Where a compromise extends to collateral matters, to matters quite outside the scope of the particular case in which counsel is engaged, in order to bind his client it must be shown that he had from his client special authority to compromise, upon the terms upon which the compromise was effected, & the other side cannot avail themselves of the position that they did not know that it had not been given; they are not entitled to assume, as in the case of an apparent authority, that it was given & was existing.—NUNDO LAL BOSE *v.* NISTARINI DASSI (1900), I. L. R. 27 Calc. 428; 4 C. W. N. 169.—**IND.**

318 ii. ——.]—Counsel's general mandate does not authorise him to conclude an extra-judicial settlement.—HENDRY *v.* HENDRY (1916), 1 S. L. T. 208; *affd.* 2 S. L. T. 135.—**SCOT.**

w. *That magistrate should take time to consider — Effect of agreement by counsel for defendant.*]—R. *v.* MCKENZIE (1910), 9 E. L. R. 214.—**CAN.**

y. *To judgment being given by judge other than judge before whom evidence heard.*]—Counsel have authority to consent on behalf of their clients to judgment being given by one judge on evidence taken before another judge.—REILANDER *v.* BENGERT (1908), 1 Sask. L. R. 259; 7 W. L. R. 891.—**CAN.**

z. *To separation of jury.*]—Counsel for P. left the ct. before the judge's charge, having authorised F., counsel for two other defts., to take on his behalf any objections he might think proper to the charge. The jury, after hearing the judge's charge, were allowed to separate before giving their verdict:—*Held:* as P.'s counsel had not authorised any one to represent him or his client, & as no one had consented or assumed to consent on behalf of P. to the jury separating, a new trial as to P. must be directed. *Semble:* had F. assumed to represent the counsel for P. in assenting to a separation of the jury, P. would have been bound to the same extent as if his own counsel had taken a similar course, contrary to instructions.—STILLWELL *v.* RENNIE (1885), 11 A. R. 724.—**CAN.**

a. *Not to appeal to Privy Council.*]—Counsel for applt. agreed, at the hearing of an appeal before the High Ct., that, if the High Ct. would restrict its judgment to a finding on one of several issues, his client would not appeal to England:—*Held:* that agreement was binding, & the appeal could not be heard.—AMIR ALI *v.* INDERJIT KOER (1871), 9 B. L. R. 460; 14 Moo. Ind. App. 203, P. C.—**IND.**

SECT. 5, SUB-SECT. 7.—C. (b), iv.

b. *Express instructions of client.*]—Where counsel, acting upon the instructions of pltf.'s solr., effected a compromise of the action not authorised by pltf. & contrary to the express instructions given by her to the solr., the compromise was set aside.—BENNER *v.* EDMONDS (1899), 19 P. R. 9.—**CAN.**

c. —— *Client's dissent notified before decree drawn up.*]—Counsel, after consulting with his attorney & client as to the advisability of compromising a case, & after receiving instructions from the attorney "to do the best he could for his client," compromised the case, notwithstanding the express prohibition of the client, who, before the consent decree was drawn up, notified her dissent to the other side:—*Held:* the consent decree must be set aside.—CARRISON *v.* RODRIGUES (1886), I. L. R. 13 Calc. 115.—**IND.**

to conduct a cause to consent to the withdrawal of a juror, & the compromise being within the counsel's apparent authority, is binding on the client notwithstanding he may have dissented, unless this dissent was brought to the knowledge of the opposite party at the time.—STRAUSS *v.* FRANCIS (1866), L. R. 1 Q. B. 379 ; 7 B. & S. 365 ; 35 L. J. Q. B. 133 ; 14 L. T. 326 ; 30 J. P. 421 ; 12 Jur. N. S. 486 ; 14 W. R. 634.

Annotations :—**Consd.** Holt *v.* Jesse (1876), 3 Ch. D. 177. **Folld.** Mathews *v.* Munster (1887), 51 J. P. 615. **Refd.** Neale *v.* Gordon Lennox, [1902] 1 K. B. 838, C. A. ; Welsh *v.* Roe (1918), 87 L. J. K. B. 520.

325. ——.]—The general authority of counsel extends to the entering of a *stet processus*, & a compromise by *stet processus* announced by counsel in open ct. in the presence of his client must be repudiated openly & at once by the client, or it cannot be set aside.—RUMSEY *v.* KING (1876), 33 L. T. 728.

Annotations :—**Consd.** Holt *v.* Jesse (1876), 3 Ch. D. 177. **Refd.** Neale *v.* Gordon Lennox, [1902] 1 K. B. 838, C. A.

326. Client present & subsequently withdrawing consent.]—Consent given by counsel in the presence & with the sanction of his client may be withdrawn before the order is drawn up, if given through inadvertence, but not so where the matter was fully understood at the time & the client shortly afterwards changes his mind.—HOLT *v.* JESSE (1876), 3 Ch. D. 177 ; 46 L. J. Ch. 254 ; 24 W. R. 879.

Annotations :—**Expld.** Scully *v.* Dundonald (1878), 8 Ch. D. 658, C. A. **Apprvd.** Davis *v.* Davis (1880), 13 Ch. D. 861. **Refd.** Harvey *v.* Croydon Union R. S. A. (1884), 26 Ch. D. 249, C. A. ; Hickman *v.* Berens, [1895] 2 Ch. 638, C. A. ; Neale *v.* Gordon Lennox, [1902] 1 K. B. 838, C. A.

327. —— Before order drawn up.]—Heads of a compromise of an action were drawn up with the ct.'s assent & signed by counsel in pltf.'s presence on the brief of one of her counsel. Before the order was drawn up she intimated that her consent had been inadvertently given & that she withdrew her consent :—*Held :* the compromise could not be varied on the mere allegation that the consent was given inadvertently, without evidence of mistake or misapprehension. —DAVIS *v.* DAVIS (1880), 13 Ch. D. 861 ; 49 L. J. Ch. 241 ; 41 L. T. 790.

Annotation :—**Consd.** Harvey *v.* Croydon Union R. S. A. (1884), 26 Ch. D. 249, C. A.

See, also, Nos. 340 *et seq., post.*

328. Counsel's knowledge that client opposed to compromise.]—During the trial of an issue *devisavit vel non*, the counsel for the heir & the devisee agreed to compromise the case on the terms of the devisee giving up the estate & receiving a life annuity. It was well known to the counsel & attorney of the devisee that she was opposed to any compromise. At the time when these terms were come to, her arrival in ct. was immediately expected, but the heads of agreement were signed & a juror withdrawn before she arrived. The agreement was embodied in a *Nisi Prius* order. The devisee having refused to comply with its terms, the heir applied to the Ct. of Common Law for an order to commit her, which was refused. He then filed a supplemental bill for specific performance of the agreement :—*Held :* assuming counsel to have, without express authority, such power to bind their clients by a compromise as to make the agreement good at law, still an agreement made under such circumstances was one of which, in the absence of subsequent acquiescence or confirmation by the devisee, specific performance ought not to be decreed against her.—SWINFEN *v.* SWINFEN (1858), 2 De G. & J. 381 ; 27 L. J. Ch. 491 ; 31 L. T. O. S. 157 ; 22 J. P. 306 ; 4 Jur. N. S. 774 ; 6 W. R. 480 ; 44 E. R. 1037, L.JJ. *S. C.*, at law (1857), 1 C. B. N. S. 364.

Annotations :—**Expld.** Thomas *v.* Harris (1858), 27 L. J. Ex. 353. **Distd.** Mackintosh *v.* Fraser (1860), 2 L. T. 60. **Expld.** Harding *v.* Chowne (1863), 1 New Rep. 284. **Consd.** Prestwick *v.* Poley (1865), 6 New Rep. 175. The case of *Swinfen* v. *Swinfen* was remarkable throughout. No general doctrine can be drawn from such a case (ERLE, C.J.). **Distd.** Strauss *v.* Francis (1866), 30 J. P. 421 ; *Re* Wood, *Ex p.* Wenham (1872), 21 W. R. 104. *Swinfen* v. *Swinfen* must be distinguished as having been a case in which the matter was collateral to the suit (BACON, C.J.). **Expld.** Mathews *v.* Munster (1887), 51 J. P. 615. **Refd** Chambers *v.* Mason (1858), 5 C. B. N. S. 59 ; Chown *v.* Parrott (1863), 14 C. B. N. S. 74 ; Kennedy *v.* Broun (1863), 1 New Rep. 275 ; Holt *v.* Jesse (1876), 3 Ch. D. 177 ; Neale *v.* Gordon Lennox, [1902] 1 K. B. 838, C. A.

329. Not expressed wish of attorney's clerk against compromise.]—It is the duty of a counsel to exercise his own discretion as to the conduct of a cause in which he holds a brief, so long as the brief is not withdrawn from him, & the ct. will not grant a new trial on the ground that the counsel consented to a nonsuit, contrary to the express wish of the clerk of the attorney instructing him. *Semble :* there might be cases in which the ct. would interfere if the counsel had exercised a clearly wrong discretion.—LYNCH *v.* COWELL (1865), 12 L. T. 548 ; 13 W. R. 846.

330. Positive instructions to fight.]—If counsel receives positive instructions to fight, he cannot compromise, however advantageous it might be to his client to do so. Without such instructions he has supreme authority to compromise, & the compromise binds his client.—SCHEYER *v.* WONTNER (1890), 90 L. T. Jo. 116, C. A.

331. Express authority to refer on different terms.]—Pltf. in an action for defamation of character authorised her counsel to consent to a reference on condition that all imputations on her character were publicly disclaimed in ct. Her counsel, who did not make this limitation of his authority known to deft.'s counsel, agreed with the latter to refer the action without any disclaimer of imputation :—*Held :* the counsel having exceeded his authority, pltf. was entitled to have the agreement to refer set aside & the cause restored to the list for trial.—NEALE *v.* GORDON LENNOX, [1902] A. C. 465 ; 71 L. J. K. B. 939 ; 87 L. T. 341 ; 66 J. P. 757 ; 51 W. R. 140 ; 18 T. L. R. 791 ; 46 Sol. Jo. 319, H. L.

Annotations :—**Distd.** Little *v.* Spreadbury, [1910] 2 K. B. 658. **Consd.** Welsh *v.* Roe (1918), 87 L. J. K. B. 520. **Mentd.** *Re* Newen, Carruthers *v.* Newen, [1903] 1 Ch. 812.

332. Duress.]—Defts. issued a commission of lunacy against pltf., & at the hearing, before the comrs., an agreement was entered into that the proceedings should be dropped in consideration of pltf.'s assigning her property to trustees. This agreement was signed by her counsel ; & in order to carry it out, her title deeds were placed in defts.' hands. On the trial of an issue, as to whether pltf. was entitled to the deeds notwithstanding the agreement :—*Held :* the agreement was entered into under duress, & was not binding on pltf., not-

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326 i. *Withdrawal of client's consent.*]—*Semble :* a compromise made against the will of the client will bind him, if the dissent, or withdrawal of counsel's authority to compromise, is not communicated to the other side.—MANSON *v.* MAFFRA (SHIRE OF) (1881), 7 V. L. R. 364.—**AUS.**

326 ii. —— *Before signature by parties.*]—At a conference out of ct. before the trial, between counsel & solrs. for all the parties (one of pltfs. & deft. being also present), an agreement was arrived at, & the terms of the compromise were settled & embodied in writing, but not signed, & the case was struck out of the list for trial. Subsequently pltfs. repudiated the agreement, & continued the action. On a motion to stay proceedings :—*Held :* the agreement was not binding until signed by the parties.—GETHINGS *v.* CLONEY (1914), 48 I. L. T. 55.—**IR.**

326 iii. —— *To consent verdict—Before verdict entered.*]—An oral agreement made by counsel at *Nisi Prius* for a verdict to be entered for pltf. for a named amount, deft. to pay certain costs, may be repudiated by deft. before the verdict has been rendered.—BROWN *v.* BLACKWELL (1876), 26 C. P. 43.—**CAN.**

Sect. 5.—Relation between counsel and client: Sub-sect. 7, C. (b), (iv.) & D. Sub-sects. 8, 9 & 10.]

withstanding the consent of her legal advisers.—CUMMING *v.* INCE (1847), 11 Q. B. 112; 17 L. J. Q. B. 105; 10 L. T. O. S. 263; 12 Jur. 331; 116 E. R. 418.

333. Fraud or misunderstanding.]—When counsel agree to an arrangement, it should be binding, unless fraud or misunderstanding be imputed.—BAKER *v.* BLACK (1847), 8 L. T. O. S. 393.

334. Consent of counsel given in error.]—An order consented to by counsel in consequence of mistake will be discharged, but not with costs.—IRVING *v.* PRITCHARD (1825), 3 L. J. O. S. Ch. 100.

335. ——.]—Where, acting upon general instructions given by a client to compromise a litigation, counsel consents to a compromise under a misapprehension, such as where, intending to concede one thing, he inadvertently concedes another, or where counsel on both sides are not *ad idem*, neither the counsel nor the client is bound by the compromise, & the ct. will set it aside.—HICKMAN *v.* BERENS, [1895] 2 Ch. 638; 64 L. J. Ch. 785; 73 L. T. 323; 12 R. 602, C. A.

Annotations:—**Consd.** Ainsworth *v.* Wilding, [1896] 1 Ch. 673; Wilding *v.* Sanderson, [1897] 2 Ch. 534, C. A. **Refd.** Neale *v.* Gordon Lennox, [1902] 1 K. B. 838, C. A.

336. —— Not strictly following terms authorised.]—Although a compromise entered into by counsel under the authority implied by their employment is binding on the client, & cannot be upset by the ct., a compromise entered into in intended pursuance of terms consented to by the client, but by misapprehension not strictly following them, is not binding on the client.—LEWIS'S *v.* LEWIS (1890), 45 Ch. D. 281; 59 L. J. Ch. 712; 63 L. T. 84; 39 W. R. 75.

Annotation:—**Distd.** Hickman *v.* Berens, [1895] 2 Ch. 638, C. A.

337. —— Not when it gives effect to will of parties.]—Order of *Nisi Prius* refused to be amended according to the terms contained in a paper signed by the counsel at the trial, the intention of the parties appearing from their subsequent acts to have been in favour of the terms of the order.—PEARMAN *v.* CARTER (1815), 2 Chit. 29.

Annotation:—**Consd.** Winn *v.* Nicholson (1849), 7 C. B. 819.

338. Counsel's ignorance of material facts.]—A party is bound by the consent of his counsel given in ct., though they had no instructions to consent, if they are at the time apprised of all those facts, of which the knowledge was essential to the proper exercise of their discretion; but he will be relieved from an order made by such consent, if they give that consent in ignorance of material circumstances.—FURNIVAL *v.* BOGLE (1827), 4 Russ. 142; 6 L. J. O. S. Ch. 91; 38 E. R. 758.

Annotations:—**Apld.** Clifford *v.* Turnell (1848), 11 L. T. O. S. 197. **Consd.** Swinfen *v.* Swinfen (1857), 24 Beav. 549; Holt *v.* Jesse (1876), 3 Ch. D. 177; Harvey *v.* Croydon Union R. S. A. (1884), 26 Ch. D. 249, C. A. **Refd.** Chambers *v.* Mason (1858), 5 C. B. N. S. 59; Neale *v.* Gordon Lennox, [1902] 1 K. B. 838, C. A. **Mentd.** Thomas *v.* Hewes (1834), 4 Tyr. 335; Wright *v.* Sorsby (1834), 4 Tyr. 434; Brown *v.* Newall (1837), 2 My. & Cr. 558; *Re* Keyworth, *Ex p.* Banner (1874), 9 Ch. App. 380, n.; Wiedegemann *v.* Walpole (1889), 53 J. P. 614; Huddersfield Banking Co. *v.* Lister (1895), 72 L. T. 703, C. A.

339. —— Not when opportunity of learning facts.]—Some contributories appeared before the Vice-Warden of the Stannaries to oppose the admission of certain claims in a winding up. The Vice-Warden decided that the claims must be admitted. The counsel of the opposing contributories undertook not to appeal, & their costs were given them out of the estate. Before the order was passed & entered, they applied to have this undertaking omitted, on the grounds that counsel could not give a consent not to appeal, that he could not give a consent after a decision on the merits & that the consent was given by mistake, as the decision of the Vice-Warden turned on a resolution of the co. which they had not seen, & that if they had known its terms the consent would not have been given. It appeared, however, that the resolution had been read in ct. on a former day:—*Held:* counsel had authority to consent not to appeal, & as the opposing contributories had had an opportunity of becoming acquainted with the terms of the resolution, there was no such mistake as to entitle them to withdraw their consent.—*Re* WEST DEVON GREAT CONSOLS MINE (1888), 38 Ch. D. 51; 57 L. J. Ch. 850; 58 L. T. 61; 36 W. R. 342; 4 T. L. R. 297, C. A.

Annotations:—**Mentd.** Morgan *v.* Bowles, [1894] 1 Q. B. 236; Hickman *v.* Berens (1895), 12 R. 602, C. A.; Kirby *v.* North British & Mercantile Insce., [1896] 2 Q. B. 99, C. A.; Bevan *v.* Webb, [1901] 2 Ch. 59, C. A.; Darlow *v.* Shuttleworth, [1902] 1 K. B. 721.

340. Not withdrawal of client's consent—After counsel's consent before order drawn up—Arbitrary withdrawal.]—*Held:* where counsel by the authority of their clients consented to an order the clients could not arbitrarily withdraw such consent, & the Registrar must be directed to proceed to perfect the order, without prejudice to any application which clients might make to the ct. to be relieved from their consent, on the ground of mistake or surprise or for other sufficient reason.—HARVEY *v.* CROYDON UNION RURAL SANITARY AUTHORITY (1884), 26 Ch. D. 249; 53 L. J. Ch. 707; 50 L. T. 291; 32 W. R. 389.

Annotations:—**Consd.** Wiedegemann *v.* Walpole (1889), 53 J. P. 614; Lewis's *v.* Lewis (1890), 45 Ch. D. 281. **Folld.** Wedge *v.* Panter (1908), 52 Sol. Jo. 241. **Refd.** *Re* West Devon Great Consols Mine (1888), 38 Ch. D. 51, C. A.; Neale *v.* Gordon Lennox, [1902] 1 K. B. 838, C. A.

341. —— —— ——.]—The circumstance that a material fact within the knowledge of the client & his solr. has not been communicated to counsel at the time when he gives his consent to an order in ct. is not a sufficient ground for the client withdrawing his consent to the order before it is passed & entered, & does not prevent such a withdrawal being arbitrary, & this is so even if counsel states that he would not have given his consent if he had known of the fact.—*Re* WEDGE, WEDGE *v.* PANTER (1908), 98 L. T. 436; 52 Sol. Jo. 241.

342. —— After consent given by counsel acting on express instructions.]—An action was brought against deft. for infringing pltfs.' trade mark, & a motion was made for an injunction against him. When the motion came on for hearing deft., by counsel, submitted to a perpetual injunction (which pltfs. had never asked for) being made against him, his servants, & agents, with costs:—*Held:* that was not a mere consent by counsel without specific instructions, but a consent which deft. specifically instructed his counsel to give, so that it was the consent not merely of counsel but of deft. himself, & a motion to allow the consent to be withdrawn must be refused.—ELSAS *v.* WILLIAMS (1884), 54 L. J. Ch. 336; 52 L. T. 39; 1 T. L. R. 144.

343. Effect of withdrawal of client's consent—When client wishes to restore consent.]—Where a decree was taken by consent of counsel & one of the parties had afterwards refused to authorise such consent or to sanction the compromise, he was required, if he wished to renew his former consent, to appeal in ct. & do so in person before the

334 i. *Consent of counsel given in error.*]—Where counsel under a misapprehension of his client's instructions, & believing himself to have authority, acts in fact without it, he cannot bind his client.—NUNDO LAL BOSE *v.* NISTARINI DASSI (1900), I. L. R. 27 Calc. 428; 4 C. W. N. 169.—**IND.**

decree was drawn up.—CAREW *v.* COOPER (1864), 12 W. R. 767, L.C.

See, also, Nos. 326, 327, *ante.*

D. Revocation and Termination of Authority.

344. Revocation—When effectual to admit of client pleading personally.]—When a party appears in ct. by counsel & the cause is on & the counsel has been fully seised of it, his authority cannot be revoked by his client so as to give the client a right himself to address the ct. But if counsel is not so seised, as where, upon a motion, the hearing has proceeded no further than the reading of the affidavits, & the counsel has addressed no arguments to the ct., he may at the instance of his client be permitted to withdraw, & the client himself may be heard.—R. *v.* MAYBURY (1865), 11 L. T. 566.

SUB-SECT. 8.—STATEMENTS BY COUNSEL.

345. Made out of court.]—Counsel only represent the party for whom they appear when in ct., & statements by them out of ct. are not binding on their clients.—RICHARDSON *v.* PETO (1840), 1 Man. & G. 896; 9 Dowl. 73; Drinkwater, 61; Woll. 78; 133 E. R. 595.

346. In address to jury—Client present & not objecting.]—A statement made by a counsel in ct. in the hearing of his client is binding on the client if he makes no objection.—COLLEDGE *v.* HORN (1825), 3 Bing. 119; 10 Moore, C. P. 431; 3 L. J. O. S. C. P. 184; 130 E. R. 459.

Annotations:—**Mentd.** Brigstock *v.* Smith (1833), 2 L. J. Ex. 187; Gardner *v.* M'Mahon (1842), 3 Q. B. 561; *Re* River Steamer Co., Mitchell's Claim (1871), 6 Ch. App. 825, n., V.-C.; Chasemore *v.* Turner (1875), L. R. 10 Q. B. 500, Ex. Ch.

See, also, Nos. 322, 323, *ante,* & No. 356, *post.*

347. In opening address — As to payment of cheque.]—Pltf.'s counsel had stated in his opening address that a cheque drawn by pltf. had afterwards been paid by him:—*Held:* this statement warranted the presumption that the cheque was in the possession of pltf., & deft. might call upon him to produce it without proving it to be in his hands. —DUNCOMBE *v.* DANIELL (1837), 8 C. & P. 222; 2 Jur. 33.

Annotations:—**Mentd.** Kirkman *v.* Jervis (1839), 7 Dowl. 678; Speck *v.* Phillips (1839), 7 Dowl. 470; Haller *v.* Worman (1861), 3 L. T. 741; Pankhurst *v.* Hamilton (1887), 3 T. L. R. 500.

348. In regard to arrangement made between them in lower court.]—The ct. will not attend on an appeal to statements at the bar respecting any arrangements made between counsel in the ct. below contrary to the usual course of the ct. unless they are expressed in the order.—BARTLETT *v.* WOOD (1861), 30 L. J. Ch. 614; 4 L. T. 692; 9 W. R. 817, L.C.

Annotations:—**Mentd.** Croggan *v.* Allen (1882), 22 Ch. D. 101; Plumb *v.* Craker (1885), 16 Q. B. D. 40, D. C.; *Re* Cope, D'Auguier *v.* Cope (1885), 1 T. L. R. 611; Power *v.* Parker (1887), 4 T. L. R. 143; *Re* Ormston, Goldring *v.* Lancaster (1887), 58 L. T. 74.

In regard to his authority.] — *See* Nos. 280, 281, *ante.*

349. In regard to what took place at trial.] — Where the counsel, who had been employed at the trial of an issue in the ct. below, moved for a new trial in the Bail Ct., that ct. received from him a statement of what took place at the trial, although a verified copy of the judge's notes was not in ct.—FLOWER *v.* EVANS (1840), 4 Jur. 105.

350. In regard to deeds used by him.]—The ct. will take the word of counsel as to whether any deed was or was not used by him.—BOYD *v.* PETRIE (1870), 19 W. R. 221.

351. On instructions—Subsequently found to be incorrect.]—Where counsel were instructed to state that which upon inquiry was found to be incorrect, on such discovery being made:—*Held:* the ct. would order the decree to be amended.—MOYE *v.* SPARROW (1870), 22 L. T. 370.

SUB-SECT. 9.—UNDERTAKINGS BY COUNSEL.

352. Without authority—Not accepted by court.] —*Held:* the ct. would not accept an undertaking of counsel to pay the price of demurrer books delivered by the opposite party, where the counsel had no authority, on the part of his client, to enter into such undertaking.—SMITH *v.* BEEMAN (1842), 6 Jur. 222.

353. Should be observed as if embodied in order of court.]—An undertaking given by counsel in ct. is to be as scrupulously observed as if the terms of the undertaking were embodied in an order of the ct.—PENNELL *v.* ROY (1853), 20 L. T. O. S. 269; 1 W. R. 192, V.-C.

354. Not to appeal—Not embodied in order—Should be carried out in good faith.]—An undertaking by counsel not to appeal against an order, although not embodied in the order, ought to be carried out in good faith; but it is no legal bar to the right of appeal.—*Re* HULL & COUNTY BANK, TROTTER'S CLAIM (1879), 13 Ch. D. 261; 41 L. T. 537; 28 W. R. 125, C. A.

Annotation:—**Refd.** Harvey *v.* Croydon Union R. S. A. (1883), 53 L. J. Ch. 335.

355. That litigant will refrain from doing something—Attachment of litigant if not carried out.]—If a litigant undertakes by his counsel not to do a certain thing (*e.g.,* not to erect a wall above a certain height), & the undertaking is not carried out, the litigant may be attached.—HALFORD *v.* HARDY (1899), 81 L. T. 721; 44 Sol. Jo. 90.

Annotations:—**Distd.** *Re* Launder, Launder *v.* Richards (1908), 98 L. T. 554. **Refd.** D. *v.* A., [1900] 1 Ch. 484; Carter *v.* Roberts, [1903] 2 Ch. 312.

SUB-SECT. 10.—ADMISSIONS BY COUNSEL.

356. Client present & not repudiating—Evidence.] —Where a party appears by counsel before the ct.

SECT. 5, SUB-SECT. 7.—D.

b. *Termination—By verdict of jury—In criminal prosecution.*]—*Semble:* the retainer of counsel in a criminal case ends with the verdict of the jury.—R. *v.* KERR (1912), 21 W. L. R. 652; 3 D. L. R. 720; 22 Man. L. R. 353.—**CAN.**

SECT. 5, SUB-SECT. 8.

c. *In argument.*] — Parties are bound by the views presented by their counsel in arguing cases, & the ct. will not entertain a motion to set aside or alter their judgment on the ground that counsel misrepresented the point to be argued.—TOWER *v.* OUTHOUSE & KNAPP (1883), 23 N. B. R. 354.—**CAN.**

SECT. 5, SUB-SECT. 10.

d. *How far binding.*] — MAHONY *v.* MAHONY (1850), 2 Ir. Jur. 129.—**IR.**

e. ——.] — Pltf. not bound by the inadvertent statement or admission of his counsel in opening his case when promptly retracted.—JANNETTE *v.* GREAT WESTERN RY. CO. (1855), 4 C. P. 488.—**CAN.**

f. *In interlocutory proceedings — As to acts of client's agents.*]—An admission by deft.'s counsel in an interlocutory proceeding, that deft.'s agents had employed pltf., is not an admission that they had any authority to bind deft.—GUY *v.* BRADY (1885), 24 N. B. R. 563.—**CAN.**

g. *Client unable to make admission or waiver.*]—Deft., while awaiting trial on a charge of murder, made an admission to the prosecuting officer in the presence of deft.'s counsel:—*Held:* prisoner's counsel could not assent to or waive anything to prisoner's prejudice. & in a case where prisoner himself could not make a waiver or admission, such waiver or admission could not be made through the agency of his counsel.—R. *v.* HOPE YOUNG (1905), 38 N. S. R. 427; 10 Can. Crim. Cas. 466.—**CAN.**

Sect. 5.—Relation between counsel and client: Subsects. 10, 11, 12 & 13.]

or a judge at chambers in any stage of the cause, & counsel makes an admission of a fact, though unsupported by affidavit, the ct. will regard such statement as presumably true, & will admit it in evidence when offered by the other side.

In an action of detinue to recover possession of certain papers deft. took out a summons before a judge at chambers to change the venue, & appeared by counsel to support the application. In the course of the proceedings before the judge counsel admitted that his client had the papers:—*Held:* this admission was rightly received in evidence at the trial of the cause, as a statement made by counsel in discharge of his functions as counsel, relevant to the matter at issue, & made for the purpose of influencing the judge to take a step in favour of his client.

When counsel makes before the ct. or a judge a statement, or does an act in the presence of the attorney on the record, or any authorised person who represents him, & the statement or the act is not repudiated by the attorney or his representative, that amounts to an assent to or adoption of it, & it becomes the statement or act of the attorney (WILLIAMS, J.).—HALLER *v.* WORMAN (1861), 3 L. T. 741; 9 W. R. 348.

See, also, Nos. 322, 323, 346, *ante.*

357. For petitioning creditor.]—The ct. will not, in showing cause against an adjudication, upon the admission of counsel for petitioning creditor unsupported by evidence that the act of bkpcy. is insufficient to support it, annul the adjudication where all the requisites, as proved upon the proceedings, appear to be sufficient.—*Re* A DISPUTED ADJUDICATION (1860), 3 L. T. 632.

358. As to jurisdiction of Scottish Court—Binding as admission of fact.]—At the trial of an action counsel for deft. made an admission that an order made by the Ct. of Session in Scotland nominating the curator of a lunatic subscriber, on behalf of the lunatic as "nominee," to receive the share of a grant had the same effect as if it had been a nomination made by the subscriber himself (being sane): —*Held:* by the Ct. of Appeal, as the question of the jurisdiction of the Scottish ct. to make such an order was a question of fact, proof of which, like proof of other facts, might be dispensed with by the admission of counsel, the trial judge was wrong in going into that question.—URQUHART *v.* BUTTERFIELD (1887), 37 Ch. D. 357; 57 L. J. Ch. 521; 57 L. T. 780; 36 W. R. 376; 4 T. L. R. 161, C. A.

359. By Attorney-General—How far binding on Crown.]—The confession of the Attorney-General is not binding to the King in matter of law, though it be a matter of fact.—WALL *v.* PENNINGTON (1660), Hard. 170; 145 E. R. 436.

See, generally, CONSTITUTIONAL LAW.

SUB-SECT. 11.—NOTICE TO COUNSEL.

360. Whether notice to client.]—Though notice to a man's counsel be notice to the party, yet where the counsel comes to have notice of the title in another affair, which, it may be, he has forgot, when his client comes to advise with him in a case with other circumstances, that shall not be such a notice, as to bind the party.—PRESTON *v.* TUBBIN (1684), 1 Vern. 286; 23 E. R. 474.

361. ——.]—Notice to counsel who was employed in the thing by another person, or in another business, & at another time, is no notice to his client who employs him afterwards.—WORSLEY *v.* SCARBOROUGH (EARL) (1746), 3 Atk. 392; 26 E. R. 1025.

Annotations:—**Folld.** Dresser *v.* Norwood (1863), 14 C. B. N. S. 574. **Refd.** Price *v.* Price (1887), 35 Ch. D. 297. **Mentd.** Kinsman *v.* Kinsman (1831), 1 Russ. & M. 617; Bellamy *v.* Sabine (1857), 1 De G. & J. 566.

362. Attendance of counsel—When injunction continued—Not notice to client.]—The presence of counsel in ct. without instructions, when an injunction is continued against his client does not constitute such notice to the client as will justify committal for contempt.—CARROW *v.* FERRIOR, DUNN *v.* FERRIOR (1868), 37 L. J. Ch. 569; 17 L. T. 536; 16 W. R. 454.

SUB-SECT. 12.—ADVICE OF COUNSEL.

Effect of taking—As to title.]—*See* SOLICITORS; SALE OF LAND.

—— **As safeguarding solicitors.**] — *See* SOLICITORS.

—— **As safeguarding trustees.**] — *See* TRUSTS & TRUSTEES.

363. —— As defence to action for malicious prosecution.]—In an action for a malicious prosecution, it is no answer that deft. was encouraged in what he did by the opinion of counsel, if the statement of facts was incorrect, or the opinion ill founded.—HEWLETT *v.* CRUCHLEY (1813), 5 Taunt. 277; 128 E. R. 696.

364. —— ——.]—It is a good defence to an action for a malicious arrest, that deft., when he caused pltf. to be arrested, acted *bonâ fide* upon the opinion of a legal adviser of competent skill & ability, & believed that he had a good cause of action against pltf.; but where it appeared that the party was influenced by an indirect motive in making the arrest:—*Held:* it was properly left to the jury to consider whether he acted *bonâ fide* upon the opinion of his legal adviser, believing that he had a good cause of action.—RAVENGA *v.* MACKINTOSH (1824), 2 B. & C. 693; 4 Dow. & Ry. K. B. 187; 2 L. J. O. S. K. B. 137; 107 E. R. 541.

Annotations:—**Mentd.** Blachford *v.* Dod (1831), 2 B. & Ad. 179; Grainger *v.* Hill (1838), 1 Arn. 42; Broad *v.* Ham (1839), 8 L. J. C. P. 357; Johnson *v.* Emerson (1871), L. R. 6 Exch. 329.

365. —— ——.]—In an action against an attorney or any other party, for a malicious or fraudulent proceeding, it is not enough to excuse deft. that he acted on counsel's opinion, unless he also shows a case fairly stated & advice obtained *bonâ fide* & properly pursued.—ANDREWS *v.* HAWLEY (1857), 26 L. J. Ex. 323.

366. —— As evidence of good faith only.]—The advice of a barrister, whose ability & experience may be reasonably trusted, is only evidence of the good faith of those who do an act, but cannot

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SECT. 5, SUB-SECT. 12.

363 i. *Effect of taking — As defence to action for malicious prosecution.*]—In an action for damages for malicious prosecution, the having taken counsel's opinion before prosecuting will not sustain a plea of probable cause & absence of malice, unless it be shown that all the facts were laid before him & unless he be heard to establish that he advised the prosecution with a full knowledge of them.—DUROCHER *v.* BRADFORD (1907), Q. R. 31 S. C. 240.—**CAN.**

h. —— *As defence in application to take carriage of proceedings from party.*]—To an application to take the carriage of proceedings from a party on the ground of delay, it is not a sufficient answer to state that the delay had arisen in consequence of counsel having advised a certain course, which had the effect of protracting the proceedings. The proper course is to apply for time to the ct. —*Re* NOLAN (1850), 15 L. T. O. S. 284.—**IR.**

excuse an improper act, least of all when it is a questionable contrivance for dong indirectly what cannot be done directly.—R. *v.* GREAT WESTERN RY. CO. (1849), 3 New Mag. Cas. 133; 18 L. J. M. C. 145; 13 L. T. O. S. 45; 13 J. P. 198; 13 Jur. 652.

367. —— As defence to action against company director—For omission from prospectus.]—In an action against a director based on the wrongful omission of contracts from a prospectus:—*Held:* the fact that the contracts were omitted from the prospectus on the advice of counsel was no defence.—BROOME *v.* SPEAK, [1903] 1 Ch. 586; 72 L. J. Ch. 215; 88 L. T. 580; 51 W. R. 258; 19 T. L. R. 187; 47 Sol. Jo. 230; 10 Mans. 38, C. A.; *affd. sub nom.* SHEPHEARD *v.* BROOME, [1904] A. C. 342, H. L.

Annotations:—**Mentd.** Watts *v.* Bucknall, [1903] 1 Ch. 766, C. A.; Hoole *v.* Speak (1904), 91 L. T. 183; Nash *v.* Calthorpe, [1905] 2 Ch. 237, C. A.; Shepheard *v.* Bray, [1906] 2 Ch. 235; Macleay *v.* Tait, [1906] A. C. 24, H. L.; Cork (Eastern Division) Case (1911), 6 O'M. & H. 318.

See, further, COMPANIES.

368. —— By Official Receiver.]—The Official Receiver ought not to allow his name to be used, on an indemnity being given in proceedings by other persons, unless he has satisfied himself, by taking counsel's opinion, as to the propriety of the proceedings, because as soon as he allows his name to be so used, he ceases to be master of the litigation & to have control over the proceedings.—*Re* ANGLO-SARDINIAN ANTIMONY CO. (1894), 38 Sol. Jo. 682.

See, generally, BANKRUPTCY & INSOLVENCY.

SUB-SECT. 13.—MISTAKES AND OMISSIONS OF COUNSEL.

369. In failing to press point of law.]—A point of law suggested by the ct. on a trial, if rejected by the counsel in whose favour it would have then prevailed, is not a ground on which the ct. will grant a new trial.—R. *v.* HELSTON CORPN. (1713), 10 Mod. Rep. 202; 88 E. R. 693; *sub nom.* POCKINGHALL *v.* HAWKINS, Gilb. 120.

Annotation:—**Mentd.** Bright *v.* Eynon (1757), 1 Burr. 390.

370. Rule nisi discharged through.]—If a rule *nisi* has been discharged in consequence of a mistake of counsel in stating the terms of the affidavit on which it was founded, the case may be reheard.—R. *v.* MIDDLESEX SHERIFFS, COOPER *v.* JAGGER (1819), 1 Chit. 445.

371. To exhibit interrogatories to prove will.]—Pltfs. sued as devisees of A., but omitted to prove his will, & the bill was dismissed. They afterwards presented a petition of rehearing, & moved for leave to exhibit interrogatories to prove the will, which was granted, the omission having arisen from the inadvertence of counsel, & the will not being the subject of dispute in the cause.—HOOD *v.* PIMM (1830), 4 Sim. 101; 1 Coop. *Temp.* Cott. 279; 9 L. J. O. S. Ch. 63; 58 E. R. 39.

Annotations:—**Distd.** Tullock *v.* Hartley (1845), 4 L. T. O. S. 409, L.C. **Refd.** Reynell *v.* Sprye 1849), 8 Hare, 222. **Mentd.** Hugh *v.* Eades (1842), 1 Hare, 486; Breeze *v.* English (1844), 4 L. T. O. S. 230.

372. Mistaken basis for assessment of damages.]—Where damages found by the jury have been calculated upon a value assented to by counsel on both sides, the ct. will not interfere to alter the amount of the verdict, on affidavits that counsel were mistaken in that which they assumed as the basis of their calculation.—HILTON *v.* FOWLER (1836), 5 Dowl. 312, Ex. Ch.

373. In calculating interest.]—Where, in an action for principal & interest on a mtge. deed, which was undefended, pltf.'s counsel took a verdict for principal only, omitting to include the interest, the ct. refused to increase the amount of the verdict by adding the interest.—BAKER *v.* BROWN (1836), 2 M. & W. 199; 5 Dowl. 313; 2 Gale, 223; 6 L. J. Ex. 11; 150 E. R. 727.

374. Accidental allusion to affidavit.]—An accidental allusion, in the heat of argument, by a junior counsel to an affidavit, which his leader had previously determined not to use, will not bind his client to file it.—PEEL *v.* WEATHERBY (1844), 3 L. T. O. S. 205.

375. Slip in argument—When ground for rehearing.]—A mere slip in argument, *e.g.*, by counsel omitting to rely on a sect. of an Act of Parliament supposed to be decisive of the question, is not of itself a sufficient ground for allowing a re-argument of the case, although the order of the ct. has not been passed & entered. *Semble:* although this rule applies when the question involved is only as to the mode of procedure by which the rights of the parties are to be brought before the ct., a rehearing will be allowed in a case where the order of the ct. finally settles the rights of the parties.—BIRMINGHAM & DISTRICT LAND CO., LTD. *v.* LONDON & NORTH WESTERN RY. CO. (1886), 34 Ch. D. 261; 56 L. J. Ch. 956; 55 L. T. 699; 35 W. R. 173, C. A.

Annotations:—**Mentd.** Tritton *v.* Bankart (1887), 56 L. J. Ch. 629; Johnston *v.* Salvage Assocn. (1887), 19 Q. B. D. 458, C. A.; Hammond *v.* Bussey (1887), 20 Q. B. D. 79, C. A.; Hooper *v.* Bromet, Raphael Third Party (1903), 89 L. T. 37; Moel Tryvan Ship Co. *v.* Kruger, [1907] 1 K. B. 809, C. A.; The Devonshire & St. Winifred, [1913] P. 13; Groves *v.* Webb & Kenward (1916), 85 L. J. K. B. 1533, C. A.

376. As to R. S. C., Ord. 58, r. 15—Insufficient ground for granting special leave to appeal.]—Through a mistake of counsel as to the effect of Ord. 58, r. 15, an appeal was not brought until after the expiration of the time thereby allowed for appealing:—*Held:* there was no sufficient ground for granting special leave to appeal under the above rule.—*Re* COLES & RAVENSHEAR, [1907] 1 K. B. 1; 76 L. J. K. B. 27; 95 L. T. 750; 23 T. L. R. 32, C. A.

Annotations:—**Follid.** Nicholson *v.* Piper (1907), 24 T. L. R. 16, C. A. **Distd.** Baker *v.* Faber, [1908] W. N. 9, C. A.; The Charlotte, [1908] P. 206, C. A.; Rumbold *v.* L. C. C. (1909), 100 L. T. 259, C. A.

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368 i. —— *By receiver.*] — Where a receiver seeks to save himself from costs, by alleging that he has acted upon the advice of counsel, it will be referred to the master to inquire whether a proper case, with all the facts, was submitted to counsel.—FORDE *v.* HEAD (1830), 3 Ir. L. Rec., 1st Ser., 170.—**IR.**

SECT. 5, SUB-SECT. 13.

k. *As to construction of conveyance — Whether "sufficient cause" within Civil Procedure Code (Act XIV. of 1882), s. 623.*] — GOPAUL CHUNDER LAHARI *v.* SOLOMON (1885), I. L. R. 11 Calc. 767; I. L. R. 13 Calc. 62.—**IND.**

l. *In failing to appeal in time.*]—When a client *bonâ fide* accepts the advice of counsel as to the proper procedure to adopt in the course of limitation &, misled by the advice, fails to file an appeal within time, he is entitled to the benefit of Limitation Act, 1877, s. 5.—KURA MAL *v.* RAM NATH (1906), I. L. R. 28 All. 414.—**IND.**

m. *In drafting answer to bill.*] — Deft. was allowed to amend his answer to a cross-bill, as to a sum of money which he had admitted as having been paid by pltf., upon a full affidavit, not contradicted, that the mistake was made by his counsel, who had so altered the draft of the answer, although pltf., who was deft. in the original cause, had endeavoured to avail himself of the error by adding this sum to his charge on the account which was then carrying on in the original cause.—KNOX *v.* LOYD (1763), How. C. S. 15.—**IR.**

n. *To sign declaration.*] — The ct. allowed a declaration to be amended by putting the signature of counsel to it, when it had been omitted by mistake, without costs, & without prejudice to the rules to plead, although a motion had been made to take the declaration off the file for irregularity.—KEENE *v.* GRAHAM (1839), 1 I. L. R. 159.—**IR.**

Sect. 5.—Relation between counsel and client: Sub-sect. 13. Sect. 6: Sub-sects. 1, 2, 3 & 4.]

377. As to R. S. C., Ord. 39, rr. 1 (a), 4—Direction of court under Ord. 64, r. 7.]—Pltf. was mistakenly advised by his counsel that Ord. 39, rr. 1 (a) & 4, did not apply where the appeal was against the ruling of the judge:—*Held:* a case for the ct. to exercise its discretion under Ord. 64, r. 7, to extend the time for appealing.—BAKER *v.* FABER, [1908] W. N. 9, C. A.

Annotation:—**Apprvd.** Rumbold *v.* L. C. C. (1909) 100 L. T. 259, C. A.

378. —— Owing to illness of counsel.]—Owing to the illness of counsel instructed to draw notice of motion for a new trial in an action tried before a judge & jury in the K. B. Div. of the High Ct., notice of appeal could not be lodged within the prescribed time.

On a motion for extending the time for appealing:—*Held:* leave should be granted upon the terms that appcts. paid resp.'s cost of the application in any event.—RUMBOLD *v.* LONDON COUNTY COUNCIL & SCOTT (1909), 100 L. T. 259; 53 Sol. Jo. 227, C. A.

Annotation:—**Refd.** Codling *v.* Mowlem (John) (1913), 7 B. W. C. C. 13, C. A.

379. In failing to settle notice of appeal.]—An application for extension of time for appeal from a decision in the High Ct. was made, on the ground that pltf.'s counsel had overlooked the papers instructing him to settle the notice of appeal, & that in consequence the limit of time had expired. This was opposed on the ground that the appeal would fail & costs would be unnecessarily incurred: —*Held:* the application should be granted.—CODLING *v.* MOWLEM (JOHN) & CO., LTD. (1913), 7 B. W. C. C. 13, C. A.

Non-attendance.] — *See* Nos. 268, 269, *ante;* Sect. 6, sub-sect. 4, *post.*

SECT. 6.—DUTIES AND DISCRETION OF COUNSEL AT HEARING.

SUB-SECT. 1.—IN GENERAL.

380. Duty to exercise discretionary powers.]—The ct. intimated to the counsel that, in the absence of their clients, they ought to take upon themselves the responsibility of going on, or sending the matters in dispute to a reference.—ANON. (1823), 1 L. J. O. S. K. B. 117.

381. Duty to insist upon being heard.]—Every counsel ought to insist upon being heard (BRETT, L.J.).—GREAT WESTERN RY. CO. *v.* WATERFORD & LIMERICK RY. CO. (1881), 17 Ch. D. 493; 50 L. J. Ch. 513; 44 L. T. 723; 29 W. R. 826, C. A.

Annotations:—**Mentd.** Stannard *v.* St. Giles Camberwell Vestry (1881), 20 Ch. D. 190, C. A.; Halesowen Ry. Co. *v.* G. W. Ry. Co. & Mid. Ry. Co. (1883), 48 L. T. 710; North London Ry. Co. *v.* G. N. Ry. Co. (1883), 52 L. J. Q. B. 380, C. A.; Barlow *v.* St. Mary Abbott's Kensington Vestry (1883), 31 W. R. 514; R. *v.* Mid. Ry. Co. (1887), 19 Q. B. D. 540; R. *v.* London County JJ. & L. C. C., [1894] 1 Q. B. 453, C. A.; G. W. Ry. Co. *v.* Barry Ry. Co., [1909] 2 K. B. 670, C. A.

382. Duty where case discovered to be unsustainable.]—It is the duty of counsel to say so when he finds a point not to be arguable. The chief function of the Bar is to assist the ct. in coming to a just conclusion (KEATING, J.).

It is the duty of counsel to assist the ct. by referring to authorities which he knows to be against him. But when the counsel has satisfied himself that he has no argument to offer in support of his case, it is his duty at once to say so, and to withdraw altogether. The counsel is master of the argument & of the case in ct. & should at once retire, if he finds it wholly unsustainable, unless indeed he has express instructions to the contrary (BRETT, J.).—BEAUCHAMP (EARL) *v.* MADRESFIELD (1872), L. R. 8 C. P. 245; 2 Hop. & Colt. 41; 42 L. J. C. P. 32; 21 W. R. 124; *sub nom.* SALISBURY *v.* BONTEMS, BEAUCHAMP *v.* MADRESFIELD OVERSEERS, 27 L. T. 606; 37 J. P. 39.

Annotations:—**Mentd.** Rendlesham *v.* Haward (1873), L. R. 9 C. P. 252; Stowe *v.* Jolliffe (1874), 43 L. J. C. P. 265; Bristol *v.* Beck (1907), 71 J. P. 99.

383. Duty to conduct case fairly—Should not constitute himself judge.]—A barrister is not bound to degrade himself in carrying on a case; a barrister ought not to fight unfairly; but short of that he ought to use every effort to bring the case of a client to a successful issue; a barrister ought not to set himself up as a judge of his client's case; he has no right to forsake a client on any mere suspicion of his own as to his chance of success.—*Re* COOKE (1889), 5 T. L. R. 407; 33 Sol. Jo. 397, C. A.

384. Duty generally in criminal proceedings—Counsel for prosecution.]—In cases of felony it is the duty of the counsel for the prosecution to be assistant to the ct. in the furtherance of justice, & not to act as counsel for any particular person or party.—R. *v.* THURSFIELD (1838), 8 C. & P. 269.

385. —— ——.]—It is a general principle of criminal procedure, that counsel for the prosecution should consider themselves not merely as advocates for a party, but as ministers of justice, & not as struggling for a verdict, but as assistants in the ascertainment of truth according to law.—R. *v.* BERENS (1865), 4 F. & F. 842.

386. —— ——.]—Counsel for the prosecution should regard themselves as ministers of justice, & not struggle for a conviction, as in a case at *Nisi Prius*, nor be betrayed by feelings of professional rivalry to regard the question at issue as one of professional superiority, & a contest for skill & pre-eminence.—R. *v.* PUDDICK (1865), 4 F. & F. 497.

Annotation:—**Folld.** R. *v.* Banks, [1916] 2 K. B. 621, C. C. A.

387. —— —— Distinguished from duty at Nisi Prius.]—In cases usually tried at *Nisi Prius*, counsel were in the habit, to a certain extent, of identifying themselves with the interests of their clients, & it was their duty to struggle hard in their exertions to obtain a verdict; but in criminal cases this ought not to be the feeling of the bar (MELLOR, J.).—R. *v.* WEBB (1865), 4 F. & F. 862.

388. —— —— To abstain from conduct likely to prejudice jury.]—Counsel for the Crown should abstain from appeals to the jury likely to inflame or prejudice their minds.—R. *v.* BANKS, [1916] 2 K. B. 621; 85 L. J. K. B. 1657; 115 L. T. 457; 80 J. P. 432; 25 Cox, C. C. 535; 12 Cr. App. Rep. 74, C. C. A.

389. Duty in trial with jury—To abstain from conduct likely to prejudice jury.]—It is the duty of counsel to know & observe the rules governing what they may & what they may not do in the conduct of cases; they may not disregard those rules & trust to not being checked in time, & counsel are not entitled to put an irregular question in cross-examination in order to prejudice the minds of the jury.

SECT. 6, SUB-SECT. 1.

p. *No duty to inquire as to truth of client's case.*]—It is the duty of a pleader to present his client's case, but it is not his duty to inquire whether it is true or false, so far, at any rate, as the purpose of a prosecution for defamation is concerned. It is for the public good that an advocate should, as far as may be, feel unfettered by any control, other than that of the ct., in the use of every weapon placed at his disposal by law for the defence of his client.—NIKUNJA BEHARI SEN *v.* HAVENDRA CHANDRA SINHA (1913), I. L. R. 41 Calc. 514.—**IND.**

It is most improper & most irregular for pltf.'s counsel to ask deft. in a "running down" action if he is insured. Such a question is calculated to prejudice deft. with the jury, & the judge is justified in discharging the jury & in making pltf. pay the costs.—WRIGHT *v.* HEARSON, [1916] W. N. 216.

See, also, Nos. 109, *ante,* 431 *et seq., post.*

390. Must appear in robes.]—Counsel are not heard in sittings in open ct. unless they are robed. —R. *v.* WHITTAKER (1844), 8 J. P. Jo. 390, 853.

391. Cannot address judge for nonsuit—After having addressed jury & examined witness.]—If the counsel for a deft. has addressed the jury & examined witnesses, he has no right then to address the judge for a nonsuit.—ROBERTS *v.* CROFT & MILLER (1836), 7 C. & P. 376.

392. May insist on bringing matters before court.]—The ct. cannot decline to entertain a question which counsel insists on bringing before them though it be one which it is derogatory to the honour of the bar to discuss, & of which any discussion is useless.—CRAVEN *v.* SANDERSON (1838), 2 Jur. 374.

393. May insist on evidence being heard—Effect of waiver.]—Where a judge is about to decide in favour of a litigant without hearing evidence with which he is prepared, his counsel may insist on the evidence being heard before the delivery of the decision; but if the counsel waives his right & accepts the decision, the ct., on appeal, may hear the evidence before reversing the decision of the ct. below.—*Re* PINCOFFS, *Ex p.* JACOBSON (1882), 22 Ch. D. 312; 48 L. T. 197; 31 W. R. 554, C. A.

394. May refrain from mentioning names.]—The ct. will leave to the discretion of counsel in certain applications the mention or not of the names of appcts. & other parties concerned.—*Re* A MARRIED WOMAN (1867), 16 L. T. 323.

395. May observe on cases cited by other side.]—If deft.'s counsel take an objection, & pltf.'s counsel answer it, &, in replying on the objection, deft.'s counsel cite a case, pltf.'s counsel will be allowed to observe on the case so cited.—FAIRLIE *v.* DENTON (1828), 3 C. & P. 103; 2 Man. & Ry. K. B. 353.

Annotation:—**Mentd.** Gaskill *v.* Skene (1850), 14 Q. B. 664.

396. ——.]—If counsel cite a case, but call no witnesses, the opposing counsel has a right to observe on the case cited.—POWER *v.* BARHAM (1835), 7 C. & P. 356; 1 Mood. & R. 507.

397. May reply on law to answer to objection.]—Where a deft. relies upon a legal objection & calls evidence to support it, pltf.'s counsel having answered the objection, deft. is entitled to be heard on the law in reply.—ARDEN *v.* TUCKER (1832), 1 Mood. & R. 191.

398. May not move for decree—After notice of injunction.]—It was contempt of ct. for counsel to move for judgment at common law after notice of an injunction against proceedings at law.—ALLEN *v.* DINGLEY (1576), Ch. Cas. in Ch. 113; 21 E. R. 70.

SUB-SECT. 2.—AS TO WITNESSES.

Authority of counsel to refrain from calling witnesses.]—*See* Sect. 5, sub-sect. 7, *ante.*

399. Whether counsel can — Examine witness after other counsel on same side has closed examination.]—When there are several counsel on the same side, & a junior has begun to examine a witness, the leader may interpose, take the witness into his own hands, & finish the examination. But after one counsel has brought his examination to a close, a question cannot regularly be put to the witness by another counsel on the same side.—DOE *v.* ROE (1809), 2 Camp. 280, N. P.

400. —— Object on behalf of witness—That answering questions may render him liable.]—The counsel in a cause have no right to object in favour of a witness, that the answer to a particular question renders him liable to punishment or forfeiture. Such objection belongs to the witness only.—THOMAS *v.* NEWTON (1826), Mood. & M. 48, n.

401. —— Argue on behalf of witness objecting to answer questions.]—If a witness objects to answer questions, on the ground that they may subject him to criminal proceedings, the counsel on the opposite side cannot argue in support of the witness's objection.—R. *v.* ADEY (1831), 1 Mood. & R. 94.

See, generally, PRACTICE & PROCEDURE.

Effect of intervention of litigant on counsel's right to examine & cross-examine witness.]—*See* Nos. 199—201, *ante.*

SUB-SECT. 3.—IN REGARD TO NOTES.

402. Duty to take notes.]—On motion for the new trial of an issue, the judge's notes & the notes of the counsel engaged upon the trial of the issue, form the materials upon which the determination of the ct., as to the granting or refusing a new trial, will be grounded; & it is the duty of the counsel attending at the trial to take correct notes of the evidence, & those notes are the foundation of a motion for a new trial.—MALINS *v.* PRICE (1845), 1 Ph. 590; 5 L. T. O. S. 385; 9 Jur. 955; 41 E. R. 757, L.C.

403. ——.]—It is the duty of both the judge at the trial & the junior counsel of the parties to take full notes of the evidence given at the trial (LUSH, L.J.).—DE LA WARR (EARL) *v.* MILES (1881), 19 Ch. D. 80; 45 L. T. 424; 30 W. R. 35, C. A.

Annotations:—**Refd.** Glasier *v.* Rolls (1889), 59 L. J. Ch. 63, C. A. **Mentd.** The Turret Court (1901), 84 L. T. 331.

404. ——.]—It is the duty of counsel to make notes of the grounds of a judgment in order to lay them before the ct. above in the event of an appeal. —*Ex p.* SKERRATT (1884), 28 Sol. Jo. 376, C. A.

405. Notes admitted as evidence of what took place at time.]—Notes of counsel at the back of his brief, in a trial at law, admitted as evidence in subsequent proceedings of what took place at the trial. —CATTELL *v.* CORRALL (1839), 3 Y. & C. Ex. 413; 160 E. R. 763.

406. When court will act on notes.]—Where notes of an arrangement appear on counsel's briefs, which all agree, the ct. will act upon them, although no minute of the arrangement was made in the registrar's book.—ANDERTON *v.* YATES (1850), 17 L. T. O. S. 37; 15 Jur. 833.

407. Whether entitled to take notes—Witness called under Bankruptcy Act, 1883 (c. 52), s. 27.]—Where a witness summoned under the above sect. is permitted to be represented by counsel, counsel must be allowed to make a note of the evidence for the purpose of aiding his memory.—*Re* WALKER, *Ex p.* CHILDE (1909), 100 L. T. 860; 25 T. L. R. 528; 53 Sol. Jo. 486; 16 Mans. 207, D. C.

See, also, cases in Sect. 5, sub-sect. 1, A. (c.), *ante.*

SUB-SECT. 4.—NON-ATTENDANCE.

408. Probable absence of counsel—Ground for postponing trial.]—The probable absence of counsel

q. *Duty to attend.*]—Duty of counsel in a cause to attend ct. until cause disposed of.—BOWES *v.* SUTHERLAND (1842), 2 Kerr. 1.—CAN.

Sect. 6.—Duties and discretion of counsel at hearing: Sub-sects. 4 & 5.]

is a sufficient ground for postponing the trial of an issue.—BEARBLOCK *v.* TYLER (1820), 1 Jac. & W. 225; 37 E. R. 361.

Annotation:—**Mentd.** Casborne *v.* Barsham (1840), 5 My & Cr. 113.

409. Inability of some counsel to attend—Not ground for postponing trial—If postponement objected to.]—Counsel for pltf. requested that the cause might stand over until the next day, some of the other counsel in the cause being unable to attend. One of defts. appearing in person, & having no counsel, objected to the postponement:—*Held:* the hearing should proceed.—FAIRBURN *v.* ROTHWELL (1843), 1 L. T. O. S. 456.

410. Non-attendance—Summons adjourned.]—Application to adjourn summonses for attendance of counsel granted.—HATCH *v.* SEARLES (1854), 22 L. T. O. S. 280; 2 W. R. 213.

411. Illness of sole counsel in case—Ground for adjournment.]—Motion adjourned, on the ground of the illness of counsel, who was alone in the case, & had to argue it.—HEMMING *v.* HALE (1859), 33 L. T. 136.

412. Counsel not thinking case would be reached.]—A new trial was granted because counsel were absent, not thinking the cause would come on, & no defence was made; but a like motion was denied in B. R.—ANON. (1696), 2 Salk. 645; 91 E. R. 546.

413. ——.]—Every cause in the list of the day ought to be considered by the parties as the first cause, & they should be prepared accordingly.

A cause was called on as undefended, whereupon deft.'s counsel interposed, & stated that it was defended, & the case was accordingly ordered to keep its place. It being in the list for trial on a certain day, it could not have been reached on that day in the ordinary course of things, but on its being intimated by the judge, shortly before the rising of the ct., that he would take two short cases, the counsel for pltf. applied to have the case taken, on the ground that it was a short cause, whereupon it was called on, & deft.'s counsel not being in ct., pltf. obtained a verdict. Upon an application subsequently to set aside the trial, on the ground that it was improperly taken out of its turn in the absence of deft.:—*Held:* it was competent to the judge to take the causes in any order he thought most convenient, & it was the duty of the legal advisers of deft. to have been present, & the application must be refused.—COTTAM *v.* BANKS (1847), 2 New Pract. Cas. 11; 1 Saund. & C. 302; 8 L. T. O. S. 347; 11 Jur. 148.

414. ——.]—A cause, which stood No. 6 on the list for the day, was called on at a quarter to eleven o'clock, & no counsel or attorney appearing for deft., the trial proceeded, & a verdict was given for pltf. A rule *nisi* for a new trial upon payment of costs was obtained upon deft.'s affidavit of merits, & the absence of counsel & attorney was accounted for upon the ground that they did not suppose, from the position of the cause on the list, that it could be reached so early:—*Held:* no sufficient ground for a new trial.—EARL *v.* DOWLING (1852), 19 L. T. O. S. 115; 16 Jur. 479.

415. ——.]—Where counsel were taken by surprise & were not prepared to argue, in consequence of a change in the sittings of the ct., the ct. allowed the cases to stand over.—PENNELL *v.* DAWSON (1856), 28 L. T. O. S. 103.

416. Counsel arriving late.]—Where the usual hour for the sitting of the Sheriff's Ct. was ten o'clock, & deft.'s counsel was in attendance at a quarter past ten o'clock, but the cause was then concluded, the under-sheriff, although informed that counsel was instructed & that deft. was present, having refused to allow deft. to address the jury in his defence, the ct. granted a rule *nisi* for a new trial.—SCHWANFELTER *v.* LEPAGE (1844), 4 L. T. O. S. 94.

417. ——.]—Where deft.'s counsel attended to oppose a summons at chambers, three or four minutes after half-an-hour next immediately following the return thereof had elapsed, but the order had been obtained before he arrived, it was rescinded without costs on either side.—MOYSE *v.* DINGLE (1854), 23 L. J. Q. B. 305; 2 W. R. 550.

418. —— **Counsel delayed on way to court.**]—The counsel & solr. for a debtor, against whom a petition for adjudication was appointed to be heard at Croydon, being unexpectedly delayed on their way to the place appointed for the hearing, telegraphed from London Bridge that they were on the road, & requested a short delay. The registrar received the telegram ten minutes after the time appointed for the hearing, but before anything had been done. He waited ten minutes after the receipt of the telegram, & then pronounced an adjudication. The counsel arrived at thirty-two minutes past the time appointed, but the registrar refused to hear him without the consent of the other side, which was not given. On appeal to the chief judge, the order of adjudication was discharged & the case sent back to the registrar for further consideration.—*Re* PHILLIPS, *Ex p.* PHILLIPS (1874), 44 L. J. Bcy. 11; 31 L. T. 416; 23 W. R. 24.

419. Counsel attending in another court.]—If counsel on either side appear to argue a special case, on the day appointed by the rule for the *concilium*, & the counsel for the other party do not attend, the counsel in attendance will be heard, & the ct. will give judgment in the absence of the other counsel. The ct. will not, on any occasion, permit the case to be opened again, for the purpose of giving the counsel, who may have been absent, an opportunity of arguing it, as the necessary attendance of counsel in another ct. is not a sufficient reason for being absent.—HARBER *v.* RAND (1821), 9 Price, 55; 147 E. R. 18.

420. ——.]—Applt.'s counsel was actually speaking in another case when his case was called, &, on application of the other side, was dismissed with costs, the ct. saying that the only alternative was to strike it out. Subsequently on the application of the counsel in default, the case was restored to the bottom of the list.—SANDERS *v.* MCCONNELL (1885), *Times*, Feb. 12th & May 5th.

421. —— **Priority should be given to House of Lords.**]—The House of Lords has a prior claim to the attendance of counsel. It is a very high obligation on the counsel engaged to attend the House in priority to other cts., & although the House is

411 i. *Illness of counsel — Whether ground for new trial.*]—Deft.'s counsel was absent from illness, but no attorney appeared at the trial to attend to the cause, & no application was made to put it off. New trial refused.—GUNN *v.* VAN ALLEN (1849), 5 U. C. R. 513.—**CAN.**

411 ii. —— —— *Senior counsel continuing.*]—One of prisoner's counsel, whilst addressing the jury, was suddenly seized with a fit, & incapacitated from proceeding any further. No adjournment was applied for, but the senior counsel continued the address to the jury without raising any objection:—*Held:* no ground for a new trial.—R. *v.* FICK (1866), 16 C. P. 379.—**CAN.**

419 i. *Counsel attending in another court.*]—It is no excuse for not proceeding to trial according to notice that pltf.'s attorney was so much engaged in the House of Assembly as to be unable to attend the trial, & that the counsel spoken to on the previous day to try the cause was occupied in another ct., it not appearing that the counsel was prevented from attending by any unforeseen cause, or that no other sufficient counsel could be procured.—ESTABROOKS *v.* TAPLEY (1852), 2 All. 454.—**CAN.**

r. *Absence of counsel on public duties.*]—The absence of counsel on public duties is such an exceptional circumstance as will induce the ct. to relax the rule requiring that a conditional order for a new trial shall be moved for within the first four days of the Sittings next after the trial.—HUNT *v.* MALLEY (1878), 11 I. R. C. L. 534.—**IR.**

always indulgent in cases of necessity, application for indulgence should be specially & personally made.—VACHER & SONS, LTD. *v.* LONDON SOCIETY OF COMPOSITORS (1912), 29 T. L. R. 73, H. L.

422. Effect of non-attendance—As regards costs.]—If counsel do not appear when a case is called on, their clients must pay the costs.—VYSE *v.* BIRD (1845), 5 L. T. O. S. 239.

423. —— ——.]—In a pauper cause, the counsel who had certified to the ground of action, & had been assigned to the pauper pltf., returned his brief. The cause was called on some days later, & an excuse made that pltf.'s counsel was ill, & so again when it was called on at a later period. As there had been ample time, pltf. was ordered to pay costs for not proceeding to trial pursuant to his notice, although not dispaupered, & all further proceedings were ordered to be stayed in the meantime.—BREMMILOW *v.* ARDEN (1854), 23 L. T. O. S. 129, 191.

424. —— ——.]—Where judgment had been given for defts. owing to the absence by accident of the counsel for pltf., the case was restored to the list on pltf. paying the costs of the day & of the application to restore.—COCKLE *v.* JOYCE (1877), 7 Ch. D. 56; 47 L. J. Ch. 543; 37 L. T. 428; 26 W. R. 59.

Annotations:—**D.std.** Burgoine *v.* Taylor (1878), 9 Ch. D. 1, C. A. **N.F.** James *v.* Crow (1878), 7 Ch. D. 410.

425. —— **Rule discharged—Right reserved to restore—On explanation of non-attendance.**]—A rule *nisi* was granted, but when the case was called on no counsel appeared to support the rule. The ct. ordered the rule to be discharged, reserving to themselves the power of restoring it if the party obtaining it could satisfactorily account for the absence of counsel to support it.—STOKES *v.* KROMSHRODER, [1879] W. N. 196, C. A.

Mistakes & omissions of counsel.]—*See* Nos. 369 *et seq.*, *ante*.

See, also, Nos. 268 *et seq.*, *ante*.

SUB-SECT. 5.—WHAT MAY BE SAID IN SPEECHES IN CIVIL CASES.

426. In general—Reference to matters of general history.]—Counsel at a trial may refer to matters of general history, provided the licence be exercised with prudence, but cannot refer to particular books of history or read particular passages from them to prove any fact relevant to the cause. Works of standard authority in literature may, provided the privilege be not abused, be referred to by counsel at a trial, in order to show the general course of composition, explain the sense in which words are used, & matters of a like nature, but cannot be resorted to, to prove facts relevant to the cause.—DARBY *v.* OUSELEY (1856), 1 H. & N. 1; 25 L. J. Ex. 227; 2 Jur. N. S. 497; 156 E. R. 1093; *sub nom.* DERBY *v.* OUSELEY, 4 W. R. 463.

Annotation:—**Consd.** Henman *v.* Lester (1862), 12 C. B. N. S. 776.

427. —— **As to giving personal opinion.**]—On the hearing of a petition under Legitimacy Declaration Act, 1858 (c. 93), the jury intimated that they considered certain documents, which had been put in as evidence, were spurious, on examining the documents. Counsel for petitioners thereupon began to say he believed on his word & honour as a gentleman that the documents which petitioner produced ——, but the sentence was not finished, COCKBURN, C.J., saying: "I insist on your not finishing that sentence. It is a violation of a fundamental rule of conduct which every advocate ought to observe to give a jury your personal opinion."—RYVES *v.* A.-G. (1866), Annual Register, p. 255.

428. —— ——.]—Counsel ought not to inform the ct. of any facts he has personally investigated in the course of preparing an appeal; & where it is desired to bring new facts before the ct. proper evidence of them should be obtained & tendered, & the ct. should be asked by means of a proper application to receive it.—R. *v.* BENJAMIN (1913), 8 Cr. App. Rep. 146, C. C. A.

429. —— **As to attack on character of defendant.**]—It may be the duty of counsel to make attacks upon the character of deft., the law giving him a discretion.—CURTIS *v.* BOTTOMLEY (1911), *Times*, Aug. 1st, C. A.

430. —— **May not talk sedition.**]—A lawyer may not speak sedition in defence of his client.—TWYN'S CASE (1663), 6 State Tr. 513, 548.

—— **Slanderous & libellous statements — Privilege.**]—*See* LIBEL & SLANDER.

431. In opening—As to whether or not he will call witnesses.]—Deft.'s counsel, in addressing the jury, has no right to say to the jury that he shall call witnesses, unless they inform him that they are satisfied that deft. is entitled to a verdict as the

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422 i. *Effect of non-attendance — Whether ground for setting aside—Nonsuit.*]—Where pltf. was nonsuited, his cause having been unexpectedly called on in the absence of his counsel, several causes before it on the docket having been suddenly disposed of, the ct. refused to set aside the nonsuit, except on payment of costs. — DOE d. DUNLOP *v.* MCNAB (1842), 3 Ont. Dig. 4846.—**CAN.**

422 ii. —— —— *Verdict.*]—*Held:* no ground for setting aside a verdict for pltfs. that deft.'s counsel was absent.—PEGG *v.* PLANK (1853), 3 C. P. 396.—**CAN.**

422 iii. —— *Whether ground for new trial.*]—Where a cause was tried as undefended, in consequence of deft.'s counsel not being in ct. when it was called on, the ct. refused a new trial, though the amount in dispute was large, & deft. swore that he had a good defence, but the defence appeared to arise out of partnership transactions between them which remained unsettled.—DOHERTY *v.* HOGAN (1844), 2 Kerr. 492.—**CAN.**

422 iv. —— ——.]—The absence of deft.'s counsel is ground for a new trial only on payment of costs.—DRISCOLL *v.* HART (1839), 5 O. S. 677.—**CAN.**

422 v. —— ——.]—New trial granted, upon conditions, pltf. having recovered against a sheriff during the absence of his counsel.—MARTIN *v.* CORBETT (1849), 7 U. C. R. 169.—**CAN.**

422 vi. —— ——.]—Where a cause was tried as undefended in the absence of deft.'s counsel, who was accidentally out of ct. in expectation that the case which stood before it would occupy the whole day, the ct. granted a new trial on terms.—MCLEAN *v.* MCDONALD (1864), N. B. Dig. 544.—**CAN.**

422 vii. —— ——.]—Deft. applying for a new trial, on the ground that the cause was taken in the absence of his counsel, must state unequivocally that he has a good & legal defence to the action.—R. *v.* BAKER (1856), 6 C. P. 68.—**CAN.**

422 viii. —— ——.]—A case was tried in the unavoidable absence of counsel for defts., an application to postpone having been refused by the presiding judge:—*Held:* there ought to be a new trial on terms.—JACKSON *v.* MCLELLAN (1879), 19 N. B. R. 432.—**CAN.**

422 ix. —— —— *Interpleader issue.*]—In an interpleader issue, the verdict having been taken in the absence of deft.'s counsel, the ct. granted a new trial, without requiring the usual affidavit disclosing fully the merits, as there was not the same necessity for such affidavit in an interpleader as in ohter cases.—VIDAL *v.* UPPER CANADA BANK (1865), 24 U. C. R. 436; (1865), 15 C. P. 421.—**CAN.**

SECT. 6, SUB-SECT. 5.

426 i. *In general — Objectionable remarks to jury.*]—If counsel in addressing the jury makes objectionable remarks, the judge will require the objectionable observations to be withdrawn.—GILBERT *v.* CAMPBELL (1870), 2 Han. 55.—**CAN.**

426 ii. —— *Improper argument to influence court.*]—It is improper in argument to endeavour to influence a ct. by reference to a course which another ct. might think fit to adopt, or to the view which the Appellate Ct. might take of its proceedings, or even to refer to the likelihood of an appeal.—JUGGERNATH SAHOO *v.* MAHOMED HOSSEIN (1870), 15 W. R. 173.—**IND.**

429 i. —— *Making charges of fraud & crime.*]—Counsel are not justified in making serious charges of fraud & crime unless they are personally satisfied that there are reasonable grounds for putting them forward.—WESTON *v.* PEARY MOHAN DASS (1912), I. L. R. 40 Calc. 898.—**IND.**

431 i. *In opening—Stating amount of damages claimed.*]—*Semble:* it is proper for counsel for pltf. in his address to the jury to name a sum which he asks them

Sect. 6.—Duties and discretion of counsel at hearing: Sub-sects. 5, 6 & 7.]

case stands; he must either call his witnesses, or close his case without saying anything about them. —MORIARTY *v.* BROOKS (1834), 6 C. & P. 684; 2 Nev. & M. M. C. 624, Ex. Ch.

432. —— As to facts which cannot be proved.]—The counsel for deft. has no right to open facts which he is not in a condition to prove.—STEVENS *v.* WEBB (1835), 7 C. & P. 60.

433. —— ——.]—A judge must always rely to a great extent upon counsel, as to their not stating matters which are either legally irrelevant, or which they are not in a position to prove; it is impossible for the judge beforehand to know how much of the matters stated will be material or provable.—ROUPELL *v.* HAWS (1863), 3 F. & F. 784.

434. —— ——.]—Counsel should not mention in his statement facts requiring proof when he is not prepared with proof, nor facts which are irrelevant to the issue.—WALLACE *v.* COOK (1903), *Times*, June 15th.

435. —— As to reading brief to jury.]—Counsel must not read his brief to the jury, by way of opening the case.—BENNETT *v.* HARTHILL (1847), 8 L. T. O. S. 451.

436. —— That former jury found for plaintiff.]—Where pltf.'s counsel informed the jury that a former jury had found a verdict for pltf., a rule *nisi* for a new trial was granted.—BULL *v.* WRIGHT (1850), 15 L. T. O. S. 93.

437. —— As to letters demanding reparation—Action of tort.]—As a general rule, letters asking for reparation in actions of tort should not be read in opening where they represent the writer as the best of humankind & the person addressed as the worst. But reading a letter asking merely for reparation is a strictly business-like proceeding.—CLIGART *v.* MAYER (1854), 23 L. T. O. S. 288, N. P.

—— As to payment into court.]—*See* PRACTICE & PROCEDURE.

438. In summing up—As to issues on record & evidence which supports them.]—The province of counsel in summing up is confined to the issues on the record & the evidence which supports them (CRESSWELL, J.).—BOYKER *v.* SURGEY (1854), 24 L. T. O. S. 84.

439. In reply—By plaintiff's counsel—As to what amount of damages would carry costs.] — The counsel for pltf. in his reply, told the jury that unless they gave damages for a named sum in all probability the costs would be thrown upon pltf.: —*Held:* he was wrong in so doing, & the jury, in estimating damages, had no right to take into their consideration what amount would carry costs, the question of costs being in the judge. If counsel makes a suggestion to the jury which he has no right to make, it would be ground for a new trial if the jury acted upon it.—POOLE *v.* WHITCOMBE (1862), 12 C. B. N. S. 770; 3 F. & F. 70; 6 L. T. 783; 10 W. R. 732; 142 E. R. 1345.

SUB-SECT. 6.—WHAT AUTHORITIES MAY BE CITED.

440. Books on insurance written by mercantile men.]—*Qu.:* whether in an action on a policy of marine insurance counsel may read to the jury passages from books on insurance written by mercantile men.—CROFTS *v.* MARSHALL (1836), 7 C. & P. 597.

441. As to Act of Parliament passed since transaction which is subject of action.]—In opening a case, pltf.'s counsel has a right to refer to & comment on an Act of Parliament which has passed since the transaction which is the subject of the action as going to show what the law was before the passing of the Act, but he has no right to state what occurred in the progress of the Act through the Houses of Parliament, such as that counsel were heard against its passing, because he would not be entitled to go into evidence of such facts.—HOWARD *v.* GOSSETT (1842), Car. & M. 380; 4 State Tr. N. S. 839.

442. Medical books.]—Where a plea of insanity is set up, the prisoner's counsel has no right in his address to the jury to quote the opinions of medical men as given in their works.—R. *v.* CROUCH (1844), 3 L. T. O. S. 186; 9 J. P. 10; 1 Cox, C. C. 94.

443. ——.]—Medical books or books on farriery cannot be cited by counsel in proof of facts.

In this case, deft.'s counsel proposed to read certain specific canons, not as matters of speculative opinion, but as canons of the Church of Rome, promulgated by authority & sanctioned by the Pope in Council; these are matters of fact &, if of any authority, ought to have been proved. . . . Deft.'s counsel wanted to prove certain facts; he opened them as facts, & supposed that, because he could find them in certain documents & books, he was relieved from the necessity of calling witnesses to prove them, thereby avoiding a reply; in that notion he was clearly wrong (POLLOCK, C.B.).—DARBY *v.* OUSELEY (1856), 1 H. & N. 1; 25 L. J. Ex. 227; 2 Jur. N. S. 497; 156 E. R. 1093; *sub nom.* DERBY *v.* OUSELEY, 4 W. R. 463.

Annotation:—**Mentd.** Henman *v.* Lester (1862), 12 C. B. N. S. 776.

444. Law books — As to facts.] — A counsel in addressing a jury will not be permitted to show the probability of mistaken identity by citing cases from law books. They are authorities on questions of law, but the facts stated in them are not to be relied on upon questions of fact. Nor can such counsel state to the jury cases within his own knowledge.—R. *v.* BETTS (1851), 15 J. P. 582.

445. —— When author still living.]—It is much to be regretted, & it is a regret in which every judge on the bench shares, that text-books by living authors are more & more quoted in ct., & some judges have gone so far as to say that they shall not be quoted (KEKEWICH, J.).—UNION BANK *v.* MUNSTER (1887), 37 Ch. D. 51; 57 L. J. Ch. 124; 57 L. T. 877; 52 J. P. 453; 36 W. R. 72; 4 T. L. R. 29.

446. —— ——.]—Propositions in a legal text-book may be of great authority, but are not legal authority when the author is alive.—MCFADDEN & CO. *v.* BLUE STAR LINE (1905), 53 W. R. 576; 10 Com. Cas. 123.

Annotations:—**Mentd.** The Northumbria (1906), 95 L. T. 618; Hordern *v.* Commonwealth & Dominion Line, [1917] 2 K. B. 420.

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to award, & there is no difference between making such a claim orally & reading from the statement of claim.—WHITE *v.* GRAND TRUNK PACIFIC RY. CO. & HISLOP (1910), 13 W. L. R. 158.—**CAN.**

432 i. —— *As to facts which cannot be proved.*]—The ct. will permit counsel, in opening a case, to state, on his responsibility, any matter in proof in the cause which he considers properly admissible in evidence, subject to subsequent objection to the proof of such matter.—LOW *v.* HOLMES (1858), 8 I. Ch. R. 53; Drury *temp.* Nap. 290.—**IR.**

432 ii. —— ——.]—Observations by counsel are not justifiable unless they be warranted by facts proved, or which may legally be proved.—BUTT *v.* JACKSON (1846), 10 I. L. R. 120.—**IR.**

439 i. *In reply—By defendant's counsel—As to what amount would carry costs.*]—Deft.'s counsel told the jury that a verdict in favour of pltf. for any sum would carry costs. *Semble:* the objections to a verdict for pltf. founded upon it would apply equally to a verdict for deft. *Qu.:* as to the right to make such statement. — CARRICK *v.* JOHNSTON (1866), 26 U. C. R. 69.—**CAN.**

SUB-SECT. 7.—DUTY TO OBJECT AND RIGHT TO LEAVE COURT.

447. Duty to object at time—Misdirection to jury.]—If counsel sit by & hear the judge direct the jury as to what appears to him to be the question raised by the parties, he should object to it at the time, & not afterwards.—BUNNETT *v.* BREES (1844), 3 L. T. O. S. 51.

448. —— Judge leaving as fact for jury to determine matter which he should decide as point of law.]—If a judge at the trial leaves as a fact for the jury to determine any matter which he should decide as a point of law, the counsel should interpose; otherwise, if in the opinion of the ct. the jury decide the question left to them correctly in point of law, the judge's misdirection is no ground for a new trial.—DOE d. STRICKLAND *v.* STRICKLAND (1849), 8 C. B. 724; 19 L. J. C. P. 89; 14 L. T. O. S. 270; 137 E. R. 693.

Annotation:—**Mentd.** Price *v.* Powell (1858), 3 H. & N. 341.

449. —— Matter at issue not properly raised in pleadings.]—*Semble:* if counsel considers that the matter at issue between the parties is not properly raised in the pleadings, he should call the attention of the judge to it at the trial, when the plea may be amended.—HORTON *v.* MCMURTRY (1860), 5 H. & N. 667; 29 L. J. Ex. 260; 2 L. T. 297; 8 W. R. 528; 157 E. R. 1347.

Annotation:—**Mentd.** Clouston *v.* Corry, [1906] A. C. 122, P. C.

450. —— Misstatement in judge's summing up.]—If a judge misstates the evidence in summing up a case, the party complaining should correct the misstatement of the case, as a mistake is a matter of fact which is no ground for a new trial on the ground of misdirection.—PAYNE *v.* IBBOTSON (1858), 27 L. J. Ex. 341.

451. —— ——.]—If a mistake is made in summing up, counsel ought to correct it.—R. *v.* KAMS (1910), 4 Cr. App. Rep. 8, C. C. A.

Annotation:—**Mentd.** R. *v.* Landow (1913), 8 Cr. App. Rep. 218, C. C. A.

452. —— ——.]—If a judge makes a misstatement in summing up, counsel may interrupt to correct him.—R. *v.* MOWBRAY (1912), 8 Cr. App. Rep. 8, C. C. A.

453. —— Omission in judge's summing up.]—If counsel think that the judge has not called attention to any particular point in the summing up, it is their duty to call his attention to it at the time & ask him to submit it to the jury. Counsel are not to stand by.—SEATON *v.* BURNAND, BURNAND *v.* SEATON, [1900] A. C. 135; 69 L. J. Q. B. 409; 82 L. T. 205; 16 T. L. R. 232; 5 Com. Cas. 198, H. L.

Annotations:—**Apld.** Floyd *v.* Gibson (1909), 100 L. T. 761, C. A. **Mentd.** Parr's Bank *v.* Albert Mines Syndicate (1900), 5 Com. Cas. 116; *Re* Denton's Estate, Licenses Insce. Corpn. & Guarantee Fund *v.* Denton, [1904] 2 Ch. 178, C. A.; Weiser *v.* Segar, [1904] W. N. 93; Cantiere Meccanico Brindisino *v.* Janson, [1912] 3 K. B. 452, C. A.; London General Omnibus Co. *v.* Holloway, [1912] 2 K. B. 72, C. A.

454. How objection should be made—Point should be pressed.]—Where counsel objected to certain evidence being given, but did not press or insist upon it, & the judge understood him to acquiesce in his ruling:—*Held:* it was not necessary that the counsel should request the judge to take a note of the objection, but he ought to press it so that it might be clearly understood that he insisted upon it notwithstanding the ruling of the judge, because the other side might perhaps withdraw the evidence.—WARD *v.* GALSWORTHY (1854), 22 L. T. O. S. 274.

455. —— Document rejected as not being correctly stamped.]—Where on the trial of a cause an objection is taken to the reception of a document in evidence on the ground of the want of a stamp, & the objection is allowed by the judge & the evidence rejected, it is the duty of counsel, intending to rely on such rejection as a ground for a new trial, to object to the rejection of the document after the judge's decision that it requires a stamp, & formally to tender the document in evidence, & to require a note to be taken of the tender & its rejection, & failing to do so, the rejection cannot afterwards be made available as a ground for a new trial.—CAMPBELL *v.* LOADER (1865), 5 New Rep. 285; 34 L. J. Ex. 50; 11 L. T. 608; 29 J. P. 103; 13 W. R. 348.

Annotation:—**Mentd.** Hodson *v.* Walker (1872), L. R. 7 Exch. 55.

456. —— County court judge refusing to hear witness.]—Where a cty. ct. judge at the hearing of a cause refuses, without just ground, to hear witnesses, the proper course for counsel to take is to leave the ct., respectfully informing the judge of the reason, & to take no further part in the cause.—FORTESCUE *v.* CLAYTON (1860), 24 J. P. 712.

457. —— Where only facts in dispute.]—Where a judge may suppose that nothing but the facts are in dispute, the counsel ought, when they are dissatisfied with his opinion, to say, "I hope your lordship does not intend to direct the jury in such & such a manner."—MICHELSON *v.* BUTLER (1837), 1 Jur. 797.

458. —— On rejection of evidence by judge.]—Where evidence is rejected by a judge at *Nisi Prius*, the counsel relying on the evidence ought to make a formal tender of it to the judge, & request him to put it on his notes.—GIBBS *v.* PIKE & WELLS (1842), 1 Dowl. N. S. 409; 9 M. & W. 351; 12 L. J. Ex. 257; 6 Jur. 465; 152 E. R. 149.

Annotations:—**Mentd.** Seaman *v.* Netherclift (1876), 1 C. P. D. 540; Allen *v.* Flood, [1898] A. C. 1, H. L.

459. Effect of failure to object—That counsel prevented from addressing jury — Reluctant acquiescence not equivalent to objection.]—Where the sheriff had prevented counsel from addressing the jury, which he was desirous of doing, but counsel had acquiesced in what the sheriff did, though his acquiescence had been reluctant, a motion for new trial was refused.—NORTON *v.* SWEENEY (1844), 4 L. T. O. S. 98.

460. —— At proper time—Later objection prevented.]—If in commenting upon the evidence given at the trial, with a view to the explanation of the meaning of the questions to be left to the jury, & of the grounds of the decision proper for the jury, the judge makes some observations which appear to give a different sense to counsel's remarks from what counsel intended, he should suggest that fact at the time for the consideration of the judge, & not bring that objection for the first time before the ct. on a motion for a new trial. The making

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SECT. 6, SUB-SECT. 7.

s. *Duty to object at time.*]—CALDWELL *v.* DAVYS (1900), 7 B. C. R. 156.—**CAN.**

t. —— *To counsel's address to jury.*]—If counsel in addressing the jury makes remarks which are considered objectionable by opposing counsel he should call the attention of the judge to it at the time.—GILBERT *v.* CAMPBELL (1870), 2 Han. 55.—**CAN.**

u. *S. P.* SORNBERGER *v.* CANADIAN PACIFIC RY. CO. (1897), 24 A. R. 263.—**CAN.**

447 i. —— *Misdirection to jury.*]—A judge, who threatened to remove counsel from ct. for interrupting him in his explanation of the law to a jury, who could not agree, subsequently apologised to him.—ARNOTT *v.* HUMPHREYS (1877), 11 I. L. T. Jo. 386.—**IR.**

450 i. —— *Request for further directions to jury.*]—If further directions in the judge's charge to the jury are required counsel should formulate the propositions of the law applicable to the facts & ask the judge to instruct the jury accordingly.—MCKENNA *v.* CUMMISKY (1913), 13 E. L. R. 229.—**CAN.**

w. —— *Ruling of judge at Nisi Prius.*]—PARSONS *v.* QUEEN INSURANCE CO. (1878), 43 U. C. R. 271; *affd.* 4 A. R. 103.—**CAN.**

Sect. 6.—Duties and discretion of counsel at hearing: Sub-sect. 7. Sects. 7 & 8.]

of such observations cannot support a rule for a new trial upon the ground of misdirection, when the substantial question was in fact left for the consideration of the jury.—PONTIFEX *v.* WILKINSON (1845), 1 C. B. 75; 4 L. T. O. S. 313; 135 E. R. 464.

461. —— Counsel resting defence on one issue.]—Deft.'s counsel at the trial rested the defence exclusively on one issue, & after verdict on that, objected that the judge had omitted to notice a point of law not arising on that issue, but on another:—*Held:* he had precluded himself from the objection, & could not afterwards treat the judge's omission as a misdirection.—HORLOR *v.* CARPENTER (1857), 3 C. B. N. S. 172; 27 L. J. C. P. 1; 140 E. R. 705.

462. —— To judge taking time to consider matters.]—Counsel for pltf. in an action in the Ct. of Q. B., in detinue, who recovered a verdict for £10, at once applied to the judge to certify that there was sufficient reason for bringing the action in a superior ct. The judge said he would take time to consider whether he would certify or not. Deft.'s counsel was present, & made no objection to the judge's taking time to consider:—*Held:* by so doing he gave an implied consent to an arrangement that the judge should take time to consider.—HEDEN *v.* ATLANTIC ROYAL MAIL STEAM NAVIGATION CO. (1860), 2 E. & E. 671; 29 L. J. Q. B. 191; 6 Jur. N. S. 677; 8 W. R. 410; 121 E. R. 251.

463. —— By informing judge of other matters to be passed to jury.]—It may well be that when the judge frames specific questions to be put to the jury & submits them to counsel, who after full consideration agree to them, the point cannot afterwards be raised on an application for a new trial that other questions ought to have been put to the jury. But when no specific questions for the jury are prepared by the judge, the fact that at the close of his summing up he asked counsel whether there were any other questions which they desired to be put to the jury, & they replied in the negative, cannot prevent counsel from saying on a motion for a new trial that there is some other important question which ought to have been submitted to the jury. The judge cannot shift from his own shoulders the responsibility of putting proper questions to the jury by asking counsel (who may be a junior just called to the Bar) whether there are other questions which he desires to have put to the jury, so as to prevent its being said on a motion for a new trial that the proper questions were not put to the jury.—WEISER *v.* SEGAR, [1904] W. N. 93.

464. Effect of leaving court without justification—Remarks of judge prejudicial to client.]—The judge, in ct. & in the hearing of the jurors about to be sworn on the trial, having made observations which pltf.'s counsel considered to be prejudicial to his client's case, & such as would prevent his having an impartial hearing, he retired from the ct., & the cause was struck out, & the judge subsequently refused pltf.'s appliction to re-enter the cause for hearing. The Ct. of Exch. refused a rule calling upon the judge of the cty. ct. & defts. to show cause why the cause should not be re-entered & restored to the list for hearing.—JENNINGS *v.* LONDON GENERAL OMNIBUS CO. (1874), 30 L. T. 640; 22 W. R. 757.

465. —— Misconduct of jury.]—The mere communication by the jury, who are trying an action, of an opinion in favour of pltf. during or at the close of pltf.'s case before deft.'s evidence is heard, is not of itself such misconduct on the part of the jury as will justify counsel for deft. in refusing to go on with the case before that jury, & entitle deft. to a new trial.—CAMPBELL *v.* HACKNEY FURNISHING CO., LTD. (1906), 22 T. L. R. 318.

466. Effect of abandonment of well-founded objection.]—If a junior counsel at *Nisi Prius* takes a well-founded objection to deft., which his leader gives up, the ct. will not entertain it, in discussing a rule for a new trial or nonsuit on another ground.—WINTER *v.* MAIR (1811), 3 Taunt. 531; 128 E. R. 120.

SECT. 7.—BARRISTER LITIGANTS.

467. Right to open pleadings, address jury & give evidence.]—*Semble:* a barrister pltf. having opened the pleadings may address the jury on his own behalf without prejudice to his right afterwards to give evidence.—KENNEDY *v.* BROUN (1862), 2 F. & F. 801.

468. Whether heard both by himself & counsel.]—A party to the suit, being a barrister, & stating that he had received a brief in the usual form, was permitted to be heard, & also another counsel in support of the motion, the ct. expressly stating it was not to be deemed a precedent for dispensing with the rule that a party cannot be heard both by himself & his counsel.—NEWTON *v.* RICKETTS (1848), 2 Ph. 624; 11 L. T. O. S. 81; 12 Jur. 238; 41 E. R. 1084.

469. ——.]—A barrister, party to a cause, cannot be allowed to address the ct. where he is represented by counsel.—NEWTON *v.* CHAPLIN (1850), 10 C. B. 356; 19 L. J. C. P. 374; 14 Jur. 1121; 138 E. R. 144.

Annotation:—**Mentd.** Volant *v.* Soyer (1853), 13 C. B. 231.

470. Duty to elect.]—A barrister who is a party in an appeal case must elect to conduct his own case or to have it conducted by counsel.—NEW BRUNSWICK & CANADA RY. CO. *v.* CONYBEARE (1862), 9 H. L. Cas. 711; 31 L. J. Ch. 297; 11 E. R. 907, H. L.

Annotations:—**Mentd.** Kisch *v.* Central Ry. Co. of Venezuela (1865), 3 De G. J. & Sm. 122; *Re* Leeds Banking Co., *Ex p.* Barrett (1865), 5 New Rep. 460; Western Bank of Scotland *v.* Addie, Addie *v.* Western Bank of Scotland (1867), L. R. 1 Sc. & Div. 145, H. L.; A.-G. *v.* Ray (1874), 9 Ch. App. 402, n.; *Re* Coal Economising Gas Co., Gover's Case (1875), L. R. 20 Eq. 114; Houldsworth *v.* City of Glasgow Bank (1880), 5 App. Cas. 317, H. L.; McKeown *v.* Bondard Peveril Gear Co. (1896), 74 L. T. 310; Hambro *v.* Burnand, [1903] 2 K. B. 399.

471. Judge arguing his own case.]—One of defts. (having lately been one of the judges of the Common Pleas, but then discharged of his place after eight years sitting there) came into the Ct. of King's Bench, & in arrest of judgment argued his own case, not as counsel, nor at the Bar, but in the ct. in his cloak, having a chair set for him by the order of the Lord Chief Justice.—R. *v.* ATKINS (1682), 3 Mod. Rep. 3; 87 E. R. 3.

Annotation:—**Mentd.** R. *v.* Soley (1707), 11 Mod. Rep. 115.

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463 i. *Effect of failure to object—To questions put to jury—Motion for new trial.*]—On a new trial motion, when the judge has put, without objection, certain questions to the jury, neither party can afterwards raise the point that such questions did not decide the real question, & that other questions should have been put. If counsel is of opinion that the questions put do not go to the root of his case as presented by him it is his duty to ask the judge to put such question as he considers requisite.—COLVILLE *v.* BOWMAN (1904), 38 I. L. T. 75.—**IR.**

466 i. *Effect of abandonment of well-founded objection—On same objection taken at re-hearing.*]—When counsel, at the original hearing, abandon an objection respecting parties, or proof of a document, that objection cannot be made on a re-hearing.—MALONE *v.* GERAGHTY (1843), 3 Dr. & War. 252; 2 Con. & Law. 252.—**IR.**

SECT. 7.

468 i. *Whether heard both by himself & counsel.*]—A barrister, against whom an action is brought, has no right to conduct his defence both in person & by counsel.—ROBINSON *v.* PALMER (1851) 2 All. 223.—**CAN.**

472. Barrister conducting criminal prosecution on own behalf.]—A barrister who conducts a criminal prosecution on his own behalf is entitled to no other privilege than an ordinary person, & will not therefore be allowed to comment on the evidence or address the jury.—R. *v.* PHILIPS (1844), 2 L. T. O. S. 287 ; 1 Cox, C. C. 17.

473. ——.]—In a criminal matter a party will not be entitled to retain wig & gown among the Bar as his own counsel (WILDE, C.J.).—NEWTON *v.* CHAPLIN (1850), 19 L. J. C. P. 374 ; 14 Jur. 1121.

Annotations :—**Mentd.** Volant *v.* Soyer (1853), 13 C. B. 231 ; Morgan *v.* Fernyhough (1855), 11 Exch. 205.

474. Whether robes should be worn.]—Pltf. appeared in person, & said he claimed to appear in the dress of his profession, though it was long since he had used it, because the question he intended to raise was on behalf of the profession :—*Held :* he need make no apology for appearing in his proper dress.—NEATE *v.* DENMAN (1874), L. R. 18 Eq. 127 ; 43 L. J. Ch. 409.

SECT. 8.—CONVEYANCERS.

475. Jurisdiction of court over.]—The ct. has no summary jurisdiction over a conveyancer, he not being an attorney, in respect of deeds detained by him from his clients, or in respect of any other disputes between him & them.—*Ex p.* CHARLES (1828), 6 L. J. O. S. K. B. 122.

476. Remedy for fees.]—A certificated conveyancer can maintain no action for his fees.—JENKINS *v.* SLADE (1824), 1 C. & P. 270.

Annotation :—**Dbtd.** Steadman *v.* Hockley (1846), 10 Jur. 819. You may assume that a certificated conveyancer may maintain an action for his fees, notwithstanding what was said by Best, C.J., in *Jenkins* v. *Slade* (POLLOCK, C.B.).

477. ——.]—*Assumpsit* for work & labour lies at the suit of a certificated conveyancer to recover his fees.—DAVIES *v.* SIBLY (1825), 6 Dow. & Ry. K. B. 4.

478. ——.]—A certificated conveyancer may maintain an action for his fees.—POUCHER *v.* NORMAN (1825), 3 B. & C. 744 ; 5 Dow. & Ry. K. B. 648 ; 3 L. J. K. B. 115 ; 107 E. R. 909.

Annotations :—**Folld.** Davies *v.* Sibly (1825), 6 Dow. & Ry. K. B. 4. **Apprvd.** Steadman *v.* Hockley (1846), 10 Jur. 819.

479. —— **Not lien.**]—A certified conveyancer has no lien for his charges upon deeds delivered to him, " with & in respect of " which he does certain business for the owner of the deeds.—STEADMAN *v.* HOCKLEY (1846), 15 M. & W. 553 ; 15 L. J. Ex. 332 ; 7 L. T. O. S. 211 ; 10 Jur. 819.

Annotation :—**Mentd.** Castellain *v.* Thompson, Thompson *v.* Castellain (1862), 32 L. J. C. P. 79.

480. —— **Effect of 44 Geo. 3, c. 98, s. 14.**]—The above Act, which imposed a penalty on any unqualified person who acted as a conveyancer, was a prohibitory Act, & such person could not recover for conveyances drawn by him.—TAYLOR *v.* CROWLAND GAS & COKE CO. (1854), 10 Exch. 293 ; 23 L. J. Ex. 254 ; 23 L. T. O. S. 194 ; 18 Jur. 913 ; 2 W. R. 563 ; 2 C. L. R. 1247 ; 156 E. R. 455.

Annotations :—**Expld.** D'Allex *v.* Jones (1856), 2 Jur. N. S. 979. **Refd.** Day *v.* Hemings (1861), 26 J. P. 55 ; Melliss *v.* Shirley L. B. (1885), 16 Q. B. D. 446, C. A. **Mentd.** Payne *v.* New South Wales Coal & Intercolonial Steam Navigation Co. (1854), 10 Exch. 283 ; Adams *v.* G. W. Ry. Co. (1861), 6 H. & N. 404 ; *Re* Brown *v.* L. & N. W. Ry. Co. (1864), 32 L. J. Q. B. 318.

See, now, Stamp Act, 1891 (c. 39), s. 44.

481. —— **& outlays—Employment procured by misrepresentation.**]—If a certificated conveyancer induce a creditor of a bkpt. to employ him in investigating bkpt.'s affairs by representing himself to be an attorney & solr., he is not entitled to recover anything for his trouble ; & even if he paid fees to counsel in the course of the investigation, he cannot recover them of his employer as money paid, laid out, & expended.—CRAMMOND *v.* CROUCH (1828), 3 C. & P. 77, N. P.

482. Conveyancing counsel of court—Position of.]—The conveyancing counsel of the ct. must be treated as the agent of the vendor as between the vendor & the purchaser, &, though in a sense an officer of the ct., is still counsel for the vendor, who is responsible for any misrepresentations in the conditions of sale settled by such counsel.—*Re* BANISTER, BROAD *v.* MUNTON (1879), 12 Ch. D. 131 ; 48 L. J. Ch. 837 ; 40 L. T. 828 ; 27 W. R. 826, C. A.

Annotations :—**Mentd.** Smith *v.* Robinson (1879), 13 Ch. D. 148 ; Blenkhorn *v.* Penrose (1880), 43 L. T. 668 ; Jones *v.* Rimmer (1880), 29 W. R. 165, C. A. ; *Re* Marsh & Granville (1883), 24 Ch. D. 11, C. A. ; Nash *v.* Wooderson (1884), 52 L. T. 49 ; *Re* Scott & Alvarez's Contract, Scott *v.* Alvarez (1895), 12 R. 474, C. A. ; *Re* Tyler, *Ex p.* Official Receiver, [1907] 1 K. B. 865, C. A.

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474 i. *Whether robes should be worn.*]—Where a barrister appears as a litigant in person, he must not address the ct. from the advocate's table or in robes, but from the same place & in the same way as any ordinary member of the public.—*Re* WEST HOPETOWN TEA CO. (1886), I. L. R. 9 All. 180.—**IND.**

z. *Not entitled to trial at bar.*]—Being a barrister not, as formerly, ground to obtain trial at bar.—BURNE *v.* BURNE (1800), Rowe, 615.—**IR.**

BASE FEE.

See Real Property and Chattels Real.

BASTARDY.

PAGE

PART I. THE PRESUMPTION OF LEGITIMACY 358
SECT. 1. THE NATURE OF THE PRESUMPTION 358
SECT. 2. WHEN THE PRESUMPTION ARISES 359
SECT. 3. HOW THE PRESUMPTION MAY BE REBUTTED 360
SECT. 4. WHAT EVIDENCE IS ADMISSIBLE TO REBUT THE PRESUMPTION 364

PART II. MODE OF DETERMINING QUESTION OF LEGITIMACY 369
SECT. 1. BY ACT OF PARLIAMENT 369
SECT. 2. BY LEGAL PROCEEDINGS 369
SUB-SECT. 1. UNDER LEGITIMACY DECLARATION ACT, 1858 369
SUB-SECT. 2. OTHER PROCEEDINGS 370

PART III. LEGITIMATION BY SUBSEQUENT MARRIAGE 372
SECT. 1. CONDITIONS OF LEGITIMATION 372
SECT. 2. EFFECT OF LEGITIMATION 374

PART IV. LEGAL POSITION OF BASTARD 375
SECT. 1. THE BASTARD'S RELATIONSHIPS 375
SECT. 2. RIGHTS AND LIABILITIES 375
SUB-SECT. 1. PERSONAL 375
SUB-SECT. 2. PROPRIETARY 376
A. Descent and Distribution 376
(*a*) To the Bastard 376
(*b*) From the Bastard 376
B. Under Wills 377
C. Under other Instruments 378

PART V. RIGHTS AND LIABILITIES TOWARDS THE BASTARD 381
SECT. 1. RIGHT TO CUSTODY 381
SECT. 2. GUARDIANSHIP 383
SECT. 3. EDUCATION 383
SECT. 4. MAINTENANCE 384

PART VI. AFFILIATION PROCEEDINGS AND KINDRED PROCEEDINGS UNDER COLONIAL STATUTES 387
SECT. 1. REQUISITES FOR JURISDICTION 387
SUB-SECT. 1. AS TO THE CHILD 387
SUB-SECT. 2. AS TO THE MOTHER 387

PAGE
SECT. 2. THE APPLICATION FOR A SUMMONS 389
SECT. 3. THE SUMMONS 391
SUB-SECT. 1. ISSUE 391
SUB-SECT. 2. SERVICE 392
SECT. 4. THE HEARING 394
SECT. 5. THE ORDER 400
SECT. 6. ENFORCEMENT OF ORDER 403
SECT. 7. APPEALS 405
SUB-SECT. 1. TO QUARTER SESSIONS 405
SUB-SECT. 2. OTHER MODES OF APPEAL 406

Divorce Proceedings . *See* HUSBAND AND WIFE.

Maintenance of Bastard Paupers . . . ,, POOR LAW.

Proof and Validity of Marriage . . *See* EVIDENCE; HUSBAND AND WIFE.

Registration of Births ,, REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS.

Part I.—The Presumption of Legitimacy.

SECT. 1.—THE NATURE OF THE PRESUMPTION.

1. Presumption of fact.]—The presumption of the legitimacy of a child born during marriage is not a *presumptio juris et de jure*, but a presumption of fact.—GARDNER *v.* GARDNER (1877), 2 App. Cas. 723, H. L.

Annotations:—**Refd.** Jones *v.* Davies (1900), 70 L. J. Q. B. 38; Lloyd *v.* Powell Duffryn Steam Coal Co., [1914] A. C. 733, H. L. **Mentd.** The Poulett Peerage, [1903] A. C. 395, H. L.

2. —— May be rebutted by evidence.]—The presumption of legitimacy arising from the birth of a child during wedlock, the husband & wife not being proved to be impotent & having opportunities of access to each other during the period in which a child could be begotten & born in the course of nature, may be rebutted by circumstances inducing a contrary presumption.—BANBURY PEERAGE CASE (1811), 1 Sm. & St. 153; 57 E. R. 62.

Annotations:—**Consd.** Morris *v.* Davies (1837), 5 Cl. & Fin. 163, H. L. **Refd.** Legge *v.* Edmonds (1855), 25 L. J. Ch. 125; Plowes *v.* Bossey (1862), 2 Drew. & Sm. 145; Atchley *v.* Sprigg (1864), 33 L. J. Ch. 345; Hawes *v.* Draeger (1883), 23 Ch. D. 173; Bosvile *v.* A.-G. (1887), 57 L. T. 88. **Mentd.** Berkeley Peerage Case (1811), 4 Camp. 401, H. L.; Head *v.* Head (1823), 1 Sim. & St. 150; R. *v.* All Saints, Southampton (1828), 7 B. & C. 785; Davies *v.* Morgan (1831), 1 Cr. & J. 587; Stockdale *v.* Hansard (1839), 9 Ad. & El. 1; R. *v.* Millis (1844), 8 Jur. 717; De Bode's Case (1845), 8 Q. B. 208; Boileau *v.* Rudlin (1848), 12 Jur. 899; Van der Donckt *v.* Thellusson (1849), 8 C. B. 812; Sinclair *v.* Sinclair (1853), 2 W. R. 69; Gee *v.* Ward (1857), 7 E. & B. 509; Gurney *v.* Gurney (1863), 1 Hem. & M. 413; *Re* Yearwood's Trusts (1877), 5 Ch. D. 545; *Re* Perton, Pearson *v.* A.-G. (1885), 53 L. T. 707; *Re* Westhead's Settlmt. Trusts (1885), 1 T. L. R. 651, C. A.; Burnaby *v.* Baillie (1889), 42 Ch. D. 282; Lyell *v.* Kennedy, Kennedy *v.* Lyell (1889), 14 App. Cas. 437, H. L.; Gordon *v.* Gordon, [1903] P. 141.

3. —— ——.]—The presumption in favour of the legitimacy of a child born in wedlock is not a *presumptio juris et de jure*, but may be rebutted by evidence.—BOSVILE *v.* A.-G. (1887), 12 P. D. 177; 56 L. J. P. 97; 57 L. T. 88; 36 W. R. 79; 3 T. L. R. 726, D. C.; *subsequent proceedings*, 4 T. L. R. 7, C. A.

Annotations:—**Consd.** Burnaby *v.* Baillie (1889), 42 Ch. D. 282. **Refd.** Evans *v.* Evans & Blyth (1904), 20 T. L. R. 612.

4. —— ——.]—The presumption in favour of the legitimacy of a child born in wedlock within the usual period of gestation is a presumption which may be rebutted by appropriate evidence.—THE POULETT PEERAGE, [1903] A. C. 395; 72 L. J. K. B. 924; 19 T. L. R. 644, H. L.

5. —— —— Burden of proof.]—When a married woman has a child, the presumption is in favour of its legitimacy. Formerly the presumption was that if the husband continued within the four seas & was alive at the child's birth, such child could not be a bastard. But now the law allows inquiry; those who dispute the fact of the child's legitimacy are bound to make out the contrary.—WRIGHT *v.* HOLDGATE (1850), 3 Car. & Kir. 158.

6. —— —— ——.]—The presumption is that a husband admits by his marriage that a child born subsequently to the marriage is his, if he takes no steps to repudiate it but adopts towards it exactly the same course as if it were his own child. Assuming a valid marriage the child is legitimate, & the burden of proving the contrary lies on those who dispute the legitimacy.—ANON. *v.* ANON. (1856), 23 Beav. 273; 53 E. R. 107.

Annotation:—**Mentd.** Poulett Peerage Claim (1903), 72 L. J. K. B. 924, H. L.

See, now, Nos. 75, 76, *post*.
See, also, Nos. 7—10, *post*.

Validity of marriage.]—*See* HUSBAND & WIFE.

PART I. SECT. 1.

1 i. *Presumption of fact.*]—There is no presumption of legitimacy where the party merely sets forth circumstances said to infer the marriage of his alleged parents.—SWINTON *v.* SWINTON (1862), 24 Dunl. (Ct. of Sess.) 833.—**SCOT.**

SECT. 2.—**WHEN THE PRESUMPTION ARISES.**

7. Marriage during pregnancy — Presumption arises.]—The marriage of the parties is the criterion adopted by the law, in cases of antenuptial generation, for ascertaining the actual parentage of the child. For this purpose it will not examine when gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage.

T. married E. in June, 1848, & E. had a child in Dec. of the same year. T. did not cohabit with his wife after Aug., 1848, but he allowed £20 a year for the support of the child up to the time of his death in 1867 :—*Held :* the child was the legitimate son of T.—TURNOCK *v.* TURNOCK (1867), 36 L. J. P. & M. 85 ; 16 L. T. 611.

8. —— ——.]—On the birth of a child shortly after marriage the presumption of legitimacy clearly exists until rebutted by satisfactory evidence to the contrary.—*Re* PARSONS' TRUST (1868), 18 L. T. 704.

9. —— ——.] — After open courtship & constant intercourse, a man & woman (she being ultimately in an advanced state of pregnancy) hurried on their marriage to prevent, or to mitigate, scandal, & in less than seven weeks after marriage she gave birth to a child :—*Held :* the presumption of the husband's paternity to that child was next to insuperable, & the *onus* of establishing the husband's denial of paternity lay on himself.—GARDNER *v.* GARDNER (1877), 2 App. Cas. 723, H. L.

Annotations :—**Consd.** Lloyd *v.* Powell Duffryn Steam Coal Co., [1914] A. C. 733, H. L. **Refd.** Jones *v.* Davies (1900), 70 L. J. Q. B. 38, D. C. ; *Re* Poulett Peerage, [1903] A. C. 395, H. L.

10. —— ——.]—If a man, with full knowledge of the pregnancy of a woman with whom he has had sexual intercourse, becomes, during her pregnancy, engaged to be married to her, the fact of that contract having been entered into, though not carried out, is a most powerful piece of evidence on the issue of fact of the paternity of the child, because by the marriage a relation would be created from which the presumption of the legitimacy of the child would arise (LORD ATKINSON).—LLOYD *v.* POWELL DUFFRYN STEAM COAL CO., LTD., [1914] A. C. 733 ; 83 L. J. K. B. 1054 ; 111 L. T. 338 ; 7 B. W. C. C. 330, H. L.

11. Possibility of access—Husband within four seas.]—A child born of a married woman, whose husband is within the four seas, is always to be presumed to be legitimate, unless there is evidence of a satisfactory character that sexual intercourse did not take place between them at any time when, in the course of nature, the husband might have been the father of the child.—HEAD *v.* HEAD (1823), Turn. & R. 138 ; 1 Sim. & St. 150 ; 37 E. R. 1049, L. C.

Annotations :—**Consd.** Morris *v.* Davies (1828), 3 C. & P. 427 ; Plowes *v.* Bossey (1862), 2 Drew. & Sm. 145. **Refd.** Bury *v.* Philpott (1833), 3 L. J. Ch. 119 ; Atchley *v.* Sprigg (1864), 10 Jur. N. S. 144 ; Bosvile *v.* A.-G. (1887), 57 L. T. 88, D. C. ; Gordon *v.* Gordon & Granville Gordon (1903), 72 L. J. P. 33.

See, also, Nos. 5, *ante,* 35, *post.*

12. —— **Presumption arises.**]—Where husband & wife have been in such a situation that sexual intercourse may have taken place, the presumption of law is in favour of the issue, but this presumption may be rebutted.—MORRIS *v.* DAVIES (1837), 5 Cl. & Fin. 163 ; 1 Jur. 911 ; 7 E. R. 365, H. L.

Annotations :—**Apld.** Saye and Sele Barony (1848), 1 H. L. Cas. 507, H. L. ; Piers *v.* Piers (1849), 2 H. L. Cas. 331, H. L. **Consd.** Legge *v.* Edmonds (1855), 25 L. J. Ch. 125 ; Gurney *v.* Gurney (1863), 32 L. J. Ch. 456. **Apprvd.** The Aylesford Peerage (1885), 11 App. Cas. 1, H. L. **Foll.** Bosvile *v.* A.-G. (1887), 12 P. D. 177, D. C. **Refd.** R. *v.* Mansfield (1841), 1 Q. B. 444 ; Plowes *v.* Bossey (1862), 2 Drew. & Sm. 145 ; Atchley *v.* Sprigg (1864), 33 L. J. Ch. 345 ; Hawes *v.* Draeger (1883), 23 Ch. D. 173 ; *Re* Walker, *Re* Jackson (1885), 53 L. T. 660 ; Burnaby *v.* Baillie (1889), 42 Ch. D. 282 ; Gordon *v.* Gordon & Granville Gordon (1903), 72 L. J. P. 33 ; Evans *v.* Evans & Blyth (1904), 20 T. L. R. 612 ; Lloyd *v.* Powell Duffryn Steam Coal Co., [1914] A. C. 733, H. L. **Mentd.** Woodmason *v.* Doyne (1843), 10 Cl. & Fin. 22, H. L. ; Stewart *v.* Forbes (1849), 1 Mac. & G. 136, L.C. ; Pisani *v.* A.-G. for Gibraltar (1874), L. R. 5 P. C. 516, P. C. ; *Re* Yearwood's Trusts (1877), 5 Ch. D. 545 ; Aronegary *v.* Sambonade (1881), 50 L. J. P. C. 28, P. C. ; *Re* Shephard, George *v.* Thyer, [1904] 1 Ch. 456.

PART I. SECT. 2.

a. *Birth before marriage.*]—In a question as to the paternity of a child born before the marriage of the alleged father with the mother, there is no presumption that he is the father; but the fact of paternity must be proved.—INNES *v.* INNES (1837), 2 Sh. & Macl. 417.—**SCOT.**

7 i. *Marriage during pregnancy—Presumption arises.*]—A. had intercourse with B. up to June, 1860. B. married C. in Oct., 1860, & a child was born on Feb. 11, 1861 :—*Held :* the child having been born in lawful wedlock, B.'s evidence was inadmissible to prove it illegitimate.—RYAN *v.* MILLER (1861), 21 U. C. R. 202 ; *affd.* 22 U. C. R. 87.—**CAN.**

7 ii. —— ——.]—On the facts set out above :—*Semble :* no evidence could be received to rebut the presumption of legitimacy the evidence being consistent with the fact of access by the husband before marriage.—RYAN *v.* MILLER (1862), 22 U. C. R. 87.—**CAN.**

7 iii. —— ——.]—A child was born three months after the marriage of female pursuer with male pursuer, & they stated that no sexual intercourse took place between them until after the marriage, & that the husband was not aware of his wife's pregnancy until the birth of the child. It was proved, however, that they had been seen on terms of great familiarity on two occasions about a year & a half & nine months respectively before the birth of the child :—*Held :* the intimacy of the pursuers, followed by marriage, raised a strong presumption in favour of the husband being the father of the child, & the testimony of the spouses was insufficient to overcome that presumption.—REID *v.* MILL (1879), 6 R. (Ct. of Sess.) 659 ; 14 Sc. L. R. 338.—**SCOT.**

7 iv. —— ——.]—The mother of a child born upon Jan. 5, 1890, alleged that it was the result of an act of connection upon Apr. 7, 1889. Defender admitted that he had once had connection with the pursuer in Feb. In Aug. the pursuer married a widower, to whom she had confided that she was pregnant. She & her husband both denied ever having been unduly intimate before their marriage :—*Held :* the presumption that the husband was the father of the child arising from his having married her in full knowledge of her pregnancy had not been rebutted.—KERRS *v.* LINDSAY (1890), 18 R. (Ct. of Sess.) 365 ; 28 Sc. L. R. 233.—**SCOT.**

12 i. *Possibility of access—Presumption arises.*]—When there is opportunity of cohabitation between husband & wife, the law presumes there has been intercourse between them.—DAY *v.* SPREAD, 1 Leg. Rep. 167.—**IR.**

12 ii. —— ——.] — Whenever it is sought to bastardise a child, if it only appear that the child may be the offspring of the mother's husband, or of another man, the law presumes in favour of legitimacy, & does not sanction a discriminating inquiry upon the subject.—DOE d. MARR *v.* MARR 1852), 3 C. P. 36. —**CAN.**

12 iii. —— ——.]—In or about the year 1860 a wife, in consequence of her husband's ill-treatment, left him & went to reside a considerable distance away. She did not return until about 1875, some six years after his death. During this period of absence a son was born to her :—*Held :* if her husband could be shown to have had access to her or to have gone to the part of the country in which she was residing so that he might have had access at about the appropriate time before the birth of the child, an almost irrebuttable presumption would arise that such child was legitimate.—NGANGELIZWE KAMA *v.* KAMA'S EXORS. & OTHERS (1903), 17 E. D. C. 39.—**S. AF.**

b. *Child of Victorian woman & Chinaman.*]—No presumption of legitimacy arises in the case of a child born in Victoria in 1876 to a white woman & a Chinaman, who had lived together as man & wife for several years.—POTTER *v.* MINAHAN (1908), 7 C. L. R. 277.—**AUS.**

c. *Under Evidence Act* (1 *of* 1872), *s.* 112—*Burden of proof.*]—TIRLOK NATH SHUKUL *v.* LACHMIN KUNWARI (1903), I. L. R. 25 All. 403 ; L. R. 30 I. A. 152 ; 7 C. W. N. 617.—**IND.**

d. *Child introduced as son—Declarations of marriage.*]—Deceased during his lifetime made conflicting declarations & statements as to the legitimacy of a son whom he had brought home with him from Java after the mother's death. He treated him with affection & introduced him as his son, whilst he treated two illegitimate children with a marked difference, & the son was for some time treated as legitimate by members of deceased's family in his house. Deceased was of profligate habits & had frequently declared he never was married. There being less motive for deception in the declarations of marriage than in those against it & deceased's actions being in its favour, the ct. decreed for legitimacy. —COMPTON *v.* COMPTON (1832), Milw. 424.—**IR**

Sect. 2.—When the presumption arises. Sect. 3.]

13. —— ——.]—So strong is the legal presumption of legitimacy that, in the case of a white woman having a mulatto child, although the husband is also white, & the supposed paramour black, the child is to be presumed legitimate, if there was any opportunity for intercourse (LORD CAMPBELL).—PIERS *v.* PIERS (1849), 13 Jur. 569, H. L.

Annotations :—**Mentd.** Sichel *v.* Lambert (1864), 15 C. B. N. S. 781; De Thoren *v.* A.-G. (1876), 1 App. Cas. 686, H. L.; Collins *v.* Bishop (1878), 48 L. J. Ch. 31; Aronegary *v.* Sambonade (1881), 50 L. J. P. C. 28, P. C.; Fox *v.* Bearblock (1881), 44 L. T. 508; *Re* Lauderdale Peerage (1885), 10 App. Cas. 692, H. L.; Andrewes *v.* Uthwatt (1886), 2 T. L. R. 895; *Re* Duvall, Duvall *v.* Craddock (1892), 36 Sol. Jo. 398; *Re* Shephard, George *v.* Thyer, [1904] 1 Ch. 456.

14. —— —— **Even where wife adulteress.**]—If a married woman has issue in adultery, if the husband is not impotent & is within the four seas, the issue is not a bastard.—DONE & EGERTON *v.* HINTON & STARKY (1617), Roll. Abr. 358, pl. 8.

15. —— —— ——.]—A., the wife of R., lived in London with B. as B.'s mistress & gave birth to a child, who was considered by all parties to be the child of B. R. also lived in London & met A. from time to time, but none of these interviews was alleged to have occurred within a considerable period of the birth of the child :—*Held :* access would be presumed & the child was legitimate, for, if access could by any possibility have taken place, nothing would prevent the child from being considered the son of the husband.—SMYTH *v.* CHAMBERLAYNE (1792), Nicholas, Adult. Bast. 147.

16. —— —— ——.]—Access is such access as affords an opportunity of sexual intercourse, & where there is evidence of such access between a husband & wife, within a period capable of raising the legal presumption as to the legitimacy of an after-born child, the ct. will not direct an issue upon evidence showing the continued adulterous intercourse of the wife with another man, & the improbability of the husband being the father, but will declare the legitimacy of the child.—BURY *v.* PHILLPOT (1834), 2 My. & K. 349; 3 L. J. Ch. 119; 39 E. R. 977.

Annotations :—**Refd.** Morris *v.* Davies (1837), 5 Cl. & Fin. 163, H. L.; Hawes *v.* Draeger (1883), 23 Ch. D. 173.

17. —— —— ——.]—In the case of a child born in wedlock, if the husband could, from circumstances of time, place, & health, have had nuptial intercourse with his wife, the mother of the child, & it be not proved that he did not have such intercourse, he must be considered the father of her child, even if she were shown to have committed adultery with any number of men.

Sexual intercourse between man & wife must be presumed, & nothing except evidence that the husband did not have such intercourse at the period of conception can bastardise a child born in wedlock.—GORDON *v.* GORDON, [1903] P. 141; 72 L. J. P. 33; 89 L. T. 73; *subsequent proceedings*, [1904] P. 163.

Annotations :—**Refd.** Evans *v.* Evans & Blyth (1904), 20 T. L. R. 612. **Mentd.** *Re* Wingfield & Blew, [1904] 2 Ch. 665, C. A.; R. *v.* Wigand, *Re* Wigand (1913), 82 L. J. K. B. 735.

18. —— —— —— **Actual intercourse.**]—If the jury are satisfied that intercourse took place between husband & wife at such times as in the course of nature to account for the birth of the child, such child must be taken to be the husband's own child, though during the same period other men may have had intercourse with the wife.—WRIGHT *v.* HOLDGATE (1850), 3 Car. & Kir. 158.

See, also, Nos. 37, 46 *et seq.*, *post.*

19. Termination of marriage—Death of husband—Period of gestation.]—A child, born forty weeks & nine days after the death of its mother's husband shall be considered legitimate.—ALSOP *v.* BOWTRELL (1619), Cro. Jac. 541; 79 E. R. 464.

Annotations :—**Refd.** Pendrell *v.* Pendrell (1732), 2 Stra. 925. **Mentd.** Altham *v.* Anglesea (1708), 11 Mod. Rep. 210; St. Andrew & St. Brides (1717), 1 Stra. 51; Omychund *v.* Barker (1744), 1 Atk. 21.

20. —— **Divorce—Subsequent conception.**]—A child begotten after divorce *a mensâ et thoro* shall be taken to be a bastard; otherwise after voluntary separation unless found that the husband had no access.—ST. GEORGE'S *v.* ST. MARGARET'S, WESTMINSTER (PARISHES OF) (1706), 1 Salk. 123; 91 E. R. 115.

Annotations :—**Refd.** St. Andrew & St. Brides (1717), 1 Stra. 51; Hetherington *v.* Hetherington (1887), 57 L. T. 533.

21. —— **Birth between decrees nisi & absolute.**]—A child born, after a decree for dissolution of marriage between the dates of the decree *nisi* & decree absolute is *primâ facie* legitimate; & where the paternity of the child is denied by the father, the burden of proving illegitimacy rests on the father.—EVANS *v.* EVANS & BLYTH, [1904] P. 274, 378; 73 L. J. P. 87, 114; 91 L. T. 356, 600; 20 T. L. R. 516, 612.

22. Judicial separation—Separation order—Presumption of non-access.]—After an order authorising the wife to refuse to cohabit with her husband under Matrimonial Causes Act, 1878 (c. 19), s. 4 (*see, now*, Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5), the ordinary presumptions as to access & legitimacy are reversed. The presumption as to non-access applies from the date of the order as in the case of a judicial separation, & any child of the wife born more than nine months after the parties have separated will, in the absence of evidence to the contrary, be presumed to be illegitimate.—HETHERINGTON *v.* HETHERINGTON (1887), 12 P. D. 112; 56 L. J. P. 78; 57 L. T. 533; 51 J. P. 294; 36 W. R. 12.

Annotation :—**Mentd.** Manders *v.* Manders, [1897] 1 Q. B. 474.

23. Divorce for Impotence — Issue of second marriage.]—If a man divorced by reason of perpetual impotency in himself marries again, the issue of the second marriage is legitimate.—BURY'S CASE (1598), 5 Co. Rep. 98 b; 77 E. R. 207.

Annotations :—**Mentd.** Kenn's Case (1607), 7 Co. Rep. 42 B.; Harris *v.* Austin (1615), 3 Bulst. 36; Frampton *v.* Stephens (1882), 21 Ch. D. 164; Napier *v.* Napier, [1915] P. 184, C. A.

SECT. 3.—HOW THE PRESUMPTION MAY BE REBUTTED.

24. Conclusive evidence required.]—The evidence to prove the illegitimacy of the child of a married

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20 i. *Termination of marriage — Divorce.*]—A.'s wife misconducted herself & was divorced, but was delivered of a female child before the decree :—*Held :* the legitimacy of the child born *stante matrimonio* must be presumed.—ROUTLEDGE *v.* CARRUTHERS (1816), 4 Dow, 392.—**SCOT.**

PART I. SECT. 3.

24 i. *Conclusive evidence required.*]—When it is proved that two persons have lived together for many years as husband & wife, & their child has always been recognised as legitimate, the presumption of law is that they were lawfully married. The presumption can be repelled only by conclusive evidence & is not displaced merely because the direct evidence of marriage which took place many years ago is not satisfactory.—BEPIN BEHARY DAS BAIRAGI *v.* ATUL KRISHNA DAS BAIRAGI (1911), 17 C. W. N. 494.—**IND.**

24 ii. ——.]—The legal presumption contained in the maxim "*pater est quem nuptiæ demonstrant.*" may be redargued by such evidence as will convince a reasonable mind, though short of the proof of physical impossibility of connection between the mother of the child & her husband.—MACKAY *v.* MACKAY (1855), 17 Dunl. (Ct. of Sess.) 494; *sub nom.* ALEXANDER & WEBSTER *v.* MACKAY (OR WILSON) (1855), 27 Sc. Jur. 206.—**SCOT.**

24 iii. ——.]—In the case of a wife separated from her husband the above presumption may be overcome by direct

woman must not only be such as to raise in the mind of the judge strong doubts, but must be such as to produce judicial conviction that the husband was not the father of the child.—ATCHLEY *v.* SPRIGG (1864), 33 L. J. Ch. 345 ; 10 L. T. 16 ; 10 Jur. N. S. 144 ; 12 W. R. 364.

Annotation :—**Mentd.** The Aylesford Peerage (1885), 11 App. Cas. 1, H. L.

25. ——.]—The evidence required to rebut the presumption in favour of the legitimacy of a child born in wedlock must be clear & conclusive & not resting merely on a balance of probabilities.—BOSVILE *v.* A.-G. (1887), 12 P. D. 177 ; 56 L. J. P. 97 ; 57 L. T. 88 ; 36 W. R. 79 ; 3 T. L. R. 429, 726, D. C.

Annotations :—**Apld.** Burnaby *v.* Baillie (1889), 42 Ch. D. 282 ; Evans *v.* Evans & Blyth (1904), 20 T. L. R. 612.

26. —— **Relevant circumstances.**]—A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt & suspicion, but it may be wholly removed by showing that the husband was (1) incompetent, (2) entirely absent, so as to have no intercourse or communication of any kind with the mother, (3) entirely absent at the period during which the child must, in the course of nature, have been begotten, (4) only present in such circumstances as afford clear & satisfactory proof that there was no sexual intercourse. Such evidence as this puts an end to the question & establishes the illegitimacy of the child of a married woman. It is, however, very difficult to conclude against the legitimacy in cases where there is no disability & where some society or communication is continued between husband & wife during the time in question so as to have afforded opportunities of sexual intercourse, & in cases where such opportunities have occurred, & in which any one of two or more men may have been the father, whatever probabilities may exist, no evidence can be admitted to show that any man, other than the husband, may have been, or probably was, the father of the wife's child. Throughout the investigation the presumption in favour of the legitimacy is to have its weight & influence, & the evidence against it ought to be strong, distinct, satisfactory, & conclusive.—HARGRAVE *v.* HARGRAVE (1846), 9 Beav. 552 ; 8 L. T. O. S. 133 ; 10 Jur. 957 ; 50 E. R. 457.

Annotation :—**Refd.** Sinclair *v.* Sinclair (1853), 2 W. R. 69.

27. Impotence.]—If the husband was castrated, so that it is clear that he could by no possibility beget issue, & the wife had issue several years later, this will be a bastard though born during the marriage, because it is apparent that he cannot be legitimate.—DONE & EGERTON *v.* HINTON & STARKY (1617), Roll. Abr. 358, pl. 8.

28. —— **Evidence of wife's character.**]—When physical incapacity is satisfactorily made out according to the opinions of the medical witnesses, evidence of the adultery of the wife is still an important ingredient in determining the legitimacy of the child, because if the wife were of irreproachable character, it would go far to modify the opinion as to the husband's incapacity.—LEGGE *v.* EDMONDS (1855), 25 L. J. Ch. 125 ; 26 L. T. O. S. 117 ; 20 J. P. 19 ; 4 W. R. 71.

Annotations :—**Mentd.** Metters *v.* Brown (1863), 1 H. & C. 686 ; Ulverstone Union Grdns. *v.* Park (1889), 53 J. P. 629.

See, also, No. 23, *ante.*

29. Absence beyond seas—At time of conception.]—If a man has been beyond the seas for so long a time before the birth of issue born in his absence that the issue could not be his, the issue is a bastard.—DONE & EGERTON *v.* HINTON & STARKY (1617), Roll. Abr. 358, pl. 8.

30. *S. P.*—R. *v.* ALBERTSON (1698), 2 Salk. 483 ; 1 Ld. Raym. 395 ; 91 E. R. 416 ; *sub nom.* R. *v.* ALVERSTON, Carth. 469 ; Holt, K. B. 508.

Annotation :—**Refd.** R. *v.* Luffe (1807), 8 East, 193.

31. —— ——.]—If a husband be beyond the seas during the whole time of his wife's going with child, the child is a bastard.—R. *v.* MURREY (1704), 1 Salk. 122 ; 91 E. R. 115.

Annotations :—**Refd.** R. *v.* Reading (1734), Lee *temp.* Hard. 79 ; R. *v.* Luffe (1807), 8 East, 193.

32. —— ——.]—If the husband is found to have gone beyond the seas above two years before the birth of a child by his wife, she remaining at home, the conclusion is irresistible that such child is a bastard.—R. *v.* MAIDSTONE (INHABITANTS) (1810), 12 East, 550 ; 104 E. R. 215.

See, also, No. 54, *post.*

33. Non-access — Evidence allowed — Although husband within four seas.]—Pltf.'s father & mother were married, & cohabited for some months ; they then parted, she staying in London, & he going into Staffordshire, & at the end of three years pltf. was born. There being some doubt upon the evidence, whether the husband had not been in London within the last year, an issue was sent to be tried whether pltf. was the heir-at-law. Pltf. rested at first upon the presumption of law in favour of legitimacy, which was encountered by strong evidence of no access :—*Held :* the old doctrine of being within the four seas was not to take place, but the jury were at liberty to consider the point of access, which they did, & found against pltf.—PENDRELL *v.* PENDRELL (1732), 2 Stra. 925 ; 93 E. R. 945.

Annotations :—**Folld.** R. *v.* Bedall (1737), 2 Stra. 1076. **Refd.** R. *v.* Reading (1734), Lee *temp.* Hard. 79 ; Sidney *v.* Sidney (1734), 3 P. Wms. 269 ; Goodright *v.* Moss (1777), 2 Cowp. 591 ; Smyth *v.* Chamberlayne (1792), Nicolas, Adult. Bast. 147 ; Morris *v.* Davies (1837), 5 Cl. & Fin. 163, H. L.

34. —— —— **Voluntary separation.**]—What has been asserted of a child begotten & born during the time of the voluntary separation of husband & wife,

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or circumstantial evidence.—MONTGOMERY *v.* MONTGOMERY (1881), 8 R. (Ct. of Sess.) 403.—**SCOT.**

24 iv. ——.]—The above presumption is only rebuttable upon clear & satisfactory evidence of circumstances leading a reasonable & discreet mind to a contrary conclusion. The rule is not lightly to be repelled, nor is it to be departed from on a mere balance of probability.—FITZGERALD *v.* GREEN (1911), E. D. L. 433.—**S. AF.**

24 v. ——.]—Nature of evidence necessary to displace presumption of legitimacy of a child born in wedlock discussed.—CARTHY *v.* COCK (1914), S. A. L. R. 1.—**AUS.**

24 vi. ——.]—Circumstances not sufficient to give rise to the question as to what length of interval between connection & the birth of a child is sufficient to exclude the presumption of paternity.—GRASSIE *v.* CAUPER (1829), 8 Sh. (Ct. of Sess.) 259.—**SCOT.**

24 vii. —— *Burden of proof.*]—The *onus* of proving non-paternity is upon the husband. Pltf. in an action in disavowal of paternity, must prove that the child was born viable, & file the certificate of birth which he seeks to have rectified.—HICKEY *v.* BEDARD (1911), 17 R. L. 339.—**CAN.**

24 viii. —— ——.]—Pltfs. in a suit to eject deft. from land of which he was in actual possession had to prove their heirship, which depended upon the illegitimacy of deft., held bound to give sufficient general evidence in support of their case, to throw upon deft. the *onus* of proving his legitimacy.—MAHOMED GOUR ALI KHAN *v.* ASHRUFFOONISSA (1863), 2 W. R. 13 ; 9 Moo. Ind. App. 492, P. C.—**IND.**

24 ix. —— ——.]—In interest cases, when legitimacy is disputed, the *onus* of proof lies on the party alleging legitimacy.—CORCORAN *v.* DUGGAN (1864), 9 Ir. Jur. 18.—**IR.**

24 x. —— ——.]—In a suit by children to enforce payment of their portions, pltf.'s legitimacy was questioned by the next tenant for life :—*Held :* a marriage *de facto* having been once established, the party impeaching the marriage must then show that it was illegal or void.—PIERS *v.* TUITE (1838), 1 Dr. & Wal. 279.—**IR.**

27 i. *Impotence.*]—A child conceived during marriage is legitimate & is held to be the child of the husband, except when the latter proves that cohabitation was physically impossible.—HICKEY *v.* BEDARD (1911), 17 R. L. 339.—**CAN.**

Sect. 3.—How the presumption may be rebutted.]

viz., that no evidence shall be admitted to prove the illegitimacy of such child, is now held to be otherwise. For if a jury find the husband had no access, such child will be a bastard (LORD TALBOT, C.).—SIDNEY *v.* SIDNEY (1734), 3 P. Wms. 269; 24 E. R. 1060.

Annotations:—**Mentd.** Wheeler *v.* Trotter (1737), 3 Swan. 174, n.; Watkyns *v.* Watkyns (1740), 2 Atk. 96; Clarke *v.* Perian (1741), 2 Atk. 333; Legard *v.* Johnson (1797), 3 Ves. 352; Seagrave *v.* Seagrave (1807), 13 Ves. 439; Jee *v.* Thurlow (1824), 2 B. & C. 547; Duncan *v.* Campbell (1842), 12 Sim. 616; Evans *v.* Carrington (1860), 2 De G. F. & J. 481; Fearon *v.* Aylesford (1884), 14 Q. B. D. 792, C. A.

35. —— At material time.]—The presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove, to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between husband & wife at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child, in such a case, is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father of such child, & the evidence to prove that he was not the father must be of such facts & circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between husband & wife at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child.—BANBURY PEERAGE CASE (1811), 1 Sim. & St. 153; 57 E. R. 62.

Annotations:—**Apld.** Head *v.* Head (1823), 1 Sim. & St. 150; Morris *v.* Davies (1837), 5 Cl. & Fin. 163, H. L.; Legge *v.* Edmonds (1855), 25 L. J. Ch. 125; Plowes *v.* Bossey (1862), 2 Drew. & Sm. 145; Atchley *v.* Sprigg (1864), 33 L. J. Ch. 345; Hawes *v.* Draeger (1883), 23 Ch. D. 173. **Refd.** *Re* Yearwood's Trusts (1877), 5 Ch. D. 545; *Re* Perton, Pearson *v.* A.-G. (1885), 53 L. T. 707; *Re* Westhead's Settlmt. Trusts (1885), 1 T. L. R. 651, C. A.; Bosvile *v.* A.-G. (1887), 57 L. T. 88; Burnaby *v.* Baillie (1889), 42 Ch. D. 282; Gordon *v.* Gordon, [1903] P. 141. **Mentd.** R. *v.* Millis (1844), 8 Jur. 717; Sinclair *v.* Sinclair (1853), 2 W. R. 69.

See, also, Nos. 5, 11, *ante.*

36. —— —— Proof of date of birth.]—Where a husband has proved non-access, an entry or copy of an entry in a register of births, deaths, and marriages, of the birth of a child between the material dates is *primâ facie* evidence of the date, as well as the fact of the birth.—BRIERLEY *v.* BRIERLEY & WILLIAMS, [1918] P. 257; 87 L. J. P. 153; 119 L. T. 343; 34 T. L. R. 458; 62 Sol. Jo. 704.

Annotation:—**Refd.** Bird *v.* Keep, [1918] 2 K. B. 692, C. A.

See, further, EVIDENCE.

37. —— —— Wife living in adultery.]—The illegitimacy of a child born of a married woman is established beyond all dispute by evidence of her living in adultery at the time when the child was begotten, & of the husband then residing in another part of the kingdom so as to make access impossible.—SAYE & SELE BARONY (1848), 1 H. L. Cas. 307; 9 E. R. 857, H. L.

Annotation:—**Refd.** Hawes *v.* Draeger (1883), 52 L. J. Ch. 449.

See, also, Nos. 14 *et seq., ante,* 46 *et seq., post.*

38. —— —— Not within period of gestation.]—Where deft. was born eleven days after the extreme limit of the period of gestation, & the husband had not had access to the wife for one month before his death, which strengthened the presumption against deft.:—*Held:* pltf. should recover possession of the husband's land as his brother & heir, & not deft.—RADWELL'S CASE (1290), 1 Roll. Abr. 356, pl. 3; 1 Co. Litt. 1236.

39. —— —— ——.]—When a wife marries a second husband, & it is found the first had no access to her for seventeen years, the children of the second marriage are bastards.—ST. ANDREWS (PARISH) *v.* ST. BRIDES' (PARISH) (1717), 1 Stra. 51; Sess. Cas. K. B. 35; 93 E. R. 378.

40. —— —— Not till after conception.]—Non-access of the husband need not be proved during the whole of the period of the wife's pregnancy. It is sufficient if the circumstances of the case show a natural impossibility that the husband could be the father, as where he had access only a fortnight before the birth.—R. *v.* LUFFE (1807), 8 East, 193; 103 E. R. 316.

Annotations:—**Refd.** Morris *v.* Davies (1837), 5 Cl. & Fin. 163, H. L.; Turnock *v.* Turnock & Turnock (1867), 36 L. J. P. & M. 85; *Re* Parson's Trust (1868), 18 L. T. 704. **Mentd.** R. *v.* Kea (1809), 11 East, 132; R. *v.* Hartington-Upper-Quarter (1816), 4 M. & S. 559; Head *v.* Head (1823), 1 Sim. & St. 150; R. *v.* Sourton (1836), 2 Har. & W. 209; R. *v.* King's Lynn Recorder (1846), 3 Dow. & L. 725; R. *v.* Shipperbottom (1847), 11 Jur. 520; Ormerod *v.* Chadwick (1847), 16 M. & W. 367; R. *v.* Collingwood (1848), 12 Jur. 750; R. *v.* Grafton (1848), 12 Jur. 539; *Ex p.* Grimes (1853), 22 L. J. M. C. 153; R. *v.* Pilkington (1853), 17 Jur. 554; Legge *v.* Edmonds (1855), 25 L. J. Ch. 125; *Ex p.* Baker (1857), 7 E. & B. 697; R. *v.* Baker (1857), 22 J. P. 53; Yates *v.* Chippendale (1862), 11 C. B. N. S. 512; R. *v.* Suffolk JJ. (1884), 12 J. P. 426; Jones *v.* Davies, [1901] 1 K. B. 118; Webb *v.* Murrel (1904), 68 J. P. 104.

41. —— —— ——.]—A husband after a long absence did not rejoin his wife till Nov. 24, 1849. Nevertheless, she bore a full-grown child on May 18, 1850:—*Held:* he could not have been the father, & bill passed, with a clause bastardising the child.

Strict proof of non-access is required in such cases.—HEATHCOTE'S DIVORCE BILL (1851), 1 Macq. 277, H. L.

42. —— —— Doubtful period of gestation—Conduct of wife.]—A child had been born two hundred & seventy-six days after the last opportunity of intercourse between husband & wife, & there was evidence in the wife's conduct tending to show that she regarded the child as the offspring of her paramour:—*Held:* it was for the jury to say whether, on the whole of the evidence given on behalf of those who asserted illegitimacy, the conviction had been brought home to their minds that the husband was not the father of the child, & the verdict of the jury, that the child was illegitimate, was not against evidence.—BOSVILE *v.* A.-G. (1887), 12 P. D. 177; 56 L. J. P. 97; 57 L. T. 88; 36 W. R. 79; 3 T. L. R. 429, 726, D. C.

Annotations:—**Refd.** Burnaby *v.* Baillie (1889), 42 Ch. D. 282; Evans *v.* Evans & Blyth (1904), 20 T. L. R. 612.

43. —— —— —— ——.]—A husband left his wife on Dec. 20, 1915, & had not had intercourse

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35 i. *Non-access—At material time—Illness of husband.*]—A wife came to her husband's house a few days before he died, & remained there up to the time of his death. A child, alleged to be that of her husband, was born within the time necessary to give rise to the presumption under Evidence Act (I. of 1872), s. 112. The husband was, during the period within which the child must have been begotten, suffering from a serious illness which terminated fatally shortly afterwards:—*Held:* the presumption as to the paternity of the child given must prevail.—NARENDA NATH PAHARI *v.* KAM GOBIND PAHARI (1901), I. L. R. 29 Calc. 111; 6 C. W. N. 146; L. R. 29 I. A. 17.—**IND.**

42 i. —— —— *Doubtful period of gestation—Conduct of wife.*]—Where a child, born some three hundred and sixty-five days after the last period at which he could have been begotten by the husband of his mother, was set up as legitimate:—*Held:* although such a period of gestation was perhaps not absolutely beyond the bounds of possibility, yet, there being evidence that the mother had been married to her husband for ten years without having had any children by him, & also evidence which pointed strongly to the conclusion of immorality on the part of the mother, the only reasonable finding was against the legitimacy of the child.—TIKAM SINGH *v.* DHAN KUNWAR (1902) I. L. R. 24 All. 445.—**IND.**

with her since that date. She gave birth to a child on Oct. 22, 1916, three hundred & seven days afterwards. There was no evidence of the wife's adultery :—*Held :* on the particular facts of the case the wife had not committed adultery.—BOWDEN *v.* BOWDEN (1917), 62 Sol. Jo. 105.

44. Possibility of access—Circumstances disproving access.]—*Held :* independent evidence showing that, on the only occasion when the husband visited the place where his wife was residing, he was engaged in collecting evidence with a view to a divorce, would be sufficient to raise a presumption of non-access.—*Re* RIDEOUT'S TRUSTS (1870), L. R. 10 Eq. 41 ; *sub nom. Re* R——'S TRUSTS, 39 L. J. Ch. 192.

Annotations :—**Mentd.** *Re* Yearwood's Trusts (1877), 5 Ch. D. 545 ; Nottingham Grdns. *v.* Tomkinson (1879), 4 C. P. D. 343 ; Burnaby *v.* Baillie (1889), 42 Ch. D. 282.

45. —— —— Detention as lunatic not sufficient.]—The child of a married woman must be presumed to be the child of the husband, unless it is proved beyond all reasonable or serious doubt that no sexual intercourse could have taken place at the time within which the husband could be the father. The *onus probandi* lies entirely on the part of those who wish to show the illegitimacy.

Where the husband was confined in a lunatic asylum, not on account of general imbecility, but on account of certain delusions, the wife being resident twenty-five miles off, & there being a special interdiction on their being left alone when she visited him, yet, as there was evidence that there was a possibility of intercourse :—*Held :* a child born of the wife was legitimate. — PLOWES *v.* BOSSEY (1862), 2 Drew. & Sm. 145 ; 31 L. J. Ch. 681 ; 7 L. T. 306 ; 26 J. P. 325 ; 8 Jur. N. S. 352 ; 10 W. R. 332 ; 62 E. R. 576.

Annotations :—**Refd.** *Re* Yearwood's Trusts (1877), 5 Ch. D. 545. **Mentd.** Atchley *v.* Sprigg (1864), 3 New Rep. 360.

46. —— Separation—Wife living in adultery.]—If a husband have access, & others at the same period have a criminal intimacy with his wife, & she have a child, such child is legitimate ; but if husband & wife be living separately, & the wife is notoriously living in adultery, a child born in such circumstances would be illegitimate, although the husband had an opportunity of access.—COPE *v.* COPE (1833), 5 C. & P. 604 ; 1 Mood. & R. 269.

Annotations :—**Consd.** R. *v.* Mansfield (1841), 1 Gal. & Dav. 7. **Refd.** Gordon *v.* Gordon & Granville Gordon, [1903] P. 141. **Mentd.** *Re* Turner, Glenister *v.* Harding (1885), 29 Ch. D. 985.

47. —— —— ——.]—A. was summoned before justices, for wilfully refusing to maintain his child. He & his wife had lived separate for about three years before the birth of the child in question, though in the same town ; she led a disreputable & profligate life, & he always avoided her, & she had been seen as a prostitute in company with several men, & the child was born in a gaol :—*Held :* the legal presumption that the husband was the father of the child was rebutted by the above evidence.—SIBBET *v.* AINSLEY (1860), 3 L. T. 583 ; 24 J. P. 823.

48. —— —— ——.]—A husband & wife lived together without having a child for nine years & then separated. A child was born ten years after the separation, while the wife was in the habit of committing adultery with another man, who treated the child as his own :—*Held :* notwithstanding the possibility of access by the husband, the child was illegitimate. — ATCHLEY *v.* SPRIGG (1864), 3 New Rep. 360 ; 33 L. J. Ch. 345 ; 10 L. T. 16 ; 10 Jur. N. S. 144 ; 12 W. R. 364.

Annotation :—**Mentd.** The Aylesford Peerage (1885), 11 App. Cas. 1, H. L.

See, also, Nos. 14 *et seq.*, 37, *ante.*

49. Conduct of wife—Adoption of child by paramour—Concealment of birth from husband.]—The presumption of law in favour of the legitimacy of a child begotten & born of the wife during separation, may be rebutted not only by evidence to show that the husband had not sexual intercourse with her, but also evidence of their conduct, as that the wife was living in adultery, that she concealed the birth of the child from the husband, & declared to him that she never had such child, that the husband disclaimed all knowledge of the child, & acted up to his death as if no such child was in existence, &, also, that the wife's paramour aided in concealing the child, reared & educated it as his own, & left it all his property by his will.—MORRIS *v.* DAVIES (1837), 5 Cl. & Fin. 163 ; 1 Jur. 911 ; 7 E. R. 365, H. L.

Annotations :—**Apld.** Piers *v.* Piers (1849), 2 H. L. Cas. 331, H. L. ; Legge *v.* Edmonds (1855), 25 L. J. Ch. 125. **Consd.** Gurney *v.* Gurney (1863), 32 L. J. Ch. 456. **Apld.** Hawes *v.* Draeger (1883), 23 Ch. D. 173 ; Bosvile *v.* A.-G. (1887), 12 P. D. 177 ; Burnaby *v.* Baillie (1889), 42 Ch. D. 282. **Refd.** R. *v.* Mansfield (1841), 1 Q. B. 444 ; Saye & Sele Barony (1848), 1 H. L. Cas. 507, H. L. ; Plowes *v.* Bossey (1862), 2 Drew. & Sm. 145 ; Atchley *v.* Sprigg (1864), 33 L. J. Ch. 345 ; *Re* Yearwood's Trusts (1877), 5 Ch. D. 545 ; Sastry Velaider Aronegary *v.* Sembecutty Vaigalie (1881), 6 App. Cas. 364, P. C. ; The Aylesford Peerage (1885), 11 App. Cas. 1, H. L. ; *Re* Walker, *Re* Jackson (1885), 53 L. T. 660 ; Gordon *v.* Gordon & Granville Gordon (1903), 72 L. J. P. 33 ; Evans *v.* Evans & Blyth (1904), 20 T. L. R. 612. **Mentd.** Woodmason *v.* Doyne (1843), 10 Cl. & Fin. 1, H. L. ; Stewart *v.* Forbes (1849), 1 Mac. & G. 136 ; Pisani *v.* A.-G. for Gibraltar (1874), L. R. 5 P. C. 516, P. C. ; *Re* Shepherd, George *v.* Thyer, [1904] 1 Ch. 456 ; Lloyd *v.* Powell Duffryn Steam Coal Co., [1914] A. C. 723, H. L.

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44 i. *Possibility of access — Circumstances disproving access.*]—Three weeks after their marriage a husband & wife separated, though they continued to live in the same town. Five years after the separation the wife bore a child. The husband died nineteen years later. The husband had repudiated paternity, & his wife, though in very poor circumstances, had taken no steps to compel him to support it ; & she had submitted to a charge made against her by the kirk-session of her church of having given birth to an illegitimate child :—*Held :* the inference to be drawn was strong enough to displace the presumption in favour of legitimacy, even though there was some vague evidence of the spouses having met on several occasions during the two years preceding the child's birth. —COLQUHOUN *v.* COLQUHOUN (1891), 28 Sc. L. R. 689.—**SCOT.**

46 i. —— *Separation.*]—In an action of filiation & aliment at the instance of a married woman :—*Held :* the presumption, "*pater est quem nuptiæ demonstrat*" had been redargued by evidence that *de facto* there had not been connection between pursuer & her husband, although, at the time of the conception of the child they were living within fourteen miles of one another.—PATERSON OR BRODIE *v.* DYCE (1872), 11 Macph. (Ct. of Sess.) 142 ; 45 Sc. Jur. 92.—**SCOT.**

46 ii. —— ——.]—Circumstances in which it was held that the above presumption was rebutted, although the husband & wife at the time of the child's conception resided in the same village.—STEEDMAN *v.* STEEDMAN (1887), 14 R. (Ct. of Sess.) 1066 ; 24 Sc. L. R. 754.—**SCOT.**

46 iii. —— ——.]—A. was separated from her husband B. in 1848. Two children were born in Ireland in 1851 & 1852. A. was living in Ireland from 1850 to 1852, & B. in Scotland. A. never informed B. of the birth of the children & made no claim for aliment until 1873. There was nothing inconsistent with the possibility that A. & B. had met about the time of conception & nothing to suggest that they had met :—*Held :* the above presumption had been overcome. —HUNTER, ETC. (TULLOH'S TRUSTEES) *v.* COLES (1895) 32 Sc. L. R. 483 ; 3 S. L. T. 17.—**SCOT.**

46 iv. —— —— *Wife living in adultery.*]—A. & B. did not live together as man & wife after Mar., 1895. A. resided near the town of E. in Scotland until Apr. 13, 1898, when he left for India, & did not return till Nov., 1900. In 1896 B. came to live in the town of E., & was living there when A. left in Apr., 1898. In Dec., 1898, B. gave birth to a girl, in Ireland, & registered A. as the father of the girl, but she did not inform him of the birth of the child. In 1900 A. obtained a divorce from B. on the ground of her adultery. *Semble :* the evidence did not rebut the presumption of paternity.—YOOL *v.* EWING, [1904] 1 I. R. 434.—**IR.**

49 i. *Conduct of wife—Concealment of birth from husband.*]—A child conceived during marriage is legitimate & is held to be the child of the husband, except when, the wife being guilty of adultery, the birth of the child was concealed from the husband & cohabitation was morally

Sect. 3.—How the presumption may be rebutted. Sect. 4.]

50. —— —— Separation from husband.]—Husband & wife separated by mutual consent, & the wife resided in Calcutta, & the husband at Dacca, about one hundred & forty miles distant. Several years after the separation the wife gave birth to a child, who never took the husband's name, but was baptised under the name of his reputed father, by whom he was acknowledged & brought up. There was evidence that the husband had not been to Calcutta for some years previous to the birth of the child:—*Held:* the child was illegitimate.—SINCLAIR *v.* SINCLAIR (1853), 2 W. R. 69.

51. —— —— ——.]—In July, 1867, Mr. & Mrs. W. were married. They had two children, one born in 1868, one in 1870. In 1878 Mrs. W. left her home & until the death of W. in Oct., 1882, lived with G. In July, 1876, Mrs. W. gave birth to a child, who was registered on the information of G. as Mabel G., the daughter of himself & Lucy G., formerly H. The child was never seen by W. & was maintained & educated by Mrs. W. & G. The evidence showed that Mr. & Mrs. W. had met on only two occasions after 1870 & these meetings were relied on as showing the possibility of access:—*Held:* on the evidence the presumption of legitimacy was rebutted & the child must be declared illegitimate.—*Re* WESTHEAD'S SETTLEMENT TRUSTS (1885), 1 T. L. R. 651, C. A.

See, also, No. 34, *ante.*

52. —— Child taking name of paramour—Desertion by husband.]—The child of a married woman may be proved a bastard by other evidence than that of the husband's non-access, as for instance where the child had taken from its birth the name of the person with whom the mother, the husband having deserted her, was living at the time, & that name had been retained by the child & his descendants.—GOODRIGHT d. TOMPSON *v.* SAUL (1791), 4 Term Rep. 356; 100 E. R. 1062.

Annotations:—**Apprvd.** Morris *v.* Davies (1837), 5 Cl. & Fin. 163, H. L.; Hawes *v.* Draeger (1883), 23 Ch. D. 173. **Refd.** Smyth *v.* Chamberlayne (1792), Nicolas, Adult Bast. 147; R. *v.* Luffe (1807), 8 East, 193.

53. —— Baptism as child of paramour—Family reputation.]—Although the illegitimacy of a child which must have been begotten after a separation between husband & wife is not sufficiently proved by the mere fact that the wife has been living in adulterous intercourse with another man, when this fact is supplemented by corroborative evidence of family reputation that the child was the offspring of the adulterous union, & the social position of the parties is such as to render access on the part of the husband extremely improbable, although there is no precise evidence that the husband lived at a distance, the presumption of legitimacy is sufficiently rebutted.

A husband & wife had separated, & the wife went to live with another man, who was in a respectable position in life. A child was born during the lifetime of the husband, & the only evidence as to his place of residence at the time was that he died a year or two later at a place not far from the wife's residence. The child was baptised as the child of the wife & the man with whom she was then living, & there was strong evidence of reputation in the family that the child was the child of the adulterous connection:—*Held:* this evidence was sufficient to rebut the presumption of legitimacy.—HAWES *v.* DRAEGER (1883), 23 Ch. D. 173; 52 L. J. Ch. 449; 48 L. T. 518; 31 W. R. 576.

SECT. 4.—WHAT EVIDENCE IS ADMISSIBLE TO REBUT THE PRESUMPTION.

54. General nature of evidence.]—The physical fact of impotency, or of non-access, or of non-generating access, as the case may be, may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the law of England, that a physical fact be proved.—BANBURY PEERAGE CASE (1811), 1 Sim. & St. 153; 57 E. R. 62.

Annotations:—**Consd.** Morris *v.* Davies (1837), 5 Cl. & Fin. 163, H. L.; Legge *v.* Edmonds (1855), 25 L. J. Ch. 125. **Refd.** Plowes *v.* Bossey (1862), 2 Drew. & Sm. 145; Atchley *v.* Sprigg (1864), 33 L. J. Ch. 345; Hawes *v.* Draeger (1883), 23 Ch. D. 173; *Re* Perton, Pearson *v.* A.-G. (1885), 53 L. T. 707; *Re* Westhead's Settlmt. Trusts (1885), 1 T. L. R. 651, C. A.; Bosvile *v.* A.-G. (1887), 57 L. T. 88, D. C.; Burnaby *v.* Baillie (1889), 42 Ch. D. 282; Gordon *v.* Gordon, [1903] P. 141. **Mentd.** Berkeley Peerage Case (1811), 4 Camp. 401, H. L.; Head *v.* Head (1823), 1 Sim. & St. 150; R. *v.* All Saints, Southampton (1828), 7 B. & C. 785; Davies *v.* Morgan (1831), 1 Cr. & J. 587; R. *v.* Millis (1844), 8 Jur. 717, H. L.; De Bode's Case (1845), 8 Q. B. 208; Boileau *v.* Rudlin (1848), 12 Jur. 899; Van der Donckt *v.* Thellusson (1849), 8 C. B. 812; Sinclair *v.* Sinclair (1853), 2 W. R. 69; Gee *v.* Ward (1857), 7 E. & B. 509; Gurney *v.* Gurney (1863), 1 Hem. & M. 413; *Re* Yearwood's Trusts (1877), 5 Ch. D. 545; Lyell *v.* Kennedy, Kennedy *v.* Lyell (1889), 14 App. Cas. 437, H. L.

55. ——.]—The authorities do not lay down that the evidence in cases of adulterine bastardy must be of a different nature to evidence in other cases. It must be satisfactory evidence & the *onus* of proof is on the party disputing the legitimacy.—SINCLAIR *v.* SINCLAIR (1853), 2 W. R. 69.

56. To prove non-access—Evidence of spouses—Not admitted.]—The question being as to the

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impossible.—HICKEY *v.* BEDARD (1911), 17 R. L. 339.—**CAN.**

49 ii. —— *Adoption of child by paramour—Concealment of birth from husband.*]—A husband & wife lived apart, but within such a distance as rendered access not impossible:—*Held:* the presumption of the legitimacy of a child born during the separation might be rebutted by evidence that the wife had been guilty of adultery at a period corresponding to the conception of the child, that she concealed the birth of the child from her husband, registered it as the son of her paramour, & that the paramour acknowledged liability for the child's maintenance. — TENNENT *v.* TENNENT (1890), 17 R. (Ct. of Sess.) 1205; 27 Sc. L. R. 841.—**SCOT.**

50 i. —— —— *Separation from husband.*]—A child born seven & a half months after the return home of the husband, although the wife left her husband three months later & went to live with the adulterer, at whose house the child was born, must be presumed to be legitimate; but where the child was introduced by the adulterer to his mother as his child, was baptised by his name, lived with him in the same house, on majority succeeded to his estate, & represented himself to be the adulterer's son, the circumstances lead to the irresistible conclusion that the child was illegitimate.—FITZGERALD *v.* GREEN (1911), E. D. L. 433.—**S. AF.**

f. —— *Early birth — Acknowledged intercourse with another before marriage.*]—Presumption redargued.—AITKEN *v.* MITCHELL (1806), Hume, 489.—**SCOT.**

PART I. SECT. 4.

54 i. *General nature of evidence.*]—A parent is not permitted to bastardise his or her issue. The presumption of legitimacy must be rebutted by other & independent testimony. — WHITAKER *v.* JOHNSTON (1899), 18 N. Z. L. R. 589.—**N.Z.**

54 ii. —— *Treatises of experts.*]—Under Evidence Act (I. of 1872), s. 60, a ct. can consider & act upon the opinions of experts contained in treatises as regards the question whether a particular child could or could not have been begotten just before the period of non-access.—HOWE *v.* HOWE (1913), I. L. R. 39 Mad. 466.—**IND.**

54 iii. —— *Public reputation.*]—Public reputation as to relationship is not admissible as direct proof of legitimacy or illegitimacy.—*Re* OSMAND, BENNETT *v.* BOOTY, [1906] V. L. R. 455; [1907] V. L. R. 67.—**AUS.**

54 iv. —— *Reputation & declarations.*]—In answer to a claim of heirship to S., a witness, who had known him as a boy, alleged that S. had always been reputed to be illegitimate, & had been left by his mother on the parish, & that his reputed father bore a different surname. Another witness stated that S. had told him that H. was his father, & that S. said he had seen the place where his mother met with her misfortune:—*Held:* sufficient evidence of illegitimacy.—*Re* STAVELY, A.-G. *v.* BRUNSDEN (1893), 24 O. R. 324.—**CAN.**

56 i. *To prove non-access — Evidence of spouses.*]—Under Evidence Act (I. of

paternity of the child of a married woman the evidence of the latter was admitted to prove her criminal conversation with deft., but not to prove her husband's non-access.—R. *v.* READING (1734), Cunn. 140 ; Sess. Cas. K. B. 206 ; Lee *temp.* Hard. 79 ; 94 E. R. 1113.

Annotations :—**Consd.** R. *v.* Luffe (1807), 8 East, 193 ; R. *v.* Kea (1809), 11 East, 132 ; R. *v.* Sourton (1836), 5 Ad. & El. 180. **Refd.** R. *v.* Rook (1753), 1 Wils. 340 ; Cope *v.* Cope (1833), 1 Mood. & R. 269 ; Legge *v.* Edmonds (1855), 4 W. R. 71. **Mentd.** R. *v.* Cambridge Union (1861), 1 B. & S. 61.

57. —— —— ——.]—The *feme* may be admitted to prove the fact of adultery with her, but not to prove the baron had no access.—R. *v.* ROOK (1752), 1 Wils. 340 ; Say. 61 ; 95 E. R. 651.

Annotation :—**Consd.** R. *v.* Luffe (1807), 8 East, 193.

58. —— —— ——.]—It is a rule founded on decency, morality, & policy, that husband & wife shall not be permitted to say after marriage that they have had no connection, & that, therefore, the offspring is spurious (LORD MANSFIELD, C.J.). —GOODRIGHT d. STEVENS *v.* MOSS (1777), 2 Cowp. 591 ; 98 E. R. 1257.

Annotations :—**Consd.** Johnson *v.* Lawson (1824), 2 Bing. 86 ; Monkton *v.* A.-G. (1831), 2 Russ. & M. 147. **Apprvd.** R. *v.* Sourton (1836), 5 Ad. & El. 180. **Consd.** Fox *v.* Marston & Hordern (1837), 1 Curt. 494 ; Legge *v.* Edmonds (1855), 25 L. J. Ch. 125 ; Inglis *v.* Inglis & Allen (1867), 16 L. T. 775 ; Murray *v.* Milner (1879), 12 Ch. D. 845. **Refd.** Nottingham Grdns. *v.* Tomkinson (1879), 4 C. P. D. 343. **Mentd.** Whitelocke *v.* Baker (1807), 13 Ves. 511 ; Berkeley Peerage Case (1811), 4 Camp. 401, H. L. ; Haines *v.* Guthrie (1884), 13 Q. B. D. 818, C. A.

59. —— —— ——.]—On the trial of an issue as to whether A. is the legitimate son of B., neither the declarations of B. nor of his wife, the mother of A., are receivable to show that A. is illegitimate.—COPE *v.* COPE (1833), 5 C. & P. 604 ; 1 Mood. & R. 269.

Annotations :—**Refd.** R. *v.* Mansfield (1841), 5 Jur. 505 ; Gordon *v.* Gordon, [1903] P. 141. **Mentd.** *Re* Turner, Glenister *v.* Harding (1885), 29 Ch. D. 985.

60. —— —— ——.] — Neither husband nor wife can be asked any questions which directly prove non-access, or indirectly but necessarily lead to the same conclusion.—R. *v.* SOURTON (INHABITANTS) (1836), 5 Ad. & El. 180 ; 2 Har. & W. 209 ; 6 Nev. & M. K. B. 575 ; 5 L. J. M. C. 100 ; 111 E. R. 134.

Annotations :—**Consd.** Legge *v.* Edmonds (1855), 25 L. J. Ch. 125 ; The Aylesford Peerage (1885), 11 App. Cas. 1, H. L. ; Ulverstone Union Grdns. *v.* Park (1889), 53 J. P. 629. **Refd.** Nottingham Grdns. *v.* Tomkinson (1879), 4 C. P. D. 343.

61. —— —— ——.]—On the trial of an issue as to the legitimacy of a child born of a married woman the evidence of the husband is not admissible for the purpose of proving access or for the purpose of proving any collateral fact which would tend to show he had opportunities of access. Nor in such case is evidence of expressions of feeling by the wife towards the husband admissible.—WRIGHT *v.* HOLDGATE (1850), 3 Car. & Kir. 158.

62. —— —— ——.]—In an action to try the legitimacy of the child of a married woman, no question tending directly or indirectly to prove or disprove access on the part of her husband can be asked of either husband or wife.—HAMP *v.* ROBINSON (1867), 16 L. T. 29.

63. —— —— —— **Though one spouse dead.**]—A woman cannot give evidence of the non-access of her husband to bastardise her issue, though he be dead at the time of her examination as a witness.—R. *v.* KEA (INHABITANTS) (1809), 11 East, 132 ; 103 E. R. 954.

Annotations :—**Consd.** Legge *v.* Edmonds (1855), 25 L. J. Ch. 125. **Refd.** R. *v.* Sourton (1836), 5 Ad. & El. 180.

64. —— —— —— **Though child born after decree nisi.**]—A husband obtained a decree for dissolution of marriage by reason of his wife's adultery. A child had been born after the date of the decree *nisi*, & fourteen months after the termination of the wife's cohabitation with the husband. The ct. refused to inquire into the question of the legitimacy of the child on a petition for variation of the trusts of the settlement at the trial, on the ground that the evidence had not been directed to this point, &, moreover, was that of the father, whose evidence was inadmissible to bastardise his wife's child.—PRYOR *v.* PRYOR & SHELFORD (1887), 12 P. D. 165 ; 56 L. J. P. 77 ; 57 L. T. 533 ; 35 W. R. 349.

Annotations :—**Consd.** Evans *v.* Evans & Blyth (1904), 73 L. J. P. 87. **Refd.** Douglas *v.* Douglas & Trevor (1897), 78 L. T. 88.

65. —— —— —— **To contradict evidence of spouses' admission.**]—On a summons for maintenance of children against the father, who denied the paternity, his wife having been living apart during their birth, evidence of non-access was given, & the father was allowed as a witness to disprove an alleged admission by him of paternity, to which another witness testified. But the justices on consideration struck out the father's evidence, as they said there was sufficient evidence of non-access to disprove paternity without the father's evidence :—*Held :* the evidence of the father was not admissible to contradict evidence given by other witnesses as to the father's admission of paternity.—ULVERSTONE UNION GUARDIANS *v.* PARK (1889), 53 J. P. 629.

66. —— —— **Whether admissible under Evidence Further Amendment Act, 1869 (c. 68), s. 3.**]—A petition which sought to establish a claim, on the ground that a certain person was illegitimate by

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1872), ss. 118, 120, both the parties to proceedings for divorce are competent to give evidence as to non-access & illegitimacy of the child. — HOWE *v.* HOWE (1913), I. L. R. 38 Mad. 466.—**IND.**

56 ii. —— ——.]—Although a parent cannot bastardise his or her child by a statement to that effect, even though on oath, previous statements by either parent as to the child's illegitimacy are admissible as evidence of conduct.—FITZGERALD *v.* GREEN (1911), E. D. L. 433.—**S. AF.**

56 iii. —— ——.]—The ct. cannot be satisfied as regards proof of non-paternity with confessions or declarations of the husband or wife. — HICKEY *v.* BEDARD (1911), 17 R. L. 339.—**CAN.**

56 iv. —— ——.]—On questions of legitimacy, declarations of the parent after the birth of the child can have little weight.—SHERBORNE *v.* NAPIER (1790), 2 Ridg. Parl. Rep. 224.—**IR.**

56 v. —— —— *Declaration in birth certificate.*]—In a petition by a husband for divorce, where the parties had lived separate but had continued to reside in the same town for eighteen months, & up to within five months of the time when resp. gave birth to a child elsewhere, a declaration by resp. in the certificate of birth that the child is illegitimate is admissible in evidence to prove the adultery, in order to corroborate petitioner's allegation of non-access from the time the parties lived apart.—BUSH *v.* BUSH, [1893] 12 N. Z. L. R. 269. —**N.Z.**

56 vi. —— —— *Statements in unconnected matters.*]—In a declaration of legitimacy or of bastardy, although the direct evidence of the spouses will not be admitted to prove that there was no intercourse at the time of the child's conception, statements made by the spouses in matters unconnected with the action are, like evidence of the spouses' conduct, admissible.—TENNENT *v.* TENNENT (1890), 17 R. (Ct. of Sess.) 1205 ; 27 Sc. L. R. 841.—**SCOT.**

66 i. —— —— *Evidence Further Amendment Act,* 1869 (*c.* 68), *s.* 3.]—The Society for the Prevention of Cruelty to Children proceeded against a father for the abandonment & neglect of his child : —*Held :* such proceedings did not come within the above Act, so as to make the evidence of either husband or wife admissible for the purpose of bastardising the child. — LORD *v.* O'LEARY (1906), 40 I. L. T. 166.—**IR.**

k. —— *General reputation & reports of neighbourhood.*]—*Held :* evidence of general reputation of intercourse with some person other than the husband three months before marriage, & proof of the report in the neighbourhood as to the cause of the husband's suicide five months after marriage, was properly rejected as evidence to prove non-access. —DOE d. MARR *v.* MARR (1852), 3 C. P. 36.—**CAN.**

Sect. 4.—What evidence is admissible to rebut the presumption.]

reason of the adultery of his mother, who had since been divorced:—*Held:* not "a proceeding instituted in consequence of adultery," within the above sect. so as to make the husband competent to give evidence tending to prove the fact of non-access.—*Re* RIDEOUT'S TRUSTS (1870), L. R. 10 Eq. 41; *sub nom. Re* R——'s TRUSTS, 39 L. J. Ch. 192.

Annotations:—**Consd.** *Re* Yearwood's Trusts (1877), 5 Ch. D. 545; Nottingham Grdns. *v.* Tomkinson (1879), 4 C. P. D. 343; Burnaby *v.* Baillie (1889), 42 Ch. D. 282.

67. —— —— ——.]—A. married B. on July 6, 1865. In Sept., 1865, they voluntarily separated, but the marriage was never dissolved by sentence of divorce, nor was there any judicial separation. A child was born on May 13, 1866. On a petition by the child to have a fund in ct. carried over to his separate account as being solely entitled under a gift in a will in trust for all the children or any the child of B.:—*Held:* (1) an affidavit of A., the husband, should be admitted, under the above sect., to prove non-access to B. since Christmas, 1865, & that he had not seen her since that date; (2) there being other evidence, the other three children, though born during the continuance of the marriage, were illegitimate.—*Re* YEARWOOD'S TRUSTS (1877), 5 Ch. D. 545; 46 L. J. Ch. 478; 25 W. R. 461.

Annotations:—**Consd.** Nottingham Grdns. *v.* Tomkinson (1879), 4 C. P. D. 343; Burnaby *v.* Baillie (1889), 42 Ch. D. 282.

68. —— —— ——.]—Proceedings by guardians of the poor before justices against a husband to compel him to maintain a child which, although born of his wife in wedlock, he refused to maintain on the ground that he was not the child's father, are not proceedings instituted in consequence of adultery within the above Act, so as to make his evidence admissible to prove non-access to his wife, & thereby bastardise the child.—NOTTINGHAM GUARDIANS *v.* TOMKINSON (1879), 4 C. P. D. 343; 48 L. J. M. C. 171; 43 J. P. 735; 28 W. R. 151.

Annotations:—**Consd.** Ulverstone Union Grdns. *v.* Park (1889), 53 J. P. 629. **Refd.** *Re* Walker, *Re* Jackson (1885), 53 L. T. 660; Burnaby *v.* Baillie (1889), 42 Ch. D. 282; Evans *v.* Evans & Blyth, [1904] P. 378.

69. —— —— ——.]—Power was given to the trustees of a will to apply the income of a trust fund for or towards the maintenance or education of the children of a married woman during minority. There were two infant children, & an application was made to the ct., on behalf of one of them, that the income arising from a moiety of the trust fund might be applied for the maintenance & education of such infant. The application was opposed, on the ground that the infant was illegitimate:—*Held:* this was not a proceeding instituted in consequence of adultery, within the above sect., so as to make the husband's evidence admissible to prove non-access to his wife, & thereby bastardise the infant.—*Re* WALKER, *Re* JACKSON (1885), 53 L. T. 660; 34 W. R. 95.

Annotation:—**Consd.** Burnaby *v.* Baillie (1889), 42 Ch. D. 282.

70. —— —— ——.]—A husband & wife were married on Apr. 30, 1878, & there were three children born before the marriage was dissolved, by reason of the wife's adultery with W. The decree *nisi* was made on Nov. 3, 1886, & it was made absolute on May 17, 1887. The three children were born respectively on July 2, 1881, Apr. 26, 1885, & June 25, 1886. The legitimacy of the eldest child was admitted. That of the other two children was disputed:—*Held:* notwithstanding the above sect., the evidence of the husband was not admissible, even after the dissolution of the marriage on the ground of the wife's adultery, to prove the illegitimacy of a child born in wedlock.—BURNABY *v.* BAILLIE (1889), 42 Ch. D. 282; 58 L. J. Ch. 842; 61 L. T. 634; 38 W. R. 125; 5 T. L. R. 556.

Annotation:—**Consd.** Evans *v.* Evans & Blyth, [1904] P. 274.

71. —— —— **Admissible where child born more than nine months after separation order.**]—Where an order has been made under Matrimonial Causes Act, 1878 (c. 19), s. 4 (*see, now,* Summary Jurisdiction (Married Women) Act, 1895 (c. 39), s. 5), authorising a wife to refuse to cohabit with her husband, the justices, on an application to vary the order on account of the wife's adultery, cannot refuse to receive the direct evidence of the husband or the admissions of the wife in proof of the paternity of a child born more than nine months after the separation.—HETHERINGTON *v.* HETHERINGTON (1887), 12 P. D. 112; 56 L. J. P. 78; 57 L. T. 533; 51 J. P. 294; 36 W. R. 12.

Annotation:—**Mentd.** Manders *v.* Manders, [1897] 1 Q. B. 474.

72. —— —— **Non-access proved independently—Decision not vitiated by wife's evidence.**]—Upon a complaint by a married woman, living apart from her husband, charging a third party, under Poor Law Amendment Act, 1844 (c. 101), with being the father of a bastard child of which she had been delivered, evidence having been given which justified the magistrates in presuming non-access of the husband:—*Held:* it was no ground of objection to their decision that they allowed the wife to be asked a question tending to prove non-access of the husband, the magistrates certifying that they found non-access independently of her evidence.—YATES *v.* CHIPPINDALE (1862), 11 C. B. N. S. 512; 26 J. P. 182; 142 E. R. 896.

73. —— —— —— **Mother's evidence of paternity.**]—The declaration of a mother is admissible to prove the paternity of a child, where non-access by the husband has been established *aliunde.*—LEGGE *v.* EDMONDS (1855), 25 L. J. Ch. 125; 26 L. T. O. S. 117; 20 J. P. 19; 4 W. R. 71.

Annotations:—**Refd.** Ulverstone Union Grdns. *v.* Park (1889), 53 J. P. Jo. 629. **Mentd.** Metters *v.* Brown (1863), 1 H. & C. 686.

74. —— —— **Non-access not proved independently—Wife's evidence not admitted.**]—A wife was deserted by her husband, who went to live with another woman. The wife, at the end of three or four years, married by banns another man, by whom she had two children. Eleven years after the second marriage, she again cohabited with her husband. It did not appear where the husband was between the times of his deserting & again cohabiting with his wife:—*Held:* the sessions were not warranted on this evidence in finding non-access of the husband at the times when the children were begotten, & the wife's evidence could not be received to prove them illegitimate.—R. *v.* MANSFIELD (INHABITANTS) (1841), 1 Q. B. 444; 1 Gal. & Dav. 7; 10 L. J. M. C. 97; 5 J. P. 420; 5 Jur. 505; 113 E. R. 1203.

Annotations:—**Consd.** Hawes *v.* Draeger (1883), 23 Ch. D. 173. **Refd.** Gordon *v.* Gordon, [1903] P. 141.

75. —— —— **Whether admissible to prove access before marriage.**]—The privilege which enables a husband & wife to decline answering questions as to access or non-access in cases of disputed legitimacy applies to a case where a child is born three months after the marriage.—ANON. *v.* ANON. (1856), 23 Beav. 273; 53 E. R. 107.

Annotation:—**Overd.** Poulett Peerage Claim (1903), 72 L. J. K. B. 924, H. L. I do not admit the authority of the case; it is an authority which ought not to be followed (LORD HALSBURY, C.).

76. —— —— ——.]—In a suit to perpetuate testimony, Earl P., who died in 1899, deposed that he had never had intercourse with his wife (who less than six months after the marriage gave birth

to a full-grown child) before marriage; that soon after the marriage his wife confessed that she was pregnant by another man, & that thereupon he separated from his wife & never acknowledged the child:—*Held:* this evidence was admissible against the child's legitimacy. *Anon.* v. *Anon.*, No. 75, *supra*, overd.—THE POULETT PEERAGE, [1903] A. C. 395; 72 L. J. K. B. 924; 19 T. L. R. 644, H. L.

77. —— Agreement to return to cohabitation—Presumption of previous non-access.]—An agreement executed by husband & wife, who have been living apart, to live together again, is receivable in evidence to raise a presumption of previous non-access, as being an act done by the parties.—HAMP *v.* ROBINSON (1867), 16 L. T. 29.

78. Letters by wife—To medical man—Admissible.]—Letters written by a wife before suit, to a medical man as to the state of her health, are evidence as to whether her child is a bastard, & the doctor may be compelled to produce them.—ATKINSON *v.* ATKINSON (1825), 2 Add. 484; 162 E. R. 372.

Annotation:—**Mentd.** Davidson *v.* Davidson (1856), Dea. & Sw. 132, 167.

79. —— To paramour—Not admissible.] — A married woman, A., living with her husband, had a child by him. During the coverture she became intimate with B. The husband was afflicted with paralysis, & died. Three months after his death A. had another child. A., during her widowhood, wrote letters to B. stating her attachment to him & that her second child was his:—*Held:* the letters were not admissible in evidence to prove the illegitimacy of the second child.—LEGGE *v.* EDMONDS (1855), 25 L. J. Ch. 125; 26 L. T. O. S. 117; 20 J. P. 19; 4 W. R. 71.

Annotations:—**Refd.** Ulverstone Union Grdns. *v.* Park (1889), 53 J. P. Jo. 629. **Mentd.** Metters *v.* Brown (1863), 1 H. & C. 686.

80. Evidence of conduct—Previous statements by mother—Admissible.]—Where the legitimacy of a child born in wedlock is in issue, previous statements by the mother that the child is a bastard are admissible as evidence of her conduct, although she could not be allowed to make such statements in the witness box.—THE AYLESFORD PEERAGE (1885), 11 App. Cas. 1, H. L.

Annotations:—**Consd.** Lloyd *v.* Powell Duffryn Steam Coal Co., [1914] A. C. 733, H. L. **Refd.** *Re* Westhead's Settlmt. Trusts (1885), 1 T. L. R. 651, C. A.; Bosvile *v.* A.-G. (1887), 12 P. D. 177, D. C.; Burnaby *v.* Baillie (1889), 42 Ch. D. 282.

81. —— Previous statements by paramour—Admissible.]—Pltf. & his wife were married in Apr., 1878. A child was born in July, 1881, & another child was born on Apr. 26, 1885. The legitimacy of the elder child was admitted. A decree *nisi* for the dissolution of the marriage, by reason of the wife's adultery with W., was made in Nov., 1886, & the decree was made absolute on May 17, 1887:—*Held:* verbal statements made by W., previously to the birth of the second child, were admissible as evidence of conduct tending to show that he was the father of the child.—BURNABY *v.* BAILLIE (1889), 42 Ch. D. 282; 58 L. J. Ch. 842; 61 L. T. 634; 38 W. R. 125; 5 T. L. R. 556.

Annotation:—**Consd.** Evans *v.* Evans & Blyth, [1904] P. 274.

82. Child born after decree nisi—Evidence of adultery—Questions to co-respondent.]—On the hearing of an issue for determining the status of a child born after the date of the decree *nisi*, but before the date of the decree absolute for divorce, the co-resp. is bound to answer questions put to him as to adultery between himself & resp.—EVANS *v.* EVANS & BLYTH, [1904] P. 378; 73 L. J. P. 114; 91 L. T. 600; 20 T. L. R. 612.

Proof of adultery.]—*See* HUSBAND & WIFE.

83. Whether birth before marriage—Declaration of parent—Admissible after death.]—General declarations or the answer of a parent in Ch. are good evidence after the death of such parent, to prove that a child was born before marriage, but not to prove that a child born in wedlock is a bastard.—GOODRIGHT d. STEVENS *v.* MOSS (1777), 2 Cowp. 591; 98 E. R. 1257.

Annotations:—**Distd.** Fox *v.* Marston & Hordern (1837), 1 Curt. 494. **Consd.** Murray *v.* Milner (1879), 12 Ch. D. 845. **Refd.** Berkeley Peerage Case (1811), 4 Camp. 401, H. L.; Johnson *v.* Lawson (1824), 2 Bing. 86; Monkton *v.* A.-G. (1831), 2 Russ. & M. 147; Haines *v.* Guthrie (1884), 13 Q. B. D. 818, C. A. **Mentd.** Whitelocke *v.* Baker (1807), 13 Ves. 511; R. *v.* Sourton (1836), 5 Ad. & El. 180; Legge *v.* Edmonds (1855), 25 L. J. Ch. 125; Inglis *v.* Inglis & Allen (1867), 16 L. T. 775; Nottingham Grdns. *v.* Tomkinson (1879), 4 C. P. D. 343.

84. —— —— ——.]—General declarations are good evidence, after the death of a parent, to prove that a child was born before marriage.

Where the marriage of the parents of a child was in dispute, & the will of the father, who was dead, described the child as "my son or reputed son commonly called or known by the name of J. M.," & afterwards as "my said reputed son J. M.":—*Held:* it must be admitted as evidence of the illegitimacy of the child.—MURRAY *v.* MILNER (1879), 12 Ch. D. 845; 48 L. J. Ch. 775; 41 L. T. 213; 27 W. R. 881.

85. —— —— —— Entry in baptismal register.]—Declarations by the father contained in business letters written by one of his daughters in his name & under his dictation were admitted as evidence after his death upon the question whether the daughters were born before or after his marriage with their mother.

Although an entry in a baptismal register by the officiating clergyman of the day when the baptised child was born furnishes no proof *per se* that the child was born on the day stated, the entry will not be rejected altogether as an item of evidence upon an inquiry as to the legitimacy, from its birth before or after the marriage of its reputed parents, of the child in question.—*Re* TURNER, GLENISTER *v.* HARDING (1885), 29 Ch. D. 985; 54 L. J. Ch. 1089; 53 L. T. 528.

See, also, No. 36, *ante*.

86. —— Affiliation order—Made on mother's evidence.]—In an action by ejectment the principal fact in dispute was whether pltf. had been born before or after the marriage of his parents. His mother was called as a witness on his behalf. In cross-examination she stated that she had never been before the magistrates in the matter, & had not affiliated pltf. Deft. tendered in evidence, for the purpose of contradicting her, an affiliation order, signed by two justices, made on her oath, adjudging the child to be chargeable as a bastard:—*Held:* the document was admissible in evidence for that purpose.—WATSON *v.* LITTLE (1860), 5 H. & N. 472; 29 L. J. Ex. 267; 2 L. T. 223; 8 W. R. 420; 157 E. R. 1266.

87. Whether parents were married—Evidence of one spouse—After death of other.]—Evidence of the reputed father was admitted to prove, after the mother's death, that though he cohabited with her, he was never married to her, & that a child born as the result of such cohabitation was illegitimate.—R. *v.* ST. PETER'S (INHABITANTS) (1735), Burr. S. C. 25.

Annotations:—**Refd.** R. *v.* Bramley (1795), 6 Term Rep. 330. **Mentd.** R. *v.* Sourton (1836), 6 Nev. & M. K. B. 575.

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80 i. *Evidence of conduct—Declarations of husband & wife.*]—The declarations of husband & wife are evidence of conduct to prove or disprove the legitimacy of a child.—SMITH *v.* KEARNEY (A.) (1881), 2 N. S. W. Eq. 28.—AUS.

87 i. *Whether parents were married—Illegality of marriage.*]—*Held:* the evidence of the mother as to illegality of her

Sect. 4.—What evidence is admissible to rebut the presumption. Part II. Sects. 1 & 2: Sub-sect. 1.]

88. —— —— ——.]—On a question of the legitimacy of children in connection with poor law settlement the mother's evidence is admissible to prove that she was never married to the father, the father at the time being dead.—R. *v.* BRAMLEY (INHABITANTS) (1795), 6 Term Rep. 330; 101 E. R. 579.

Annotations:—**Mentd.** Doe d. Warren *v.* Bray (1828), 7 L. J. O. S. K. B. 161; R. *v.* Sourton (1835), 5 L. J. M. C. 100; R. *v.* Gamble (1847), 16 M. & W. 384.

89. —— Declaration of deceased father.]—In a case of pedigree the declaration of a deceased father is admissible evidence of the illegitimacy of his child, when the question in dispute is whether the father & mother were ever married; & such a declaration may outweigh evidence showing that the father & mother were reputed to be husband & wife.—MURRAY *v.* MILNER (1879), 12 Ch. D. 845; 48 L. J. Ch. 775; 41 L. T. 213; 27 W. R. 881.

90. —— —— Relationship only established by declaration—Not admitted.]—In a suit relating to the trusts of a term for raising portions the legitimacy of defts. was in issue. They tendered the declaration of their natural father, made after their birth, that a prior marriage, contracted by him with a woman, who was alive at the time of his *de facto* marriage with defts.' mother, was invalid:—*Held:* the declaration was inadmissible, the relationship not being established except by the evidence itself, & as being made by an interested party.—PLANT *v.* TAYLOR (1861), 7 H. & N. 211; 31 L. J. Ex. 289; 5 L. T. 318; 8 Jur. N. S. 140; 158 E. R. 453.

Annotations:—**Refd.** Haines *v.* Guthrie (1884), 13 Q. B. D. 818, C. A.; Brocklebank *v.* Thompson, [1903] 2 Ch. 344. **Mentd.** Owen *v.* Owen (1864), 11 L. T. 137.

91. Evidence as to legitimacy—Declaration in matter of pedigree—Entry by deceased father in Bible or elsewhere.]—In an action in which it was necessary for N. to prove that he was the legitimate son of T., T. being at that time dead, N., after proving by other evidence that T. was his reputed father, offered to give in evidence an entry in a Bible, in which T. had made an entry in his own handwriting that N. was his eldest son, born in lawful wedlock from J., the wife of T., on May 1, 1778, & signed by T. himself. It was proved that T. had declared "that he had made such entry for the express purpose of establishing the legitimacy, & at the time of the birth, of his eldest son N., in case same should be called in question, in any case or in any cause whatsoever, by any person, after his death":—*Held:* such entry in the Bible (or in any other book, or on any other piece of paper) could be received to prove that N. was the legitimate son of T., as evidence of the declaration of T. in matter of pedigree (but with strong circumstances of suspicion on account of its particularity).—BERKELEY PEERAGE CASE (1811), 4 Camp. 401, H. L.

Annotations:—**Consd.** Gee *v.* Ward (1857), 7 E. & B. 509; Shedden *v.* A.-G. (1860), 30 L. J. P. M. & A. 217. **Mentd.** Belfast *v.* Chichester & A.-G. (1820), 2 Jac. & W. 439; Gordon *v.* Gordon (1821), 3 Swan. 400; Moseley *v.* Davies (1822), 11 Price, 162; Roscommon's Claim (1828), 6 Cl. & Fin. 97, H. L.; Davies *v.* Morgan (1831), 1 Cr. & J. 587; Monkton *v.* A.-G. (1831), 2 Russ. & M. 147; Walker *v.* Beauchamp (1834), 6 C. & P. 552; Meath *v.* Winchester (1836), 10 Bli. N. S. 330, H. L.; Davies *v.* Lowndes (1843), 6 Man. & G. 471, Ex. Ch.; *Re* Sussex Dukedom (1844), 8 Jur. 793, H. L.; Van der Donckt *v.* Thellusson (1849), 8 C. B. 812.

92. —— —— By deceased member of family—By father.]—On an appeal against a removal order of a woman to S., on the ground that her father was settled in S., & she had no other settlement than his, evidence was tendered of a statement of the deceased father that he never was married, & that the settlement failed:—*Held:* the statement was admissible, it being a case of pedigree about the father's family, & the father was a member of his own family.—R. *v.* ST. MARYLEBONE (INHABITANTS) (1863), 27 J. P. 423.

93. —— —— —— Relationship proved independently.]—The rule as to receiving the declarations of deceased persons in questions of pedigree is that such declarations are admissible, if emanating from a deceased member of the family whose pedigree is in question, before any controversy has arisen touching the matter to which the declarations relate, & if the relationship of the declarant to the family be proved independently of the declaration itself.

Where the question was, whether deft. was the lawful sister of a testatrix whose will was in question:—*Held:* a statement in a deed made by testatrix, describing deft. as her sister, was evidence of the fact, & (in the absence of anything to the contrary) it would be presumed that the word "sister" meant "legitimate sister."—SMITH *v.* TEBBITT (1867), L. R. 1 P. & D. 354; 15 L. T. 594; 15 W. R. 562.

94. —— —— —— Not by uncle.]—On the issue whether pltf. was the natural son of H., declarations of J., brother of H., were tendered as evidence of the relationship between pltf. & H.:—*Held:* such declarations did not fall within the exception which admitted declarations of members of the family in cases of pedigree.—CRISPIN *v.* DOGLIONI (1863), 3 Sw. & Tr. 44; 8 L. T. 91; 11 W. R. 500.

95. —— —— —— Not by illegitimate member of family.]—The declarations of an illegitimate member of a family respecting his illegitimate brothers are not admissible as reputation.—DOE d. BAMFORD *v.* BARTON (1837), 2 Mood. & R. 28.

Annotation:—**Distd.** Doe d. Jenkins *v.* Davies (1847), 10 Q. B. 314.

96. —— —— Legitimacy of deceased intestate—Declarations of intestate.]—Deft. in a testamentary suit claimed to be the lawful nephew & one of the next of kin of deceased. Issue was joined upon the questions of the legitimacy of deceased & of deft. Upon the trial of the issues:—*Held:* declarations by deceased of her own illegitimacy were admissible.—DYKE (H.M. PROCURATOR-GENERAL) *v.* WILLIAMS, *In the Goods of* EMSLEY (1862), 2 Sw. & Tr. 491; 6 L. T. 726; *sub nom.* H.M.'s PROCURATOR-GENERAL *v.* WILLIAMS, 31 L. J. P. M. & A. 157; 26 J. P. 599.

Annotations:—**Distd.** R. *v.* St. Marylebone (1863), 27 J. P. 423. **Consd.** *Re* Perton, Pearson *v.* A.-G. (1885), 53 L. T. 707.

97. —— —— —— ——.]—*Held:* declarations made by a deceased person before his death as to his own illegitimacy were admissible in evidence.—*Re* PERTON, PEARSON *v.* A.-G. (1885), 53 L. T. 707; 1 T. L. R. 655.

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marriage, in a proceeding in reference to the status of the children, was admissible.—*Re* DARCYS (1860), 11 I. C. L. R. 298; 6 Ir. Jur. 36.—IR.

87 ii. —— *Letters between spouses—Reputation.*]—Letters from the alleged husband to the alleged wife, & from other members of the alleged husband's family, & statements in the will of the alleged husband & of other members of the family, in all of which the alleged marriage was recognised, were not considered sufficient *per se* to prove a marriage when there was no record, in any shape, of a marriage, & no intimacy was proved between the alleged wife & the husband's family, but the reputation in his family was against a marriage.—EASTWOOD *v.* EASTWOOD (1867), 1 I. L. T. Jo. 27.—IR.

Part II.—Mode of Determining Question of Legitimacy.

SECT. 1.—BY ACT OF PARLIAMENT.

98. Private Act—Title of honour—Application by heir presumptive—Children bastardised.]—The wife of a peer of the realm left him in 1808, a year after their marriage, & instituted a suit in the Ecclesiastical Ct. for nullity of the marriage *propter impotentiam.* Dropping that suit soon afterwards, she went to live with another man, assuming the character of his wife by a marriage in Scotland, & during many years' cohabitation with him had several children, who were named after him & educated as his children; but in 1823 they & their mother assumed the name & titles of the peer. He generally lived abroad, had no access to his wife since she left him, but knew of her infidelity, & took no proceedings to dissolve their marriage or illegitimate the children. Upon the petition of his brother, heir presumptive to his titles, stating those facts, & alleging that the peer was likely to survive all the witnesses to them, & praying protection to the descent of the titles:—*Held:* petitioner, although by law he might perpetuate evidence, regarding titles of honour, in Ch., was entitled to have a private Act of Parliament, & an Act was passed to declare the wife's children not to be the children of the peer, but without dissolving the marriage.—THE TOWNSHEND PEERAGE (1843), 10 Cl. & Fin. 289; 8 E. R. 752, H. L.

Annotation:—**Mentd.** Gurney *v.* Gurney (1863), 1 Hem. & M. 413.

99. —— Divorce—Clause bastardising child not inserted.]—A paragraph in a divorce bill contained allegations tending to bastardise a child, to whom the wife had given birth during the marriage. There had been access by the husband to the wife at the natural period of the conception of the child:—*Held:* the paragraph must be struck out of the bill, since by its inclusion the House of Lords would in effect be asked to decide the question of legitimacy of the child in his absence.—HEWAT'S DIVORCE BILL (1887), 12 App. Cas. 312, H. L.

SECT. 2.—BY LEGAL PROCEEDINGS.

SUB-SECT. 1.—UNDER LEGITIMACY DECLARATION ACT, 1858 (c. 93).

100. Scope of Act—Only legitimacy of petitioner.]—The Act was passed for the purpose of enabling persons to obtain from the Ct. of Probate declarations of their own legitimacy, & the ct. refused to allow a suit to be instituted on behalf of an infant, the real object being to establish, not the legitimacy, but the illegitimacy of such infant.—*Re* CHAPLIN'S PETITION (1867), 36 L. J. P. & M. 90; 16 L. T. 612; 15 W. R. 1048.

Annotations:—**Refd.** Mordaunt *v.* Mordaunt (1870), L. R. 2 P. & D. 109; Evans *v.* Evans & Blyth, [1904] P. 274.

101. —— ——.]—In proceedings under the Act it is not competent for the ct. to determine the question of the legitimacy or illegitimacy of any person other than that of the party putting it in motion.—MANSEL *v.* A.-G. (1879), 4 P. D. 232; 48 L. J. P. 42; 40 L. T. 367.

102. —— ——.]—The Probate Div. has no power under the Act to make a decree establishing the legitimacy of petitioner's grandfather.—DODDS *v.* A.-G. (1880), 42 L. T. 402.

103. —— Not claim to title.]—The Act gives the ct. no jurisdiction to investigate or decide upon a claim to a title of honour, & allegations in a petition to the effect that by reason of the facts set out therein petitioner was entitled to a baronetcy, were ordered to be struck out as irrelevant.—FREDERICK *v.* A.-G. (1874), L. R. 3 P. & D. 196; 43 L. J. P. & M. 32; 30 L. T. 767; 22 W. R. 416; *subsequent proceedings*, L. R. 3 P. & D. 270.

Annotation:—**Refd.** Mansel *v.* A.-G. (1879), 48 L. J. P. 42.

104. —— Not title to property.]—Where a petitioner under the Act lays claim to real estate in England, the validity of his title cannot be made an issue in the suit. An allegation in the petition, that petitioner claimed to be entitled to real estate as heir-at-law, was ordered to be amended by striking out the words "as heir-at-law."—MANSEL *v.* A.-G. (1879), 4 P. D. 232; 48 L. J. P. 42; 40 L. T. 367.

105. Petitioner—English domicil—Property in England.]—A petition was filed by a minor of the age of eight years, by his guardian, under the Act, for a declaration of his legitimacy. The marriage of his parents took place in 1864. In 1856 his mother went through a ceremony of marriage with H., who was previously married, & whose wife was then living. The petition contained a prayer that this marriage of 1856 might be declared null & void, in which event the legitimacy of petitioner would follow as a matter of course. It was admitted that the petition could not be sustained under the Act, the domicil of petitioner being Australian & not English & there being no property in England which could be affected by the decree. The ct. declined to treat the proceedings as if instituted for a declaration of the nullity of the marriage of 1856, & dismissed the petition.—JOHNSTONE *v.* A.-G. & HAWKINS (1873), 43 L. J. P. & M. 3; 29 L. T. 547; 22 W. R. 208.

106. —— Infant—Appointment of guardian.]—A petition, under the Act, presented on behalf of an infant to establish his legitimacy, can only be so by a guardian assigned to him by the ct.—*Re* UPTON'S PETITION (1860), 6 Jur. N. S. 404.

107. —— —— —— Benefit of infant.]—The ct. will not appoint a guardian to an infant for the purpose of presenting a petition on his behalf for a declaration of legitimacy, until the matter has been referred to the registrar, to ascertain whether the institution of the suit is likely to be of benefit to the infant.—*Re* CHAPLIN'S PETITION (1867), L. R. 1 P. & D. 328; 36 L. J. P. & M. 49; 16 L. T. 154.

Annotations:—**Consd.** Evans *v.* Evans & Blyth, [1904] P. 274. **Refd.** Mordaunt *v.* Mordaunt (1870), L. R. 2 P. & D. 109.

108. Form of petition—Claim to real estate.]—A petition under the Act, where petitioner alleges a claim to real estate in England, should state the nature of the claim.—MANSEL *v.* A.-G. (1879), 4 P. D. 232; 48 L. J. P. 42; 40 L. T. 367.

109. —— Amendment.]—The amendment of a petition under the Act is a matter of pleading, & the ct. has power at any time so to mould it as to bring to an issue the matters which are clearly & substantially at issue between the parties.—MAN-

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PART II. SECT. 2, SUB-SECT. 1.

100 i. *Scope of Act—Parentage of petitioner.*]—A case comes within Legitimacy Declaration Act, 1868, although the rumour circulated be, not that petitioner is illegitimate, but that he is not the child of his reputed parents.—A. B. *v.* A.-G. (1869), 3 I. L. T. Jo. 568.—IR.

108 i. *Form of petition.*]—The proper title for petition is, "In the matter of A. B. *v.* A.-G. & others, & in the matter of Legitimacy Declaration Act, 1868."—A. B. *v.* A.-G. (1869), 3 I. L. T. Jo. 314.—IR.

l. *Answer to petition by Attorney-General—Not necessary.*]—A. B. *v.* A.-G. (1869), 3 I. L. T. Jo. 568.—IR.

Sect. 2.—By legal proceedings: Sub-sects. 1 & 2.]

SEL *v.* A.-G. (1879), 4 P. D. 232; 48 L. J. P. 42; 40 L. T. 367.

110. Citation of parties—Procedure—Persons to be cited.]—A party applying to the ct. under the Act when he has filed his petition should ask permission to cite particular individuals to see proceedings, & should show sufficient reason why they should be selected.—*Re* SHEDDEN & SHEDDEN (1859), 5 Jur. N. S. 151; 7 W. R. 463.

111. —— —— ——.]—In proceedings under the Act, the ct. will not take upon itself to decide who shall be cited to attend proceedings. Petitioner should ask leave to cite some person specified & show that he is a person fit to be cited. A person who has no interest in opposing a petition will not be cited.—UPTON *v.* A.-G. (1863), 32 L. J. P. M. & A. 177.

Annotation:—**Consd.** Brinckley *v.* A.-G., Scaramanga *v.* A.-G. (1889), 53 J. P. 425.

112. —— —— ——.]—A., petitioning under the Act, for a decree of the ct. declaring the validity of the marriage of his parents & his own legitimacy, alleged in his petition a claim to real estate as heir-at-law of his father, the validity of whose marriage he sought to have declared, & claimed to have B., his elder brother, who was born before the date of the alleged marriage, cited to see proceedings, on the ground that B. claimed to be heir-at-law of his father, & if so was entitled, as such heir-at-law, to certain real estate in England in remainder under the will of his father in prejudice to the claim of petitioner. The ct. refused to allow the brother to be cited, on the ground that he had no interest in disputing the validity of the marriage in question nor the legitimacy of petitioner, & because the object of petitioner appeared to be not to establish his own legitimacy but the illegitimacy of his brother.—MANSEL *v.* A.-G. (1879), 4 P. D. 232; 48 L. J. P. 42; 40 L. T. 367.

113. —— —— —— **Greek Marriages Act, 1884 (c. 20).**]—The practice in petitions under the Act of 1858 & Greek Marriages Act, 1884, is, that, after citing the A.-G., the parties, on applying to have the case set down for trial, must lay the state of the case, by affidavit or otherwise, before the registrar, who will direct whether any, & if so which other parties shall be cited to see proceedings. The registrar's direction will be subject to an appeal to the judge in the same manner as all other orders of the registrar.—BRINKLEY *v.* A.-G., SCARAMANGA *v.* A.-G. (1889), 14 P. D. 83; 58 L. J. P. 53; 60 L. T. 935; 53 J. P. 425; 37 W. R. 687.

114. Parties cited—Plea of res judicata not available for.]—Other parties, who are interested in the result of the suit, & who, with the permission of the ct., are cited under s. 6 of the Act to see proceedings, cannot stop the suit by a plea of *res judicata*, as between themselves & petitioner.—SHEDDEN & SHEDDEN *v.* A.-G. & PATRICK & PATRICK (1860), 2 Sw. & Tr. 170; 30 L. J. P. M. & A. 217; 3 L. T. 592; 6 Jur. N. S. 1163; 9 W. R. 285; *affd. sub nom.* SHEDDEN *v.* PATRICK & A.-G. (1869), L. R. 1 Sc. & Div. 470, H. L.

Annotations:—**Mentd.** H.M.S. Hawke (1912), 28 T. L. R. 319, C. A.; Nash *v.* Rochford R. D. C., [1917] 1 K. B. 384, C. A.

115. Mode of trial—Jury.]—The ct. cannot make an order for the trial by a jury of a petition presented under the Act, unless there is some issue for the jury.—RYVES *v.* A.-G. (1865), L. R. 1 P. & D. 23; 35 L. J. P. & M. 6; 13 L. T. 305; 11 Jur. N. S. 878; 14 W. R. 17; *affd.* (1868), 37 L. J. P. & M. 75, H. L.

116. —— —— **Not in complicated cases.**]—When issues of fact are raised between the parties to a suit for a declaration of legitimacy, & either party wishes them to be tried by a jury, the ct. will grant a jury, unless complicated questions are involved which a jury cannot properly try.—*Re* BOUVERIE'S PETITION (1862), 2 Sw. & Tr. 548; 6 L. T. 692; 10 W. R. 811; *sub nom.* BOUVERIE *v.* A.-G., 31 L. J. P. M. & A. 79.

Annotation:—**Consd.** Sackville-West *v.* A.-G. (1909), 26 T. L. R. 33.

117. —— —— ——.]—The judge has absolute discretion as to the mode of trial of the issues arising on a petition for a declaration of legitimacy under the Act, &, in exercising such discretion, the judge will have regard to the balance of convenience.

Where the issues for trial involved, besides possible questions of character affecting one of the parties, the reading of a mass of evidence, taken on various commissions, the minute & careful examination of numerous documents, & probably questions of admissibility of evidence, which might prejudice the minds of a jury:—*Held:* the difficulty of deciding fairly any question of character or credit that might arise could not outweigh the inconvenience, delay, & possible miscarriage of justice which the trial of such complicated matters before a jury was likely to involve, & an application by petitioner for trial by jury should be refused.—SACKVILLE-WEST *v.* A.-G., [1910] P. 143; 79 L. J. P. 34; 26 T. L. R. 33.

118. Costs—Security—Petitioner out of jurisdiction.]—A petitioner under the Act, who is resident out of the jurisdiction of the ct., cannot be compelled to give security for costs.—SHEDDEN *v.* A.-G. (1867), 36 L. J. P. & M. 132; 16 L. T. 746; 15 W. R. 1093.

119. —— **Crown—Person cited.**]—In proceedings on a petition under the Act the ct. has jurisdiction to order a person, who has been cited & who has intervened & opposed the petition, to pay petitioner's costs.

The Crown is not liable for costs upon a petition under the Act, nor entitled to receive them, & no costs can be awarded to or against the A.-G.—BAIN *v.* A.-G., [1892] P. 261; 61 L. J. P. 135; 67 L. T. 447, C. A.

120. —— ——.]—In a legitimacy suit the A.-G. neither receives nor pays costs.—SLINGSBY *v.* A.-G. (1915), 31 T. L. R. 246; *revsd.* without affecting this point (1916), 32 T. L. R. 364, C. A.; 33 T. L. R. 120, H. L.

121. —— **Guardian of infant petitioner.**]—In a legitimacy suit, in which the judge of first instance gave judgment for the infant petitioner, but ordered each of the parties (other than the A.-G.) to pay his own costs, the Ct. of Appeal reversed the judgment for petitioner & ordered the infant & his guardian to pay the costs both in the Ct. of Appeal & in the ct. below, & the House of Lords dismissed the appeal to that House with costs to be paid personally by the guardian *ad litem* or next friend.—SLINGSBY *v.* A.-G. (1916), 33 T. L. R. 120, H. L.; *subsequent proceedings*, [1918] P. 236, C. A.

SUB-SECT. 2.—OTHER PROCEEDINGS.

122. Child en ventre sa mère—Marriage declared void—Issue bastardised.]—A marriage was solemnised between A. & B., but it was declared void by the Ecclesiastical Ct., A. being an infant, who had not obtained the consent of his guardian.

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119 i. *Costs—Crown.*]—The ct. has no jurisdiction to give costs against the Crown in legitimacy cases.—GOOD *v.* JOYNT (1874), 8 I. L. T. 415.—IR.

m. *Action for declaratory judgment & injunction to restrain mother from making statements as to legitimacy.*]—A. brought an action against B., his former wife, from whom he had obtained a divorce, & C., the infant child, whom B. alleged

Some years afterwards, a child of A. & B., *en ventre sa mère* at the time of the sentence, & who necessarily was no party to the proceedings, claimed property as descendant of A. *Semble:* the child, who was bastardised by the effect of the sentence, had no means of showing that the sentence was erroneous.—PERRY *v.* MEDDOWCROFT (1846), 10 Beav. 122; 8 L. T. O. S. 249; 50 E. R. 529.

123. Peerage claim.]—A petition in a claim to a peerage alleged that in June, 1803, petitioner's father discovered that petitioner's mother was guilty of adulterous intercourse & ceased to cohabit with her, she had already in Dec., 1802, been delivered of a male child which was alleged not to be the child of petitioner's father. In 1804 petitioner's father obtained a divorce, but the House of Lords refused to declare the alleged adulterous offspring illegitimate:—*Held:* petitioner had made good his claim.—GARDNER PEERAGE CLAIM (1826), 58 Lords Journals 165, H. L.

124. Trusts for children—Ascertainment of beneficiaries—Settlement made to raise question of legitimacy.]—In Dec., 1859, B. eloped from her husband A. & remained abroad with her paramour until Sept., 1860. A. obtained in Feb., 1861, a decree *nisi* for the dissolution of his marriage, which was made absolute on May 22, 1861. On May 4, 1861, B. was delivered of a child. In order to determine the status of this child, A. in Jan., 1862, settled a sum of money upon trust for all & every the children then living of the marriage of A. & B., & a suit was instituted seeking that the rights of the parties interested under this settlement might be declared, & the trusts of the settlement might be carried out under the direction of the ct.:—*Held:* although the real object of the settlor might be, & probably was, to obtain a decision from the ct. that the child in question was illegitimate, & although the decision of the ct. might affect property of far greater value, those circumstances were not sufficient to warrant the ct. in withholding the exercise of its ordinary jurisdiction. *Semble:* if the settlement had been made by a mere stranger with a malicious or improper motive, the ct. could have declined to exercise jurisdiction.

A suit such as that above mentioned is not properly a fictitious suit, but is rather analogous to the class of cases in which a fund is settled on an infant with the view of founding an application to the ct. respecting the custody of the infant's person.—GURNEY *v.* GURNEY (1863), 1 Hem. & M. 413; 2 New Rep. 106; 32 L. J. Ch. 456; 8 L. T. 380; 9 Jur. N. S. 514; 11 W. R. 659; 71 E. R. 180.

Annotations:—**Consd.** Anon. (1864), 2 Hem. & M. 124; Cooke *v.* Elmsall (1865), 12 L. T. 408. **Dbtd.** Cooke *v.* Cooke (1865), 4 De G. J. & Sm. 704, L.C. **Mentd.** Slingsby *v.* Slingsby, [1912] 2 Ch. 21, C. A.

125. —— —— ——.]—In 1863 a sum of money was settled in trust for the children or child of the marriage of A. with B., & in default of any such child, in trust for the benefit of C. & his children. At the date of the settlement the marriage had been dissolved, & there was one child, whose legitimacy it was the avowed object of the settlement to try, by means of a suit for carrying out the trusts thereby created. C. then filed a bill against the child & the trustee of the settlement praying that the trusts of the settlement might be carried into execution, & that it might be declared that there was no child of the marriage. The child disclaimed all interest in the trust fund; & the settlor had no interest in the question of legitimacy or illegitimacy, & neither A. nor B. desired to raise the question:—*Held:* the suit was collusive & could not be maintained.—COOKE *v.* COOKE (1865), 4 De G. J. & Sm. 704; 6 New Rep. 134; 34 L. J. Ch. 459; 29 J. P. 692; 11 Jur. N. S. 533; 13 W. R. 697; 46 E. R. 1093; *sub nom.* COOKE *v.* ELMSALL, 12 L. T. 408, L.C.

126. —— —— **Settlement made by court—Perpetuation of testimony.**]—A lunatic, who had several children, was divorced from his wife on the ground of the wife's adultery. One of the wife's children born before the divorce was alleged to be illegitimate, & the committee in lunacy presented a petition that proceedings might be taken to perpetuate the testimony of the illegitimacy:—*Held:* the proper course to pursue was for the ct. to make a settlement of some of the lunatic's property on his children, & for the legitimate children to raise the question of the right of the alleged illegitimate child to participate, & then to bring an action to perpetuate the testimony.—*Re* STOER (1884), 9 P. D. 120; 51 L. T. 141; 32 W. R. 1005, C. A.

127. Future rights—Legitimacy Declaration Act, 1858 (c. 93), available—Immediate declaration of title—Perpetuation of testimony not allowed.]—An action was brought to perpetuate testimony concerning the validity of the marriage of pltf.'s mother with a view to establish his claim to succeed, on the death of his father, to a peerage & to the family estates, to which pltf. claimed to be entitled as next tenant in tail male in remainder expectant on the death of his father. The action was brought on the ground that pltf.'s rights could not be brought to trial before the happening of a future event within R. S. C., Ord. 37, r. 35:—*Held:* inasmuch as the sole question really in dispute was the validity of the marriage of pltf.'s mother, & he could, by proceeding under the above Act, obtain an immediate judicial determination of that question, an order for the examination of witnesses abroad, for the purpose of perpetuating their testimony, ought not to be made. *Semble:* pltf. could at once, by virtue of Ord. 25, r. 5, bring an action for a declaration of his title to the estates as tenant in tail in remainder expectant on the death of his father.—WEST *v.* SACKVILLE (LORD), [1903] 2 Ch. 378; 72 L. J. Ch. 649; 88 L. T. 814; 51 W. R. 625; 19 T. L. R. 541; 47 Sol. Jo. 581, C. A.

Annotation:—**Mentd.** Sackville-West *v.* A.-G. (1909), 26 T. L. R. 33.

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to be the child of pltf., for a declaration that C. was not pltf.'s child, & sought an injunction to restrain B. from alleging that C. was his child:—*Held:* the ct. had no jurisdiction to entertain the action.—TOOL *v.* EWING, [1904] 1 I. R. 434.—**IR.**

n. *Institution of declarator after judgment reducing service.*]—A party, who claimed to be a legitimate child, served heir to her reputed father; a reduction of her service was then brought by the next heir, her uncle, & the ct. reduced the service. Having then instituted a declarator of legitimacy, which was directed against the sisters of her uncle, who (upon his death) had been sisted as parties to the former process:—*Held:* the judgment of the ct. reducing her service did not bar her from seeking to establish her status by declarator of legitimacy.—NORRIS *v.* GILCHRIST (1847), 9 Dunl. (Ct. of Sess.) 466.—**SCOT.**

o. *In Malta.*]—The Grand Master of the Knights of St. John had, from the time that the island of Malta was granted to them by the Emperor Charles V., the power possessed by the Emperor under the Roman law of legitimating by special dispensation illegitimate children, even if born of an adulterous intercourse, upon the petition of the father, & when Malta became a British possession the power in question passed to the British Governor. Such application was a *quasi*-judicial proceeding, & was disposed of upon well-recognised considerations with the assistance and advice of a judge of the Civil Ct. By an Ordinance, dated May 25, 1814, the Governor reconstituted the civil & criminal tribunals of the island & declared (*inter alia*) that the Third Hall of the Civil Ct. should in future "perform all acts of voluntary jurisdiction hitherto performed by the civil judge, or by the Govt., on a petition from the party & a report from the civil judge":—*Held:* by such Ordinance the special power of legitimation above mentioned was transferred to the Civil Ct.

A petition for the legitimation of a child is an appeal to the voluntary jurisdiction of the ct., & persons whose interests might be affected by the legitimation need not be cited as parties, or appear for their interest. — GERA *v.* CIANTAR (1887), 12 App. Cas. 557; 56 L. J. P. C. 93; 57 L. T. 818, P. C. —**MALTA.**

Sect. 2.—By legal proceedings: Sub-sect. 2. Part III. Sect. 1.]

128. Divorce—Variation of settlement—Legitimacy in question—Petition under Legitimacy Declaration Act, 1858 (c. 93).]—Upon a motion for variation of a marriage settlement, consequent on a divorce, where the paternity of the only child born in wedlock was in dispute, the ct., in lieu of dealing with the question of legitimacy on the motion, directed a petition for declaration of legitimacy to be presented by the official solr. on behalf of the child.—DOUGLAS *v.* DOUGLAS & TREVOR (1897), 78 L. T. 88.

Annotation:—**Consd.** Evans *v.* Evans & Blyth, [1904] P. 274.

129. —— —— —— Issue directed.]—On a petition for variation of settlements after a decree for dissolution of marriage, where a child had been born between the date of the decree *nisi* & decree absolute, the paternity of which petitioner denied, the ct., on the application of petitioner, directed an issue to be tried to ascertain the status of the child, & postponed the further consideration of the variation of settlements until after the trial of the issue. —EVANS *v.* EVANS & BLYTH, [1904] P. 274; 73 L. J. P. 87; 91 L. T. 356; 20 T. L. R. 516.

130. Probate action—Claim for declaration of legitimacy not allowed.]—In an action for probate pltf. included in the writ a claim for a declaration of his legitimacy:—*Held:* such a claim could not be made in an action, but must be made on petition under Legitimacy Declaration Act, 1858 (c. 93).—WARTER *v.* WARTER (1890), 15 P. D. 35; 59 L. J. P. 45; 62 L. T. 328.

Part III.—Legitimation by Subsequent Marriage.

SECT. 1.—CONDITIONS OF LEGITIMATION.

131. Domicil of father in country allowing legitimation.]—By international law, as recognised in England, those children are legitimate whose legitimacy is fixed by the law of the father's domicil.—*Re* ANDROS, ANDROS *v.* ANDROS (1883), 24 Ch. D. 637; 52 L. J. Ch. 793; 49 L. T. 163; 32 W. R. 30.

Annotations:—**Folld.** *Re* Grey's Trusts, Grey *v.* Stamford, [1892] 3 Ch. 88. **Refd.** *Re* Fergusson's Will, [1902] 1 Ch. 483.

132. —— At birth of child.]—The status of the child, with respect to its capacity to be legitimated by the subsequent marriage of its parents, depends wholly on the status of the putative father, not on that of the mother. According to English law, where at the time of a bastard's birth the father has his domicil in England, no subsequent change of domicil can render practicable the bastard's legitimation (LORD HATHERLEY, C.).—UDNY *v.* UDNY (1869), L. R. 1 Sc. & Div. 441, H. L.

Annotations:—**Refd.** *Re* Grove, Vaucher *v.* Treasury Solicitor (1887), 57 L. T. 795. **Mentd.** Haldane *v.* Eckford (1869), L. R. 8 Eq. 631; Shedden *v.* Patrick & A.-G. (1869), L. R. 1 Sc. & Div. 470, H. L.; Brunel *v.* Brunel (1871), L. R. 12 Eq. 298; Douglas *v.* Douglas, Douglas *v.* Webster (1871), L. R. 12 Eq. 617; Wilson *v.* Wilson (1872), L. R. 2 P. & D. 435; Hamilton *v.* Dallas (1875), 1 Ch. D. 257; King *v.* Foxwell (1876), 3 Ch. D. 518; Platt *v.* A.-G. of New South Wales (1878), 3 App. Cas. 336, P. C.; Doucet *v.* Geoghegan (1878), 9 Ch. D. 441; Firebrace *v.* Firebrace (1878), 4 P. D. 63; *Re* Goodman's Trusts (1881), 17 Ch. D. 266, C. A.; *Re* Tootal's Trusts (1883), 23 Ch. D. 532; Bradford *v.* Young (1884), 26 Ch. D. 656; *Re* Patience, Patience *v.* Main (1885), 29 Ch. D. 976; *Re* Robertson (1885), 2 T. L. R. 178, C. A.; *Re* Marrett, Chalmers *v.* Wingfield (1887), 3 T. L. R. 392; *Re* Cooke's Trusts (1887), 56 L. J. Ch. 637; Abd-ul-Messih *v.* Farra (1888), 13 App. Cas. 431, P. C.; *Re* Johnson, Roberts *v.* A.-G., [1903] 1 Ch. 821; Winans *v.* A.-G., [1904] A. C. 289, H. L.; *Re* James, James *v.* James (1908), 98 L. T. 438; Simon *v.* Phillips (1916), 80 J. P. 197; Tingley *v.* Müller, [1917] 2 Ch. 144, C. A.; Casdagli *v.* Casdagli, [1918] P. 89, C. A.

133. —— ——.]—B., the claimant to Scottish peerages, was born before the marriage between his father & mother was solemnised in England, the question being whether the peerages held by & vested in his father according to the law of Scotland descended to the claimant, as legitimated by the subsequent marriage of his parents. The father had at the time of his marriage become newly domiciled in England. The committee of privileges reported against the claim, & so it was then resolved. —STRATHMORE PEERAGE CASE (1821), 6 Bli. N. S. 487; 54 Lords' Journals, 554; 5 E. R. 673, H. L.

Annotations:—**Consd.** Doe d. Birtwhistle *v.* Vardill (1835), 2 Cl. & Fin. 571, H. L.; Birtwhistle *v.* Vardill (1840), 7 Cl. & Fin. 895, H. L. **Mentd.** *Re* Wright's Trust (1856), 2 K. & J. 595; *Re* Goodman's Trusts (1881), 17 Ch. D. 266, C. A.; The Lauderdale Peerage (1885), 10 App. Cas. 692, H. L.

134. —— ——.]—The legitimacy of a child is determined by the law of the country where its parents are domiciled at the time of the conception & birth of the child, & not by the law of the country where the child is born; & a child who is born illegitimate cannot afterwards be made legitimate by the parents domiciling themselves & intermarrying in a country where, if they had been domiciled there at the time of the birth, such child would have been legitimate.

A domiciled Englishman became the father of a child by a French woman, & afterwards, having gained a domicil in France, where the subsequent marriage of the parents, with acknowledgment of their children born previously to the marriage, renders those children legitimate, married the mother & acknowledged the child:—*Held:* the child was not legitimate.—*Re* WRIGHT'S TRUST (1856), 2 K. & J. 595; 25 L. J. Ch. 621; 27 L. T. O. S. 213; 20 J. P. 675; 2 Jur. N. S. 465; 4 W. R. 541; 69 E. R. 920.

Annotations:—**Consd.** Boyes *v.* Bedale (1863), 1 Hem. & M. 798. **Apld.** *Re* Goodman's Trusts (1881), 17 Ch. D. 266. **Folld.** *Re* Grove, Vaucher *v.* Treasury Solicitor (1887), 57 L. T. 795. **Refd.** Levy *v.* Solomon (1877), 37 L. T. 263.

135. —— ——.]—The question of a person's legitimacy is a question of status to be determined by the law of the country where his parents are at his birth domiciled, & the English law, except as to succession to real estate in England, recognises & acts on the status as declared by the law of the domicil.

P. was born in Holland before wedlock but legitimated, according to the law of that country, by the subsequent marriage of her parents, who were at the time of the birth domiciled in Holland:—*Held:* P. was entitled to share as one of the next-of-kin in the personal estate of an intestate who had died domiciled in England.—*Re* GOODMAN'S TRUSTS (1881), 17 Ch. D. 266; 50 L. J. Ch. 425; 44 L. T. 527; 29 W. R. 586, C. A.

Annotations:—**Folld.** *Re* Andros, Andros *v.* Andros (1883), 24 Ch. D. 637. **Expld.** *Re* Grove, Vaucher *v.* Treasury Solicitor (1888), 40 Ch. D. 216, C. A. **Mentd.** *Re* Ullee (1885), 1 T. L. R. 667; *Re* Grey's Trusts, Grey *v.* Stamford, [1892] 3 Ch. 88; *Re* Fergusson's Trust, [1902] 1 Ch. 483; Ogden *v.* Ogden, [1908] P. 46, C. A.

136. —— —— & at marriage—Switzerland.]—A child born before the marriage of its father & mother cannot be legitimated by their subsequent marriage unless the father was domiciled in a country whose laws allow such legitimation both

at the time of the marriage which gave the child the status of legitimacy, & at the time of the birth on which it took from its putative father the potentiality of being legitimated.

In 1734 T., whose domicil of origin was Swiss, came to England, where he carried on business & remained till his death in 1779. Soon after coming to England he lived with P. as his wife, & had by her a daughter S., born in 1744, & two other children born in 1745 & 1747. In 1749 T. married W. & had by her one child. W. died in 1752, & in 1755 T. married P. & had by her four more children. By the Swiss law, illegitimate children were legitimated by the subsequent marriage of their putative father & their mother notwithstanding an intermediate marriage of their father with another woman, & the birth of a child by her :—*Held :* S. & the other children born before the marriage of T. to P. were illegitimate on the grounds : (1) (COTTON & LOPES, L.JJ.) the domicil of T. was English both at the date of the birth of S. in 1744, & of his subsequent marriage with P. in 1755 ; (2) (FRY, L.J.) the domicil of T. was English at the date of his marriage to P., but not at the date of the birth of S.—*Re* GROVE, VAUCHER *v.* TREASURY SOLICITOR (1888), 40 Ch. D. 216 ; 58 L. J. Ch. 57 ; 59 L. T. 587 ; 37 W. R. 1 ; 4 T. L. R. 762, C. A.

137. —— —— —— **Scotland.**]—R., by birth a Scotsman, & holding land in Scotland, which he visited occasionally, but being domiciled in England, cohabited with an Englishwoman, by whom he had a natural son. After the birth of the child he went to Scotland, & there, after a residence of fifteen days, married the mother, according to the forms of law in Scotland, & remained there visiting his friends & superintending his estates for about two months, when he returned with his wife & child to England, where they remained domiciled until his death :—*Held :* the child was not heir to the reputed father so as to inherit lands in Scotland.—MUNRO *v.* SAUNDERS (1832), 6 Bli. N. S. 468 ; 5 E. R. 665, H. L.

Annotations :—**Mentd.** Doe d. Birtwhistle *v.* Vardill (1834), 9 Bli. N. S. 32, H. L. ; Fenton *v.* Livingstone, Livingstone *v.* Livingstone (1859), 5 Jur. N. S. 1183, H. L.

138. —— —— —— —— **Though birth & marriage in England.**]—A Scotsman left Scotland & visited London in 1794. In the course of that year he became acquainted with an Englishwoman, & in 1795 he took lodgings for her in London, where, in 1796, a child was born. He then took a house on lease & furnished it, & continued to reside in that house with her till 1801, unmarried. In Sept. of that year he married her in an English church. In 1802 he returned to Scotland, taking with him his wife & child, & settled himself in his patrimonial mansion. During the whole period of his residence in London he had been accustomed to write letters to Scotland, declaring from time to time his immediate intention to return, & desiring things to be done which could only be necessary on that account :—*Held :* he had not lost his Scottish domicil, & his marriage was in all respects a Scottish marriage, & his child capable of succeeding as his lawful heir to entailed estates.—MUNRO *v.* MUNRO (1840), 7 Cl. & Fin. 842 ; 7 E. R. 1288, H. L.

Annotations :—**Consd.** Shedden *v.* Patrick (1854), 23 L. T. O. S. 194, H. L. **Folld.** *Re* Wright's Trusts (1856), 27 L. T. O. S. 213. **Apld.** Udny *v.* Udny (1869), L. R. 1 Sc. & Div. 441, H. L. **Refd.** Doe *v.* Vardill (1840), 6 Bing. N. C. 385 ; *Re* Don's Estate (1857), 4 Drew. 194 ; Newton *v.* North-West Provinces (Judges) (1871), 8 Moo. P. C. C. N. S. 202, P. C. ; *Re* Grove, Vaucher *v.* Treasury Solicitor (1888), 40 Ch. D. 216, C. A. **Mentd.** Laneuville *v.* Anderson (1853), 21 L. T. O. S. 209 ; Anderson *v.* Laneuville (1854), 2 Ecc. & Ad. 41 ; Forbes *v.* Forbes (1854), Kay, 341 ; Lyall *v.* Paton (1856), 27 L. T. O. S. 315 ; *Re* Steer (1858), 3 H. & N. 594 ; Hodgson *v.* De Beauchesne (1858), 12 Moo. P. C. C. 286, P. C. ; Crookenden *v.* Fuller (1859), 5 Jur. N. S. 1222 ; Harvey *v.* Farnie (1880), 5 P. D. 153 ; *Re* Patience, Patience *v.* Main (1885), 29 Ch. D. 976 ; The Lauderdale Peerage (1885) 10 App. Cas. 692, H. L. ; Winans *v.* A.-G., [1904] A. C. 287, H. L.

139. —— —— —— —— ——.]—The child of a Scotsman, though born in England, becomes legitimate for all civil purposes in Scotland, by the subsequent marriage of the parents in England, if the domicil of the father was & continued throughout to be Scottish. Neither the place of the marriage nor the place of the birth of the child will, in such circumstances, affect the status of the child.

In 1796 a Scotsman came to England, bringing with him a Scotswoman then in a state of pregnancy, & her child was born in England. The woman continued to reside with him & had other children by him. He took a house, for the purposes of the children's education, in Penrith in Cumberland, &, when not in London attending his Parliamentary duties as member of Parliament for a Scottish county, frequently stayed at Penrith. In 1808 he executed a marriage contract, in which he was described as "of Logan" (Scotland), of the one part, & she was described as "M. R." (her maiden name), "residing at Penrith, Cumberland, South Britain, of the other part." No other ceremony of marriage took place, but he shortly afterwards carried her to Scotland & introduced her & the children as his wife & children :—*Held :* the children were entitled to succeed as heirs to Scottish estate.—DALHOUSIE (COUNTESS) *v.* M'DOUALL (1840), 7 Cl. & Fin. 817 ; 7 E. R. 1279, H. L.

Annotations :—**Refd.** Munro *v.* Munro (1840), 7 Cl. & Fin. 842, H. L. ; Udny *v.* Udny (1869), L. R. 1 Sc. & Div. 441, H. L. ; The Lauderdale Peerage (1885), 10 App. Cas. 692, H. L.

140. —— —— —— **Holland.**]—S. had three children born to him in England, while domiciled there, by a woman with whom he cohabited & with whom he removed to Holland. While domiciled in Holland he had another child born to him by the same woman, whom he afterwards married in Holland :—*Held :* the law of the country of the domicil at the time of the birth & of the marriage must prevail, & the child born in Holland was entitled to share equally with another child born there after the marriage in a legacy bequeathed to the children of S., but the three children born in England were illegitimate, according to the law of England, & were excluded from participation in the legacy.—GOODMAN *v.* GOODMAN (1862), 3 Giff. 643 ; 6 L. T. 641 ; 8 Jur. N. S. 554 ; 66 E. R. 565.

Annotations :—**Distd.** *Re* Goodman's Trusts (1880), 14 Ch. D 619. **Refd.** *Re* Andros, Andros *v.* Andros (1883), 24 Ch. D. 637. **Mentd.** *Re* Wilson's Trusts (1865), L. R. 1 Eq. 247.

141. —— —— —— **Guernsey.**]—A testator bequeathed personal estate to his great-nephews, the sons of his deceased nephew A., a native of Guernsey. Pltf. was the son of A. born before the marriage of his parents, who were domiciled in Guernsey at the time of his birth & of their marriage. By the law of Guernsey children were legitimated by the subsequent marriage of their parents :—*Held :*

PART III. SECT. 1.

138 i. *Domicil of father in country allowing legitimation—At birth of child—& at marriage—Scotland—Though birth in England.*]—A domiciled Scotsman having married in Edinburgh a domiciled Englishwoman, by whom he had had children born to him in England :—*Held :* the doctrine of legitimation *per subsequens matrimonium* applied.—M'DOUALLS *v.* M'DOUALL (1853), 20 L. T. O. S. 144.—**SCOT.**

b. *Intervening marriage — Effect of.*]—A child was born out of wedlock. Its mother did not marry its reputed father until after she had been married to another man, & left a widow :—*Held :* legitimation *per subsequens matrimonium* was barred by the mid-impediment of the intervening marriage.—KERR *v.* MARTIN (1836), 14 Sh. (Ct. of Sess.) 1104. —**SCOT.**

Sect. 1.—*Conditions of legitimation.* *Sect.* 2. *Part IV. Sects.* 1 & 2: *Sub-sect.* 1.]

as pltf.'s father was domiciled in Guernsey at pltf.'s birth, & afterwards married his mother, so as to make him legitimate by the law of Guernsey, he was entitled to share in the bequest with the sons of A. born after the marriage.—*Re* ANDROS, ANDROS *v.* ANDROS (1883), 24 Ch. D. 637; 52 L. J. Ch. 793; 49 L. T. 163; 32 W. R. 30.

Annotations:—**Folld.** *Re* Grey's Trusts, Grey *v.* Stamford, [1892] 3 Ch. 88. **Refd.** *Re* Ferguson's Will, [1902] 1 Ch. 483.

142. Recognition of paternity by husband.]—To legitimise children born previously to marriage a formal recognition of paternity by the husband is not requisite, so long as there is evidence that the child is the offspring of husband & wife, which may be supplied by any recognition of the fact by the husband.—LA CLOCHE *v.* LA CLOCHE (1872), L. R. 4 P. C. 325; 9 Moo. P. C. C. N. S. 87; 41 L. J. P. C. 51; 20 W. R. 953, P. C.

SECT. 2.—EFFECT OF LEGITIMATION.

143. Real estate—Descent—Lex loci.]—In deciding upon the title to real estate, the *lex loci rei sitae* must prevail; so that a person, legitimate by the law of his birthplace, & of the place where his parents were married, may not be regarded as legitimate to take real estate by inheritance elsewhere. A person legitimated by the marriage of his parents after his birth is legitimate to all intents & purposes in Scotland. But when he claims a real estate in England he is not held legitimate to that effect, because legitimacy by the English law requires the party to have been born in lawful marriage (LORD BROUGHAM).

In respect to immovable property the law of the country in which the property is situated governs exclusively as to the tenure, the title & the descent of such property (LORD WENSLEYDALE).—FENTON *v.* LIVINGSTONE (1859), 3 Macq. 497; 33 L. T. O. S. 335; 23 J. P. 579; 5 Jur. N. S. 1183; 7 W. R. 671, H. L.

Annotations:—**Mentd.** Chichester *v.* Mure (1863), 32 L. J. P. M. & A. 146; *Re* Goodman's Trusts (1881), 17 Ch. D. 266, C. A.; R. *v.* Dibden, [1910] P. 57, C. A.

144. —— —— Land in England—Whether legitimated child included.]—A child born in Scotland, of parents domiciled there, who at the time of his birth were not married, but who afterwards intermarried in Scotland (there being no lawful impediment to their marriage, either at the time of the birth or afterwards), though legitimate by the law of Scotland, cannot take, as heir, lands of his father in England.—BIRTWHISTLE *v.* VARDILL (1840), 7 Cl. & Fin. 895; 4 Jur. 1076; 7 E. R. 1308; *sub nom.* DOE d. BIRTWHISTLE *v.* VARDILL, 6 Bing. N. C. 385; West, 500; 1 Scott, N. R. 828, H. L.

Annotations:—**Apld.** *Re* Don's Estate (1857), 4 Drew. 194; Fenton *v.* Livingstone (1859), 33 L. T. O. S. 335, H. L. **Consd.** Skottowe *v.* Young (1871), 40 L. J. Ch. 366. **Expld.** *Re* Grey's Trusts, Grey *v.* Stamford, [1892] 3 Ch. 88. **Refd.** *Re* Andros, Andros *v.* Andros (1883), 24 Ch. D. 637; Escallier *v.* Escallier (1885), 10 App. Cas. 312, P. C. **Mentd.** *Re* Wright's Trust (1856), 2 K. & J. 595; Shaw *v.* Gould (1868), L. R. 3 H. L. 55, H. L.; Harvey *v.* Farnie (1880), 6 P. D. 35, C. A.; *Re* Goodman's Trusts (1881), 17 Ch. D. 266, C. A.

145. —— —— —— Father excluded.] — An antenuptial son, born in Scotland, of Scottish parents, who was legitimated according to the law of Scotland by the subsequent marriage of his parents, settled in England & purchased freehold property. The son died intestate & unmarried, leaving his father surviving him:—*Held:* the father was incapable of inheriting real estate from his son, although that son was legitimate by the law of England as to his personal status, & the property escheated to the Crown.—*Re* DON'S ESTATE (1857), 4 Drew. 194; 27 L. J. Ch. 98; 30 L. T. O. S. 190; 21 J. P. 694; 3 Jur. N. S. 1192; 5 W. R. 836; 62 E. R. 75.

Annotations:—**Refd.** Escallier *v.* Escallier (1885), 10 App. Cas. 312, P. C. **Mentd.** *Re* Goodman's Trusts (1881), 17 Ch. D. 266, C. A.

146.—— Devise to "children" — Whether legitimated child included.]—The rule that a child born out of wedlock, although legitimated by the subsequent marriage of his parents, cannot inherit land in England, relates only to the case of descent upon an intestacy & does not affect the case of a specific devise of real estate to children.

A testator specifically devised real estate & bequeathed personal estate to trustees upon trust for H. for life & then for his children. H. acquired a domicil at the Cape of Good Hope, & died there leaving amongst other children a son J., born before marriage, but, according to Cape law, legitimated by the subsequent marriage of his parents:—*Held:* J. was entitled to a share both of the real & the personal estate.—*Re* GREY'S TRUSTS, GREY *v.* STAMFORD, [1892] 3 Ch. 88; 61 L. J. Ch. 622; 41 W. R. 60; 36 Sol. Jo. 523.

147. Personal estate—Will or intestacy—Whether legitimated child can take.]—A person legitimated by the marriage of his parents is entitled to take personalty under a will or on an intestacy, on the same footing as if he were originally legitimate.—ROSE *v.* ROSS (1840), 4 Wils. & S. 289, H. L.

Annotations:—**Distd.** Udny *v.* Udny (1869), L. R. 1 Sc. & Div. 441, H. L. **Refd.** Shedden *v.* Patrick (1854), 23 L. T. O. S. 194, H. L. **Mentd.** Munro *v.* Munro (1840), 7 Cl. & Fin. 842, H. L.; *Re* Wright's Trusts (1856), 25 L. J. Ch. 621.

148. —— Statute of Distribution, 1670 (c. 10) — Legitimated child next of kin.] — A child was born before wedlock, of parents who were at her birth domiciled in Holland, but was legitimated according to the law of Holland by the subsequent marriage of her parents:—*Held:* the child was entitled to a share in the personal estate of an intestate dying domiciled in England as one of her next of kin, under the above stat.—*Re* GOODMAN'S TRUSTS (1881), 17 Ch. D. 266; 50 L. J. Ch. 425; 44 L. T. 527; 29 W. R. 586, C. A.

Annotations:—**Consd.** *Re* Grove, Vaucher *v.* Treasury Solicitor (1888), 40 Ch. D. 216, C. A. **Refd.** *Re* Andros, Andros *v.* Andros (1883), 24 Ch. D. 637. **Mentd.** *Re* Ullee, Nawab Nazim of Bengal's Infants (1885), 53 L. T. 711; *Re* Grey's Trusts, Grey *v.* Stamford, [1892] 3 Ch. 88; *Re* Fergusson's Will, [1902] 1 Ch. 483; Ogden *v.* Ogden, [1908] P. 46, C. A.

149. —— Bequest to children—Whether legitimated child excluded.]—Gift by the will of a testator, domiciled in England, of a sum of £5,000, in trust for A. for life, remainder to his wife for life, remainder among his children at twenty-one. After the death of testator A., having acquired a French domicil, had a daughter by a French lady whom he subsequently married in France, & legitimated the child according to the French law, by a contemporaneous acknowledgment:—*Held:* the term "children" in the will must be construed according to the law of England, & the daughter was not entitled to any interest in the £5,000.—BOYES *v.* BEDALE (1863), 1 Hem. & M. 798; 3 New Rep.

PART III. SECT. 2.

143 i. *Real estate—Marriage on death-bed.*]—The marriage of a domiciled Scotsman legitimates his children born previous to the marriage, & the children's right to succeed to his heritable estate is not prejudiced by the marriage taking place on death-bed.—LAUDERDALE PEERAGE (1885), 10 App. Cas. 692, H. L. —SCOT.

290 ; 33 L. J. Ch. 283 ; 10 L. T. 131 ; 10 Jur. N. S. 196 ; 12 W. R. 232 ; 71 E. R. 349.

Annotations :—**Folld.** *Re* Wilson's Trusts (1865), L. R. 1 Eq. 247 ; Levy *v.* Solomon (1877), 37 L. T. 263. **Apld.** *Re* Goodman's Trusts (1880), 14 Ch. D. 619. **N.F.** *Re* Andros, Andros *v.* Andros (1883), 24 Ch. D. 637. **Refd.** *Re* Grove, Vaucher *v.* Treasury Solicitor (1888), 40 Ch. D. 216, C. A.

150. —— —— ——.]—Gift by the will of a testator, a Jew domiciled in England, of a share of residuary real & personal estate, in trust for the "children" of his son A. At the date of the will, A. had had three children by a lady, whom he subsequently married in Holland (she having been first converted to Judajsm), pursuant to the ceremonies of the Jewish religion, & thus had made the three children legitimate according to Jewish law. He afterwards had other children :—*Held :* the term "children" in the will must be construed according to the law of England, & as there were, at the date of the will, legitimate children to answer the description, the three children born before marriage took no interest.—LEVY *v.* SOLOMON (1877), 37 L. T. 263 ; 25 W. R. 842.

151. —— —— ——.]—A bequest of personalty in an English will to the children of a foreigner must be construed to mean to his legitimate children, & by international law as recognised in England those children are legitimate whose legitimacy is established by the law of their father's domicil.—*Re* ANDROS, ANDROS *v.* ANDROS (1883), 24 Ch. D. 637 ; 52 L. J. Ch. 793 ; 49 L. T. 163 ; 32 W. R. 30.

Annotations :—**Consd.** *Re* Grey's Trusts, Grey *v.* Stamford, [1892] 3 Ch. 88. **Refd.** *Re* Fergusson's Will, [1902] 1 Ch. 483.

152. —— **Legacy duty—Paid at "children" rate.**]—A testator of English birth, but domiciled in France, gave, by his will, shares in the proceeds of converted real estate in England to his two daughters, who were not born in wedlock, but had been legitimated according to the law of France :—*Held :* the status of the daughters in England must be their status according to the law of France, *i.e.*, that of legitimate children & not of strangers in blood, & legacy duty, calculated at the rate payable by children, was payable upon the shares taken by them under their father's will.—SKOTTOWE *v.* YOUNG (1871), L. R. 11 Eq. 474 ; 40 L. J. Ch. 366 ; 24 L. T. 220 ; 19 W. R. 583.

Annotations :—**Mentd.** *Re* Goodman's Trusts (1881), 17 Ch. D. 266, C. A. ; *Re* Andros, Andros *v.* Andros (1883), 24 Ch. D. 637 ; *Re* Grey's Trusts, Grey *v.* Stamford, [1892] 3 Ch. 88.

153. Nationality—When traced through father—Whether legitimated child included.]—A. was born illegitimate in the United States of America. His father was a domiciled Scotsman, who subsequently married A.'s mother, & thereby, according to the law of Scotland, legitimised A. :—*Held :* A. was an alien, for at the time of his birth he was *filius nullius*, & allegiance attached irreversibly.—SHEDDEN *v.* PATRICK (1854), 23 L. T. O. S. 194 ; 1 Macq. 535, H. L. ; *subsequent proceedings* (1869), L. R. 1 Sc. & Div. 470, H. L. (For the commencement of these proceedings in Scotland in 1803 see 1 Macq. 537.)

Annotations :—**Consd.** Doe d. Birtwhistle *v.* Vardill (1832), 6 Bli. N. S. 479, H. L. ; Doe d. Birtwhistle *v.* Vardill (1835), 2 Cl. & Fin. 571, H. L. **Distd.** Birtwhistle *v.* Vardill (1840), 7 Cl. & Fin. 895, H. L. **Consd.** *Re* Wright's Trust (1856), 2 K. & J. 595. **Refd.** Munro *v.* Munro (1840), 7 Cl. & Fin. 842, H. L. ; *Re* Goodman's Trusts (1881), 17 Ch. D. 266, C. A. **Mentd.** Munro *v.* Saunders (1832), 6 Bli. N. S. 468, H. L. ; Edwards *v.* Kilkenny & G. S. W. Ry. Co. (1857), 2 C. B. N. S. 397 ; Shedden *v.* Patrick (1860), 2 Sw. & Tr. 170 ; R. *v.* Saddlers' Co. (1863), 10 H. L. Cas. 404, H. L. ; *Re* Grove, Vaucher *v.* Treasury Solicitor (1888), 40 Ch. D. 216. C. A.

See, further, ALIENS, Vol. II., pp. 121 *et seq.*

Part IV.—Legal Position of Bastard.

SECT. 1.—THE BASTARD'S RELATIONSHIPS.

154. Nullius filius—Extent of rule.]—The rule that a bastard is *nullius filius* applies only to cases of inheritance (BULLER, J.).—R. *v.* HODNETT (INHABITANTS) (1786), 1 Term Rep. 96 ; 99 E. R. 993.

Annotations :—**Mentd.** Horner *v.* Horner (1799), 1 Hag. Con. 337 ; *Re* Aaron, *Ex p.* Lowe (1832), 1 L. J. Bcy. 54 ; R. *v.* Maude (1842), 11 L. J. M. C. 120.

155. Marriage of bastard—Consent of parent or guardian—Marriage Act, 1753 (c. 33).]—*Held :* illegitimate infants might under the above Act marry by licence with the consent of their putative father.—R. *v.* EDMONTON (1784), Cald. Mag. Cas. 435.

Annotation :—**N.F.** Horner *v.* Horner (1799), 1 Hag. Con. 337.

156. —— —— ——.]—*Held :* bastards were within the above Act, which required the consent of the father, guardian, or mother, to the marriage of persons under age, who were not married by banns.—R. *v.* HODNETT (INHABITANTS) (1786), 1 Term Rep. 96 ; 99 E. R. 993.

Annotations :—**Distd.** R. *v.* Maude (1842), 11 L. J. M. C. 120. **Refd.** Horner *v.* Horner (1799), 1 Hag. Con. 337. **Mentd.** *Re* Aaron, *Ex p.* Lowe (1832), 1 L. J. Bcy. 54.

157. —— **Consanguinity—Marriage Act, 1835 (c. 54).**]—A marriage within the prohibited degrees of consanguinity or affinity is null & void, although one of the parties is illegitimate.

A. had an illegitimate daughter B. She subsequently married C., by whom she had a legitimate daughter D. B. married X. & had a legitimate child named Y. M. married D., & then, after her death, Y. :—*Held :* the latter marriage was invalid, as the marriage of a man with the daughter of the illegitimate half-sister of his deceased wife was null & void by s. 2 of the above Act.—R. *v.* BRIGHTON (INHABITANTS) (1861), 1 B. & S. 447 ; 30 L. J. M. C. 197 ; 5 L. T. 56 ; 25 J. P. 630 ; 9 W. R. 831 ; 121 E. R. 782.

158. Maintenance—Allowance for infant—Recognition of bastard brother.]—Upon an application for the confirmation of a report of maintenance of an infant, approval was given to a more liberal allowance in consideration of the circumstances of an illegitimate brother of the infant born of the same father & mother who was unprovided for.—BRADSHAW *v.* BRADSHAW (1820), 1 Jac. & W. 647 ; 37 E. R. 514.

159. —— **Allowance to bastards — Lunatic father.**]—An allowance will be made out of a lunatic's estate for his illegitimate children.—*Re* JONES, *Ex p.* HAYCOCK (1828), 5 Russ. 154 ; 38 E. R. 985.

SECT. 2.—RIGHTS AND LIABILITIES.

SUB-SECT. 1.—PERSONAL.

160. Surname—Only by reputation.]—Illegitimate children have no proper surname but that they acquire by repute.—SULLIVAN *v.* SULLIVAN (1818), 2 Hag. Con. 238.

Annotation :—**Mentd.** Moss *v.* Moss (1897), 66 L. J. P. 154.

161. Domicil—That of mother.]—No man shall be without a domicil ; & to secure this end the law attributes to every individual, as soon as he is born, the domicil of his father if the child be

Sect. 2.—Rights and liabilities: Sub-sect. 1. Sub-sect. 2, A. (a) & (b) & B.]

legitimate, & the domicil of his mother if the child be illegitimate (LORD WESTBURY).—UDNY *v.* UDNY (1869), L. R. 1 Sc. & Div. 441, H. L.

Annotations :—**Refd.** *Re* Goodman's Trusts (1881), 17 Ch. D. 266, C. A. **Mentd.** Haldane *v.* Eckford (1869), L. R. 8 Eq. 631 ; Shedden *v.* Patrick & A.-G. (1869), L. R. 1 Sc. & Div. 470, H. L. ; Douglas *v.* Douglas, Douglas *v.* Webster (1871), L. R. 12 Eq. 617 ; Brunel *v.* Brunel (1871), L. R. 12 Eq. 298 ; Wilson *v.* Wilson (1872), L. R. 2 P. & D. 435 ; Hamilton *v.* Dallas (1875), 1 Ch. D. 257 ; King *v.* Foxwell (1876), 3 Ch. D. 518 ; Doucet *v.* Geoghegan (1878), 9 Ch. D. 441, C. A. ; Firebrace *v.* Firebrace (1878), 4 P. D. 63 ; Platt *v.* A.-G. of New South Wales (1878), 3 App. Cas. 336, P. C. ; *Re* Tootal's Trusts (1883), 23 Ch. D. 532 ; Bradford *v.* Young (1884), 26 Ch. D. 656 ; *Re* Patience, Patience *v.* Main (1885), 29 Ch. D. 976 ; *Re* Robertson (1885), 2 T. L. R. 178 ; *Re* Cooke's Trusts (1887), 56 L. J. Ch. 637 ; *Re* Grove, Vaucher *v.* Treasury Solicitor (1887), 57 L. T. 795 ; *Re* Marrett, Chalmers *v.* Wingfield (1887), 3 T. L. R. 392 ; Abd-ul-Messih *v.* Farra (1888), 13 App. Cas. 431, P. C. ; A.-G. *v.* Winans (1900), 83 L. T. 634 ; *Re* Johnson, Roberts *v.* A.-G., [1903] 1 Ch. 821 ; Winans *v.* A.-G., [1904] A. C. 287, H. L. ; *Re* James, James *v.* James (1908), 98 L. T. 438 ; Simon *v.* Phillips (1916), 80 J. P. 197 ; Tingley *v.* Müller, [1917] 2 Ch. 144, C. A. ; Casdagli *v.* Casdagli, [1918] P. 89, C. A.

162. *S. P. Re* JOHNSON, ROBERTS *v.* A.-G., [1903] 1 Ch. 821 ; 72 L. J. Ch. 682 ; 88 L. T. 161 ; 51 W. R. 444 ; 19 T. L. R. 309.

Annotations :—**Mentd.** *Re* Bowes, Bates *v.* Wengel (1906), 22 T. L. R. 711 ; Gavin, Gibson *v.* Gibson, [1913] 3 K. B. 379 ; Casdagli *v.* Casdagli, [1918] P. 89, C. A.

163. Compensation for accident—Fatal Accidents Act, 1846 (c. 93)—No action under.]—An illegitimate child is not a person in whose interest or for whose benefit an action can be maintained under the above Act.—LANGSDON *v.* —— (1850), 15 L. T. O. S. 521.

164. *S. P.* DICKINSON *v.* NORTH EASTERN RY. CO. (1863), 2 H. & C. 735 ; 3 New Rep. 130 ; 33 L. J. Ex. 91 ; 9 L. T. 299 ; 12 W. R. 52 ; 159 E. R. 304.

—— **Workmen's Compensation Act, 1906 (c. 58) — Whether "dependant."**] — *See* MASTER & SERVANT.

SUB-SECT. 2.—PROPRIETARY.

A. Descent & Distribution.

(a) To the Bastard.

165. Real estate—Exclusion of bastard.]—A bastard cannot succeed as heir-at-law to real property in England. — BIRTWHISTLE *v.* VARDILL (1840), 7 Cl. & Fin. 895 ; 4 Jur. 1076 ; 7 E. R. 1308 ; *sub nom.* DOE d. BIRTWHISTLE *v.* VARDILL, 6 Bing. N. C. 385 ; West, 500 ; 1 Scott, N. R. 828, H. L.

Annotations :—**Apld.** *Re* Don's Estate (1857), 4 Drew. 194. **Expld. & Apld.** Fenton *v.* Livingstone (1859), 5 Jur. N. S. 1183, H. L. **Expld.** Harvey *v.* Farnie (1880), 6 P. D. 35 ; *Re* Goodman's Trusts (1881), 7 Ch. D. 266, C. A. **Mentd.** *Re* Wright's Trusts (1856), 25 L. J. Ch. 621 ; Shaw *v.* Gould (1868), L. R. 3 H. L. 55, H. L. ; Skottowe *v.* Young (1871), L. R. 11 Eq. 474 ; *Re* Andros, Andros *v.* Andros (1883), 24 Ch. D. 637 ; Escallier *v.* Escallier (1885), 10 App. Cas. 312, P. C. ; *Re* Grey's Trusts, Grey *v.* Stamford, [1892] 3 Ch. 88.

166. Personal estate—Law of domicil of deceased.]—C. claimed in a foreign ct., upon the death of a person domiciled in the country where that ct. had jurisdiction, to be the natural son of H. deceased, & as such natural son to be entitled by the law of that country to inherit the property of his father, who had died domiciled in that country, & intestate. The foreign ct. found in favour of C. :—*Held :* the Probate Ct. in England was bound by the judgment of the foreign ct., & C. was rightly admitted to be heard as contradictor to a will set up in England as having been made by H. disposing of his personal property there.—DOGLIONI *v.* CRISPIN (1866), L. R. 1 H. L. 301 ; 35 L. J. P. & M. 129 ; 15 L. T. 44, H. L.

Annotations :—**Mentd.** *Re* Trufort, Trafford *v.* Blanc (1887), 36 Ch. D. 600 ; Pemberton *v.* Hughes, [1899] 1 Ch. 781 ; *Re* Martin, Loustalan *v.* Loustalan, [1900] P. 211, C. A.

(b) From the Bastard.

167. Death intestate & without issue—Personal estate—Grant of administration to Crown.]—Where a bastard dies intestate without wife or issue the King is entitled to his personal estate, & the Ordinary of course grants administration to the patentee of the Crown. — JONES *v.* GOODCHILD (1729), 2 Eq. Cas. Abr. 425 ; 22 E. R. 361.

Annotations :—**Mentd.** Pluck *v.* Digges (1831), 5 Bli. N. S. 31, H. L. ; Loy *v.* Duckett (1841), Cr. & Ph. 305 ; Reynolds *v.* Wright (1858), 25 Beav. 100 ; Wright *v.* Chappell (1869), 20 L. T. 369.

168. —— —— Duchy of Lancaster.]—The Sovereign having succeeded to all the rights of the Duchy of Lancaster by a title distinct from the title to the Crown, is entitled in right of the Duchy to the goods of a bastard dying intestate in the Duchy.—DYKE *v.* WALFORD (1848), 5 Moo. P. C. C. 434 ; 6 State Tr. N. S. 699 ; 6 Notes of Cases, 309 ; 12 Jur. 839 ; 13 E. R. 557, P. C.

Annotations :—**Apprvd.** A.-G. (Ontario) *v.* Mercer (1883), 8 App. Cas. 767, P. C. **Mentd.** Gorham *v.* Exeter (1850),

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PART IV. SECT. 2, SUB-SECT. 1.

163 i. *Compensation for accident*—44 *Vict. c.* 22 (*O.*), *s.* 7—*No action under.*]—GIBSON *v.* MIDLAND RY. CO. (1853), 2 O. R. 658.—**CAN.**

163 ii. —— *Employers' Liability Act,* 1880 (*c.* 42)—*No action under.*]—The parent of an illegitimate child has, by the law of Scotland, no right of action against a person whose negligence has caused its death.—CLARKE *v.* CARFIN COAL CO., [1891] A. C. 412.—**SCOT.**

See, further, MASTER & SERVANT.

163 iii. —— *To mother.*]—An illegitimate child has no title to sue for damages in respect of the death of its mother at common law.—CLEMENT *v.* BELL & SONS, LTD. (1899), 1 F. (Ct. of Sess.) 924 ; 36 Sc. L. R. 725 ; 7 S. L. T. 44.—**SCOT.**

PART IV. SECT. 2, SUB-SECT. 2—A (a).

c. *Application for revocation of grant of administration.*]—A rule *nisi* to rescind a grant of letters of administration was obtained by one of intestate's daughters on the ground of the immoral conduct of the widow, who alleged that the daughter was an illegitimate child of intestate :—*Held :* if the daughter was illegitimate, as alleged, she had no right to interfere, & the question of illegitimacy was for a jury to determine.—GALLOWAY *v.* GALLOWAY, 3 J. R. N. S. 29.—**N.Z.**

d. *In Cape Colony.*] — Brothers & sisters by the same mother are entitled to succeed to each other as heirs *ab intestato,* although they are illegitimate. —MOGAMAT JASSIEM *v.* THE MASTER (1891), 8 S. C. 259 ; 1 C. T. R. 212.—**S. AF.**

e. *In Trinidad.*]—According to the Spanish laws originally in force in Trinidad, children born before marriage (contracted before Mar. 12, 1846) had the same rights of inheritance from their father & mother as children born after marriage. Ordinance No. 24 of 1845, s. 12, while preventing marriage after that date from legitimating the *ante nati* children, did not take away the status of legitimacy previously acquired. A mother married before that date died intestate in 1862, leaving seven children, three of whom were *ante nati* & four *post nati :—Held :* each by inheritance took one-seventh of the estate which the mother had acquired by purchase under Ordinance No. 24 of 1845, s. 5.—ESCALLIER *v.* ESCALLIER (1885), 10 App. Cas. 312 ; 54 L. J. P. C. 1 ; 53 L. T. 884 P. C.—**TRINIDAD.**

PART IV. SECT. 2, SUB-SECT. 2—A (b).

f. *Death intestate — Estate represented by Attorney-General.*] — The A.-G. sufficiently represents the personal estate of an intestate bastard without taking out letters of administration thereof.—M'KIERNAN *v.* KERNAN (1841), Fl. & K. 352 ; 4 I. Eq. R. 269 (R.).—**IR.**

167 i. *Death intestate & without issue —Time for ascertaining next of kin.*] — Under Administration Act, 1908, s. 50 (3), the time of the death of an unmarried intestate male illegitimate is the point of time at which to ascertain the next of kin of his mother.—PUBLIC TRUSTEE *v.* BISHOP (1915), 34 N. Z. L. R. 1014.—**N.Z.**

167 ii. —— *Trinidad.*] — Circumstances (see *supra*) in which :—*Held :* with regard to the shares of two *ante nati,* who had died thereafter intestate without issue, under Ordinance No. 24 of 1845, s. 5, & Ordinance No. 7 of 1858, s. 7, they were divisible equally amongst the four surviving children, whether *ante nati* or *post nati,* & the issue of a deceased daughter.—ESCALLIER *v.* ESCALLIER (1885), 10 App. Cas. 312 ; 54 L. J. P. C. 1 ; 53 L. T. 884, P. C.—**TRINIDAD.**

k. *Death intestate & without lawfu*

15 Q. B. 52 ; R. *v.* Suffolk JJ. (1852), 18 Q. B. 416 ; A.-G. *v.* Brunning (1859), 4 H. & N. 94 ; *Re* Higginson & Dean, *Ex p.* A.-G., [1899] 1 Q. B. 325 ; *Re* Bond, Panes *v.* A.-G. (1900), 82 L. T. 612 ; *Re* Barnett's Trusts, [1902] 1 Ch. 847 ; A.-G. *v.* British Museum Trustees, [1903] 2 Ch. 598.

169. —— —— Duchy of Cornwall.]—Where a bastard died intestate & a bachelor, in the county of Cornwall, a grant of administration was made to the Prince of Wales without notice to the Queen's Proctor, & the sureties were dispensed with.—*Re* GRIFFITHS (1884), 48 J. P. 312 ; 32 W. R. 524.

170. —— Real & personal estate—Land Transfer Act, 1897 (c. 65)—Form of grant.]—Where a widow died, after the commencement of the above Act, without issue, a bastard & intestate, entitled to both real & personal estate, a grant was made by the ct. to the solr. to the Treasury of administration of her personal estate only, as before the Act.—*Re* HARTLEY, [1899] P. 40 ; 68 L. J. P. 16 ; 47 W. R. 287.

Annotation :—**Mentd.** Talbot *v.* Jevers, [1917] 2 Ch. 363.

171. Property partly disposed of by will—Death without issue—Residue undisposed of—Escheat to Crown.]—Devise & bequest of residue of testator's property to A., B. & C. "upon trust" to convert & pay debts & certain legacies. Testator, in a subsequent clause, appointed A., B. & C. his exors., & he died without next of kin. Testator was illegitimate & died without having ever been married :—*Held :* the Crown, as against the exors., was entitled to the undisposed-of residue.—READ *v.* STEDMAN (1859), 26 Beav. 495 ; 28 L. J. Ch. 481 ; 33 L. T. O. S. 115 ; 53 E. R. 989.

Annotation :—**Apprvd.** *Re* Higginson & Dean, *Ex p.* A.-G., [1899] 1 Q. B. 325.

172. —— —— Form of grant.]—Where a bastard having no relations makes a will disposing of a part only of his or her property, the Crown has a right to a grant "save & except," or to a *cœterorum* grant, but not to a general grant of administration.—*Re* RHOADES (1866), L. R. 1 P. & D. 119 ; 35 L. J. P. & M. 125.

173. Married female bastard—Death without issue—Absolute title to settled property—Grant to husband.]—A testatrix gave property to trustees upon trust to pay the income to her illegitimate daughter for life for her separate use without power of anticipation, & after the daughter's decease upon trust for such persons as the daughter should appoint, &, on default of appointment, in trust for the daughter's children. After the death of testatrix, the daughter, while still an infant, upon her marriage, made with the sanction of the ct. under Infant Settlements Act, 1855 (c. 43), a settlement, by which, in exercise of the power of appointment given her by testatrix, she appointed the property to trustees, upon trust, after the death of the survivor of herself & her husband in default of children, for such persons as she should appoint, &, in default of such appointment, if she should survive the husband, in trust for her absolutely, & if she should not survive him, in trust for such persons as, under Stats. of Distribution, would have become entitled thereto upon her death, had she died possessed thereof intestate & without having been married. The daughter died while still an infant, & intestate, without having exercised the general power of appointment reserved to her by the settlement, & the husband took out letters of administration to her estate. There were no children of the marriage :—*Held :* having regard to ss. 1 & 2 of the above Act, the appointment made by the illegitimate daughter by her marriage settlement, being absolute in terms, operated, on failure of the limitations of the settlement (because of the fact that the daughter, being illegitimate, could have no next of kin), to make the property her own absolutely, & her husband was entitled to it as her administrator & not the next of kin of her mother.—*Re* SCOTT, SCOTT *v.* HANBURY, [1891] 1 Ch. 298 ; 60 L. J. Ch. 461 ; 63 L. T. 800 ; 39 W. R. 264.

B. Under Wills.

174. Right of bastard to take—Description.]—If illegitimate children are meant, there is no rule of policy which prevents the ct. from saying that they are intended ; in other words, if they are sufficiently described, there is no rule that prevents their taking (LORD ELDON, C.).—WILKINSON *v.* ADAM (1813), 1 Ves. & B. 422 ; 35 E. R. 163, L.C. ; *affd.* (1823), 12 Price, 470, H. L.

Annotations :—**Folld.** Beachcroft *v.* Beachcroft (1816), 1 Madd. 430 ; Woodhouselee *v.* Dalrymple (1817), 2 Mer. 419 ; Bayley *v.* Snelham (1822), 1 Sim. & St. 78 ; Barnett *v.* Tugwell (1862), 31 Beav. 232 ; Crook *v.* Hill (1871), 6 Ch. App. 311, L.JJ. ; Dorin *v.* Dorin (1873), L. R. 17 Eq. 463 ; Laker *v.* Hordern (1876), 1 Ch. D. 644 ; *Re* Deakin, Starkey *v.* Eyres, [1894] 3 Ch. 565. **Refd.** *Re* Haseldine, Grange *v.* Sturdy (1886), 31 Ch. D. 511, C. A. **Mentd.** Doe *v.* Hallett (1813), 1 M. & S. 124 ; Swaine *v.* Kennerley (1813), 1 Ves. & B. 469 ; Gordon *v.* Gordon (1816), 1 Mer. 141 ; Leake *v.* Robinson (1817), 2 Mer. 363 ; Evans *v.* Massey (1819), 8 Price, 22 ; Osmond *v.* Tindall (1825), 5 Ves. (1827 ed.) 534, n. ; Bagley *v.* Mollard (1830), 1 Russ. & M. 581 ; Gill *v.* Shelley (1831), 2 Russ. & M. 336 ; Hedger *v.* Steavenson (1837), 2 M. & W. 799 ; Lewis *v.* Gompertz (1840), 6 M. & W. 399 ; Furze *v.* Sharwood (1841), 2 Q. B. 388 ; Dover *v.* Alexander (1843), 2 Hare, 275 ; De Zichy, Ferraris and Croker *v.* Hertford (1843), 3 Curt. 468 ; Morrice *v.* Morrice (1843), 2 Notes of Cases, 199 ; Early *v.* Benbow (1846), 2 Coll. 342 ; Lambell & Lambell *v.* Cleave (1846), 10 Jur. 55 ; Warner *v.* Warner (1850), 20 L. J. Ch. 273 ; Key *v.* Key (1853), 4 De G. M. & G. 73, L.JJ. ; *Re* Overhill's Trusts (1853), 22 L. J. Ch. 485 ; Allen *v.* Maddock (1858), 11 Moo. P. C. C. 427, P. C. ; Howarth *v.* Mills (1866), L. R. 2 Eq. 389 ; Clifton *v.* Goodbun (1868), L. R. 6 Eq. 278 ; *Re* Wells' Estate (1868), L. R. 6 Eq. 599 ; Hill *v.* Crook (1873), L. R. 6 H. L. 265, H. L. ; Occleston *v.* Fullalove (1874), 9 Ch. App. 147, L.C. & L.JJ. ; Levy *v.* Solomon (1877), 37 L. T. 263 ; Kilford *v.* Blaney (1885), 31 Ch. D. 56, C. A. ; *Re* Hall, Branston *v.* Weightman (1887), 35 Ch. D 551 ; *Re* Jodrell, Jodrell *v.* Seale (1890), 59 L. J. Ch. 538, C. A. ; *Re* Pearce, Alliance Assce. *v.* Francis, [1913] 2 Ch. 674, C. A.

175. —— —— Equally with legitimate children.]—A testator gave a large sum of money upon the happening of several contingent events, "to be equally divided amongst the children, legitimate or illegitimate, of my brother B." At the death of testator illegitimate children alone were living. Legitimate children were afterwards born :—*Held :* the fund vested in the illegitimate children on the death of testator, subject to be divested *pro tanto* on the birth of legitimate children, & it was divisible among both classes.—BARNETT *v.* TUGWELL (1862), 31 Beav. 232 ; 31 L. J. Ch. 629 ; 7 L. T. 121 ; 26 J. P. 627 ; 8 Jur. N. S. 787 ; 10 W. R. 679 ; 54 E. R. 1127.

Annotation :—**Refd.** Occleston *v.* Fullalove (1873), 9 Ch. App. 147, L.C. & L.JJ.

176. Child en ventre sa mère at date of will—Reference to paternity—Uncertainty.]—Under a bequest to such child or children if more than one as A. may happen to be "enceinte of by me," a natural child, of which she was then pregnant, cannot take ; though a bequest to the natural child of which a woman was enceinte, without reference to any person as the father, would probably be good, having

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issue.]—The illegitimate son of an Englishman by a Mahommedan woman died intestate without lawful issue, leaving him surviving his mother, his mistress, & several illegitimate children :—*Held :* his property passed to the Crown in default of heirs.—SECRETARY OF STATE *v.* ADMINISTRATOR-GENERAL OF BENGAL (1868), 1 B. L. R. A. C. 87.—**IND.**

PART IV. SECT. 2, SUB-SECT. 2—B.

174 i. *Right of bastard to take.*]—*Semble :* every gift to illegitimate children not *in esse* is void, & there is no distinction between cases where they are described by reference to a particular father & where not.—*Re* CONNOR (1845), 8 I. Eq. R. 401 ; 2 Jo. & Lat. 456.—**IR.**

Sect. 2.—Rights and liabilities: Sub-sect. 2, B. & C.]

no uncertainty.—EARLE *v.* WILSON (1811), 17 Ves. 528; 34 E. R. 205.

Annotations:—**Distd.** Gordon *v.* Gordon (1816), 1 Mer. 141; Evans *v.* Massey (1819), 8 Price, 22. **Mentd.** Wilkinson *v.* Adam (1813), 1 Ves. & B. 422; Beachcroft *v.* Beachcroft (1816), 1 Madd. 430; Lambell & Lambell *v.* Cleave (1846), 10 Jur. 55; Pratt *v.* Mathew (1856), 22 Beav. 328.

177. —— —— ——.]—Bequest to the natural child of which a woman was enceinte, without reference to any person as the father:—*Held:* good, there being no uncertainty in the object described.—GORDON *v.* GORDON (1816), 1 Mer. 141; 35 E. R. 628.

Annotations:—**Folld.** Evans *v.* Massey (1819), 8 Price, 22. **Mentd.** Beachcroft *v.* Beachcroft (1816), 1 Madd. 430; Lambell & Lambell *v.* Cleave (1846), 10 Jur. 55; Occleston *v.* Fullalove (1873), 9 Ch. App. 147, L.C. & L.JJ.

178. —— **Born before testator's death—Acknowledged by him.**]—A testator, who had gone through the ceremony of marriage with L., his deceased wife's sister, who had two daughters, C. & E., by him, & who was enceinte with a third at the date of the will, gave a moiety of his property to trustees in trust for L. for life, & after her death for his reputed children C. & E., & all other children which he might have or be reputed to have by L., then born or thereafter to be born. The third child was born before testator's death, & was acknowledged by him as his child:—*Held:* the after-born child was entitled to share with her sisters under the will.—OCCLESTON *v.* FULLALOVE (1874), 9 Ch. App. 147; 43 L. J. Ch. 297; 29 L. T. 785; 38 J. P. 196; 22 W. R. 305, L.C. & L.JJ.

Annotations:—**Folld.** *Re* Goodwin's Trust (1874), L. R. 17 Eq. 345. **Distd.** *Re* Bolton, Brown *v.* Bolton (1886), 31 Ch. D. 542, C. A. **Folld.** *Re* Hastie's Trusts (1887), 35 Ch. D. 728; *Re* Loveland, Loveland *v.* Loveland, [1906] 1 Ch. 542. **Mentd.** *Re* Ayle's Trusts (1875), 1 Ch. D. 282; Dorin *v.* Dorin (1875), 33 L. T. 281, H. L.; *Re* Horner, Eagleton *v.* Horner (1887), 37 Ch. D. 695; *Re* Shaw, Robinson *v.* Shaw, [1894] 2 Ch. 573; *Re* Du Bochet, Mansell *v.* Allen, [1901] 2 Ch. 441; *In the Estate of* Frogley, [1905] P. 137; *Re* Homer, Cowlishaw *v.* Rendell (1916), 86 L. J. Ch. 324.

179. —— —— **Reputed children.**]—H. by his will gave a trust fund "in trust for my four natural children by M., viz., J., C., E., & H., & all & every other children & child which may be born of M. previous to & of which she may be pregnant at the time of my death, share & share alike." Besides the four children named in the will there were three other children born of M. after the date of the will & before the death of testator, all of whom were known by his surname:—*Held:* being a gift by will to illegitimate children of testator to be *in esse* before the death of testator, it was a good gift, & the children who came into being after the date of the will & before the death of testator were entitled to share in the gift.—*Re* HASTIE'S TRUSTS (1887), 35 Ch. D. 728; 56 L. J. Ch. 792; 57 L. T. 168; 35 W. R. 692.

Annotations:—**Folld.** *Re* Loveland, Loveland *v.* Loveland, [1906] 1 Ch. 542. **Mentd.** *Re* Du Bochet, Mansell *v.* Allen, [1901] 2 Ch. 441; *Re* Homer, Cowlishaw *v.* Rendell (1916), 86 L. J. Ch. 324.

180. —— **Born after testator's death—Sufficient description.**]—A bequest in favour of a woman's illegitimate child *en ventre sa mère* at the date of the will, though not born until after testator's death, is not contrary to public policy.

A testator, whose daughter M. had with his knowledge gone through the ceremony of marriage with C., her deceased sister's husband, & had had two children by him, made his will at a time when he knew she was again enceinte. He thereby gave leaseholds to trustees on trust for "my daughter M., the wife of C.," for her life, with remainder to "the child or children of my daughter M." as she should appoint, & in default for her child or children equally, & if none, then over. Testator died three months before the third child was born. M. appointed the two children born at the date of the will, the child of which she was then enceinte, & a fourth child begotten & born after the testator's death:—*Held:* the child *en ventre sa mère* at the date of the will took under the gift, but the child begotten & born after testator's death could not take.—CROOK *v.* HILL (1876), 3 Ch. D. 773; 46 L. J. Ch. 119; 41 J. P. 228; 24 W. R. 876.

Annotations:—**Distd.** *Re* Bolton, Brown *v.* Bolton (1886), 31 Ch. D. 542, C. A. **Folld.** Ebbern *v.* Fowler, [1909] 1 Ch. 578, C. A. **Mentd.** *Re* Du Bochet, Mansel *v.* Allen, [1901] 2 Ch. 441.

Gifts to "children"—Whether illegitimate children included.]—*See* WILLS.

C. Under other Instruments.

181. Limitation to bastard & his heirs—Fee simple.]—If lands are given to a bastard & his heirs he takes a fee simple; & a limitation over upon such gift would be void, & yet the lands cannot descend upon any other but his issue (HOLT, C.J.).—IDLE *v.* COOK (1705), 1 P. Wms. 70; 2 Ld. Raym. 1144; 11 Mod. Rep. 57; 24 E. R. 298.

Annotations:—**Mentd.** Darbison *v.* Beaumont (1713), Fortes. Rep. 18; Martin d. Tregonwell *v.* Strachan (1743), 5 Term Rep. 107, n.; Doe *v.* Martin (1790), 4 Term Rep. 39; Goodtitle *v.* Otway (1796), 1 Bos. & P. 576; Cave *v.* Holford (1798), 3 Ves. 650; Doe *v.* Smeddle (1818), 2 B. & Ald. 126; Morgan *v.* Morgan (1876), L. R. 10 Eq. 99; Olivant *v.* Wright (1878), 9 Ch. D. 646.

182. Existing illegitimate children—Validity of gifts to.]—By the settlement made on the marriage of J. with M. his wife, freehold property was conveyed to trustees in trust, after certain limitations which failed, for all & every the child or children then already born & thereafter to be born of F. & E. his wife. At the date of the settlement F. & E. his wife had been married about five years. They had previously cohabited together, & had several illegitimate children, but they never had any children born after marriage. F. & E. were both dead:—*Held:* the illegitimate children were entitled under the settlement.—GABB *v.* PRENDERGAST (1855), 1 K. & J. 439; 3 Eq. Rep. 648; 24 L. J. Ch. 431; 26 L. T. O. S. 47; 1 Jur. N. S. 900; 3 W. R. 395; 69 E. R. 531.

Annotation:—**Mentd.** Crook *v.* Whitley (1856), 25 L. J. Ch. 657.

183. —— ——.]—By a marriage settlement, personalty belonging to the intended wife was settled in trust for her separate use for her life, & subject thereto as she should by deed or will appoint, & in default of appointment, in case she should predecease her husband, in trust for such persons as under the Stats. of Distribution would have become entitled thereto at her death if she had died intestate & without having been married, & it was declared that A. (her illegitimate daughter) should, for the purposes of that trust, be deemed to be her lawful child. The wife made no appointment, & died without lawful issue, leaving her husband & A. surviving:—*Held:* A. was entitled, under the settlement, to the trust fund.—WILSON

PART IV. SECT. 2, SUB-SECT. 2—C.

m. *Conveyance—Defect in.*]—Defect in a legal conveyance not supplied in favour of a natural child.—BLAKE *v.* B. (1817), Beat. 575.—IR.

n. *Certificate under Act XXVII. of 1860—Effect of.*]—A certificate was granted under the above Act to the son of a deceased decree-holder in respect of the debts due to his father's estate. The son was alleged by a judgment debtor to be illegitimate, & not the legal representative of the deceased decree-holder:—*Held:* the certificate was conclusive of the son's representative character, & a full indemnity to all persons paying their debts to him.—GAURA *v.* GAYADIN (1882), I. L. R. 4 All. 355.—IND.

v. ATKINSON (1864), 4 De G. J. & Sm. 455 ; 4 New Rep. 451 ; 33 L. J. Ch. 576 ; 11 L. T. 220 ; 46 E. R. 995, L.JJ.

Annotations :—**Folld.** *Re* Ball's Trust (1879), 11 Ch. D. 270 ; Upton *v.* Brown (1879), 12 Ch. D. 872. **Expld.** Emmins *v.* Bradford, Johnson *v.* Emmins (1880), 13 Ch. D. 493. **Folld.** *Re* Arden's Settlmt., [1890] W. N. 204. **Expld.** Stoddart *v.* Savile, [1894] 1 Ch. 480. **Folld.** *Re* Mare, Mare *v.* Howey, [1902] 2 Ch. 112. **Consd.** *Re* Brydone's Settlmt., Cobb *v.* Blackburne, [1903] 2 Ch. 84, C. A. **Expld.** *Re* Smith's Settlmt., Wilkins *v.* Smith, [1903] 1 Ch. 373. **Mentd.** *Re* Watson's Trusts (1886), 55 L. T. 316.

184. Future illegitimate children—Invalidity of gifts to.]—B. made a feoffment to the use of himself for life, remainder to the use of the issue male of the body of L. reputed to be begotten by B., whether lawfully or unlawfully begotten, & the heirs of the bodies of such issue. Afterwards B. had issue by L. pltf., who alleged himself the reputed issue & alleged no marriage of B. & L. :—*Held :* (1) (as reported Moore, K. B. 430 ; *sub nom. Bladwell* v. *Edwards*, Noy, 35, POPHAM C.J., *diss.*) the remainder was good ; (2) (as reported Cro. Eliz. 509 ; S. C. *Anon.* Co. Litt. 3b) the remainder was void. Pltf. then alleged a marriage of B. & L. & himself to be the lawful issue ; (3) (as reported Cro. Eliz. 509) the remainder was good.—BLODWELL *v.* EDWARDS (1596), Cro. Eliz. 509 ; Moore, K. B. 430 ; 78 E. R. 758 ; *sub nom.* BLADWELL *v.* EDWARDS, Noy, 35.

Annotations :—**Distd.** Wilkinson *v.* Adam (1823), 1 Ves. & B. 422, L.C. **Consd.** Occleston *v.* Fullalove (1873), 9 Ch. App. 147, L.C. & L.JJ. **Refd.** Beachcroft *v.* Beachcroft (1816), 1 Madd. 430 ; Lomas *v.* Wright (1833), 2 My. & K. 769 ; Barnett *v.* Tugwell (1862), 31 L. J. Ch. 629 ; *Re* Hastie's Trusts (1887), 35 Ch. D. 728. **Mentd.** Irwin *v.* Grey (1865), 14 W. R. 208.

185. —— ——.]—Under a settlement made by N. in favour of his natural children, certain estates stood limited in the events which happened, to the use, in case M., with whom he cohabited, should have another child by him, of such after-born child in fee, but if such after-born son should die under age & without issue, to the use of O., an illegitimate son of N., in fee. O. died under age. There was an after-born son, namely, P., who attained twenty-one :—*Held :* the use limited to the after-born son was void, & the subsequent gift to O., being to take effect only if the after-born son died under age, also failed, & property resulted to the heir of the grantor.—LOMAS *v.* WRIGHT (1833), 2 My. & K. 769 ; 3 L. J. Ch. 68 ; 39 E. R. 1138.

Annotation :—**Mentd.** Northen *v.* Carnegie (1859), 4 Drew. 857.

186. —— ——.]—Personal estate settled in trust for after-born illegitimate children. Upon the bill of the settlor the fund was transferred to him as against such children.—WILKINSON *v.* WILKINSON (1842), 1 Y. & C. Ch. Cas. 657 ; 6 Jur. 921 ; 62 E. R. 1059.

187. —— —— **Appointment.**] — A married woman, having several legitimate children, & one illegitimate child, & being separated from her husband, & enceinte with a second illegitimate child, appointed a fund to her illegitimate child then born, reserving a power of revocation, as to a moiety, in favour of any "after-born child she might have born of her body." After the birth of the second illegitimate child she revoked the appointment of the moiety, & appointed the entire fund equally between the two illegitimate children :—*Held :* the "after-born child," for whose benefit the revocation might be made, must be taken, in the primary & legal sense, as applying to legitimate children only, & the second illegitimate child was not an object of the reserved power, & could not take under the latter appointment.

The objection to the validity of a limitation to unborn illegitimate children is not founded exclusively on the uncertainty of description ; nor, *semble*, is there any distinction between the validity of a limitation in favour of such persons, whether described as the children of a man, or the children of a woman.—DOVER *v.* ALEXANDER (1843), 2 Hare, 275 ; 12 L. J. Ch. 175 ; 7 Jur. 124 ; 67 E. R. 114.

Annotations :—**Mentd.** Bell *v.* Alexander (1847), 6 Hare, 543 ; *Re* Saville's Trusts (1866), 14 W. R. 603.

188. Child en ventre sa mère—Validity of gift to.]—A. & B., his aunt by the half-blood, went through the ceremony of marriage ; a settlement was afterwards made providing for the children of B. by A., & a month afterwards a child was born of B. by A. :—*Held :* the child took no benefit under the settlement.—*Re* SHAW, ROBINSON *v.* SHAW, [1894] 2 Ch. 573 ; 63 L. J. Ch. 770; 71 L. T. 79 ; 43 W. R. 43 ; 38 Sol. Jo. 513 ; 8 R. 421.

Annotation :—**Overd.** Ebbern *v.* Fowler, [1909] 1 Ch. 578, C. A.

189. —— ——.]—A. went through the ceremony of marriage with B., his deceased wife's sister. A settlement of a sum of stock was afterwards made by C., the mother of B., providing for the children of B. Three weeks after the date of the settlement a child was born of B. :—*Held :* the child was entitled to benefit under the settlement.—EBBERN *v.* FOWLER, [1909] 1 Ch. 578 ; 78 L. J. Ch. 497 ; 100 L. T. 717 ; 53 Sol. Jo. 356, C. A.

190. Consideration of kinship—Use not raised in favour of bastard.]—W. having issue two sons, the elder legitimate, the younger a bastard, covenanted to convey certain premises, of which he was seised in fee, to two persons in fee to the use of himself for life, & after his decease to the use of the elder son & the heirs male of his body, & for default of such issue to the use of the bastard son (naming him as such) in like entail. No estate was at any time conveyed in pursuance of this covenant. Subsequently W. surrendered & granted all his estate & interest to the elder son, who levied a fine with proclamations, & an action was brought to try the title of the illegitimate son :—*Held :* the use could not be carried to a bastard without express consideration, because the consideration in law was not good & legal, since the illegitimate son was not of the blood of the father, but in law a mere stranger.—GERRARDE *v.* WORSELEY (1579), 3 Dyer, 374a ; 73 E. R. 839.

191. —— **Defective assurance not aided—Surrender of copyholds.**]—A conveyance of copyhold lands made to a natural daughter, & expressed to be in consideration of £300, paid by her, was void for want of a surrender, this being required by the custom of the manor. The deed contained a covenant for further assurance. There was no evidence that the £300 was in fact paid :—*Held :* the covenant for further assurance could not be used to assist a void conveyance, & the defect could not be remedied in favour of a bastard.—FURSAKER *v.* ROBINSON (1717), Gilb. Ch. 139 ; Prec. Ch. 475 ; 1 Eq. Cas. Abr. 123 ; 25 E. R. 97.

192. —— —— **Execution of power.**]—A., who was seised in fee of certain premises, previously to her marriage with G. entered into articles whereby G. covenanted that A. should have power, by deed or will, to dispose of the premises, after her decease, to any person or persons, their heirs & assigns. A. had a son T., by G., previously to the marriage, who was married to pltf. in 1735. By deeds of lease & release, A., without her husband, in consideration of a portion had by T. with pltf. (which was never in fact paid), & for natural love & affection, conveyed the premises to trustees after the decease of herself to the use of T. for life, remainder to pltf. for life for her jointure with remainders over :—

Sect. 2.—Rights and liabilities: Sub-sect. 2, C. Part V. Sect. 1.]

Held: the deed of 1735 was a voluntary deed & a defective execution of the power, & the defect would not be aided by the ct. in favour of T.—BRAMHALL *v.* HALL (1764), 2 Eden, 220; Amb. 467; 28 E. R. 882.

Annotations:—**Expld.** Wright *v.* Cadogan (1764), 2 Eden, 239; Wright *v.* Englefield (1764), Amb. 468.

193. Marriage consideration — Limitation in settlement—Valid against purchaser.]—A widow, the owner of real property, having an illegitimate child, contemplated a second marriage, & by a marriage settlement made between herself, her intended husband & trustees, it recited that it had been agreed that the property should be released & conveyed as therein mentioned, which was to the separate use of the wife for life, remainder to the use of the intended husband for life, remainder to the illegitimate child absolutely. The marriage took place, & husband & wife afterwards mtged. the property. After their death the illegitimate child brought an action of ejectment to recover the property from those claiming under the mtgee.:—*Held:* the limitation in favour of the illegitimate child contained in the marriage settlement was not void as against the subsequent mtge. by 27 Eliz. c. 4, & pltf. was entitled to recover.—CLARKE *v.* WRIGHT (1861), 6 H. & N. 849; 30 L. J. Ex. 113; 7 Jur. N. S. 1032; 9 W. R. 571; 158 E. R. 350; *sub nom.* WRIGHT *v.* DICKENSON, 4 L. T. 21, Ex. Ch.

Annotations:—**Expld.** Smith *v.* Cherrill (1867), L. R. 4 Eq. 390. **Distd.** *Re* D'Angibau, Andrews *v.* Andrews (1880), 15 Ch. D. 228. **Expld.** *Re* Cameron & Wells (1887), 37 Ch. D. 32. **N. F.** De Mestre *v.* West, [1891] A. C. 264, P. C. **Distd.** A.-G. *v.* Jacobs-Smith, [1895] 2 Q. B. 341, C. A. **Refd.** Price *v.* Jenkins (1876), 4 Ch. D. 483; Mackie *v.* Herbertson (1884), 9 App. Cas. 303, H. L. **Mentd.** Gale *v.* Gale (1877), 6 Ch. D. 144; Tucker *v.* Bennett (1887), 38 Ch. D. 1, C. A.; Godfrey *v.* Poole (1888), 13 App. Cas. 497, P. C.

194. —— —— Invalid against purchaser.]—A limitation in a marriage settlement in favour of the settlor's illegitimate child & his issue, not being within the marriage consideration, may be defeated by a subsequent conveyance by the settlor to a purchaser for value, unless such result would involve the defeat of other limitations within the marriage consideration. Special agreement between the parties thereto in favour of the limitation, acceptance by one of the parties of different interests in the settled property from those which the law would have given, omission to provide for all or some of the issue of the marriage, are insufficient to support such limitation against a purchaser for value.—DE MESTRE *v.* WEST, [1891] A. C. 264; 60 L. J. P. C. 66; 64 L. T. 375; 55 J. P. 613, P. C.

Annotation:—**Mentd.** A.-G. *v.* Jacobs-Smith, [1895] 1 Q. B. 472.

195. Exclusion of equitable presumption—Satisfaction.]—In the case of children, whose relation as such the law recognises, the doctrine of presumption is that a subsequent advancement is a satisfaction of a legacy to such a child; but as the law does not recognise the relation between the putative father & illegitimate child, as imposing this debt of nature, the father in that case stands as a stranger, & no such presumption arises in that case (LORD ELDON, C.).—*Ex p.* PYE, *Ex p.* DUBOST (1811), 18 Ves. 140; 34 E. R. 271.

Annotations:—**Folld.** Wetherby *v.* Dixon (1815), 19 Ves. 407. **Apld.** Suisse *v.* Lowther (1843), 2 Hare, 424. **Refd.** *Re* Roby, Howlett *v.* Newington, [1908] 1 Ch. 71, C. A. **Mentd.** Cotteen *v.* Missing (1815), 1 Madd. 176; Hooper *v.* Goodwin (1818), 1 Wils. Ch. 212; Colvin *v.* Fraser (1829), 2 Hag. Ecc. 266; Platt *v.* Platt (1830), 3 Sim. 503; Wharton *v.* Durham (1834), 3 My. & K. 472; Edwards *v.* Jones (1836), 1 My. & Cr. 226; Powys *v.* Mansfield (1836), 6 Sim. 528; Pym *v.* Lockyer (1841), 5 My. & Cr. 29; Hughes *v.* Stubbs (1842), 1 Hare, 476; M'Fadden *v.* Jenkyns (1842), 1 Hare, 458; Meek *v.* Kettlewell (1842), 1 Hare, 464; Walker *v.* Jeffreys (1842), 1 Hare, 341; Kirk *v.* Eddowes (1844), 3 Hare, 509; Griffith *v.* Ricketts (1849), 7 Hare, 299; Kekewich *v.* Manning (1851), 1 De G. M. & G. 176, L.JJ.; Price *v.* Price (1851), 14 Beav. 598; Dipple *v.* Corles (1853), 11 Hare, 183; Weale *v.* Ollive (1853), 17 Beav. 252; Donaldson *v.* Donaldson (1854), Kay, 711; Tierney *v.* Wood (1854), 19 Beav. 330; Airey *v.* Hall (1856), 3 Sm. & G. 315; Parnell *v.* Hingston (1856), 3 Sm. & G. 337; Forbes *v.* Forbes (1857), 3 Jur. N. S. 1206; Vandenberg *v.* Palmer (1858), 4 K. & J. 204; Thomas *v.* Thomas (1859), 8 W. R. 71; Milroy *v.* Lord (1862), 4 De G. F. & J. 264, L.JJ.; Peckham *v.* Taylor (1862), 31 Beav. 250; Forrest *v.* Forrest (1865), 34 L. J. Ch. 428; Grant *v.* Grant (1865), 34 Beav. 623; Roberts *v.* Roberts (1865), 13 L. T. 492; Tucker *v.* Burrow (1865), 2 Hem. & M. 515; Chichester *v.* Coventry (1867), L. R. 2 H. L. 71, H. L.; Penfold *v.* Mould (1867), L. R. 4 Eq. 562; Richardson *v.* Richardson (1867), L. R. 3 Eq. 686; Warriner *v.* Rogers (1873), L. R. 16 Eq. 340; Bennet *v.* Bennet (1879), 10 Ch. D. 474; Harding *v.* Harding (1886), 17 Q. B. D. 442; Montagu *v.* Sandwich (1886), 32 Ch. D. 525, C. A.; *Re* Hamlet, Stephen & Cunningham (1888), 38 Ch. D. 183; *Re* Lacon, Lacon *v.* Lacon, [1891] 2 Ch. 482, C. A.; *Re* Ashton, Ingram *v.* Papillon, [1897] 2 Ch. 574; *Re* Jaques, Hodgson *v.* Braisby, [1903] 1 Ch. 267, C. A.

See, further, EQUITY.

196. —— Advancement.]—Where by the custom of a manor copyholds were held for lives successive (the legal tenancy being in the *cestui que vie*):—*Held:* the insertion, by the beneficial holder of such copyholds, of the name of the illegitimate son of his daughter as *cestui que vie* thereof was not of itself sufficient to raise a presumption that such copyholds were intended to be given to such grandchild by way of advancement, although such grandchild & his mother were at the time of the transaction inmates of the grandfather's house & maintained by him, & although the grandchild continued to be so maintained after the marriage of his parents, which took place shortly after the transaction.—TUCKER *v.* BURROW (1865), 2 Hem. & M. 515; 6 New Rep. 139; 34 L. J. Ch. 478; 12 L. T. 485; 11 Jur. N. S. 525; 13 W. R. 771; 71 E. R. 563.

Annotation:—**Mentd.** *Re* Hamlet, Stephen *v.* Cunningham (1888), 38 Ch. D. 183.

197. —— —— Evidence of intention.] — An owner of estates in Jamaica procured a deputation for his illegitimate son on the security of his estate, which office was to the value of £800 a year for seven years. The father died a year after the gift, having made other provisions by his will for his illegitimate son. The question being whether the appointment was for the grantee's own use or in trust for his father, evidence was admitted to explain the intention as to an absolute gift & that the son took the profits for his own use during the life of his father & had continued so to do since his decease:—*Held:* the son took the appointment to his own benefit & not in trust.—BECKFORD *v.* BECKFORD (1774), Lofft, 490; 98 E. R. 763.

Annotations:—**Consd.** Tucker *v.* Burrow (1865), 6 New Rep. 139. **Refd.** Soar *v.* Foster (1858), 4 K. & J. 152.

Part V.—Rights and Liabilities towards the Bastard.

SECT. 1.—RIGHT TO CUSTODY.

198. Father's right to custody—Against abductor.]—In a case, in which deft. had taken from a man's custody his natural daughter, who was fifteen years of age :—*Held :* a putative father had the right to the care & education of his child, & the illegitimacy made no difference for the purposes of 4 & 5 Phil. & Mary, c. 8.—R. *v.* CORNFORTH (1742), 11 East, 10 ; 1 Bott's Poor Law, 6th ed., p. 458 ; 2 Stra. 1162 ; 93 E. R. 1101.

Annotations :—**Distd.** *Ex p.* Glover (1835), 1 Har. & W. 508. **Refd.** R. *v.* Edmonton (1784), Cald. Mag. Cas. 435.

199. Mother's right to custody—Mother preferred to father.]—The mother of an infant illegitimate child is entitled to the custody of the child in preference to the father, though from his circumstances he may be better able to educate it.—*Ex p.* KNEE (1804), 1 Bos. & P. N. R. 148 ; 127 E. R. 416.

Annotations :—**Consd.** Barnardo *v.* McHugh, [1891] A. C. 388, H. L. **Folld.** R. *v.* Barnardo, Jones' Case, [1891] 1 Q. B. 194, D. C. **Refd.** R. *v.* Nash (1883), 10 Q. B. D. 454.

200. —— Removal by force or fraud.]—A motion for an information against deft. for taking away a bastard child from its mother & delivering it to the father, a man of fortune :—*Held :* the justices were wrong in ordering the child to be delivered to the care of its mother.

The circumstances of the parents should direct in these cases (LORD MANSFIELD, C.J.).—R. *v.* FELTON & WENMAN (1758), 1 Bott's Poor Law, 5th ed., p. 478.

Annotation :—**Apprvd.** Barnardo *v.* McHugh, [1891] A. C. 388, H. L.

201. —— —— Restoration to mother.]—If the putative father of a bastard obtain the possession of her from her mother by fraud, the ct. will order her to be restored to the mother.—R. *v.* SOPER (1793), 5 Term Rep. 278 ; 101 E. R. 156.

Annotations :—**Consd.** R. *v.* Moseley (1798), 5 East, 224, n. **Distd.** *Re* Lloyd (1841), 3 Man. & G. 547. **Consd.** Barnardo *v.* McHugh, [1891] A. C. 388, H. L. **Folld.** R. *v.* Barnardo, Jones' Case, [1891] 1 Q. B. 194, D. C.

202. —— —— ——.]—If the putative father of a bastard child obtain possession of it by force or fraud the ct. will order it to be restored on the application of the mother.—R. *v.* MOSELEY (1798), 5 East, 224, n. ; 102 E. R. 1055, n.

Annotations :—**Distd.** *Re* Lloyd (1841), 3 Man. & G. 547. **Consd.** Barnardo *v.* McHugh, [1891] A. C. 388, H. L. **Refd.** *Re* Hakewill (1852), 12 C. B. 223. **Mentd.** R. *v.* Hopkins (1806), 7 East, 579, L.C.

203. —— —— —— Child under seven.]—The ct. will grant a *habeas corpus* to bring up the body of a bastard child, within the age of nurture, for the purpose of restoring it to the custody of the mother, from whose quiet possession it was taken at one time by fraud & afterwards by force ; & this without prejudice to the question of guardianship.—R. *v.* HOPKINS (1806), 7 East, 579 ; 103 E. R. 224, L.C.

Annotations :—**Distd.** *Re* Lloyd (1841), 3 Man. & G. 547. **Consd.** Barnardo *v.* McHugh, [1891] A. C. 388, H. L. **Refd.** R. *v.* Clarke (1857), 7 E. & B. 186. **Mentd.** *Re* Ullee (1885), 53 L. T. 711.

204. —— Primâ facie right.]—A woman placed her illegitimate female child soon after its birth with N. & his wife, who were labouring people, intending to pay them for it. She fell into ill health & was unable to continue her payments, but N. & his wife continued to maintain the child till it was nearly seven years old. The mother then applied to have the child delivered to her, which N. & his wife refused. The mother, a kept mistress, did not propose that the child should live with her, but with a respectable married sister, whose husband was in a station superior to that of N. :—*Held :* the mother of an illegitimate infant had a natural right to its custody, which would be regarded by the ct., & a *habeas corpus* must be granted.—R. *v.* NASH, *Re* CAREY (1883), 10 Q. B. D. 454 ; 52 L. J. Q. B. 442 ; 48 L. T. 447 ; 31 W. R. 420, C. A.

Annotations :—**Apld.** *Re* Ullee (1885), 53 L. T. 711. **Apprvd.** Barnardo *v.* McHugh, [1891] A. C. 388, H. L. **Folld.** R. *v.* Barnardo, Jones' Case, [1891] 1 Q. B. 149, C. A. **Refd.** R. *v.* Walker (1912), 28 T. L. R. 342. **Mentd.** R. *v.* New (1904), 20 T. L. R. 583, C. A.

205. —— —— Benefit of child—Child over seven.]—S., an Englishwoman, had married, according to the Mahommedan ritual, N., a Hindoo Mahommedan, he being already married. The children of this marriage had been recognised by N. as his children, & his heirs according to Mahommedan law, & English guardians had been appointed to them by N.'s will in respect of money settled on them by the English Govt. S. moved that an order might be made giving her the custody of her children, as she admitted that her union with N. was not a marriage, & contended that, as her children were illegitimate, she had the right to the custody of them :—*Held :* (1) even if the children were illegitimate by international law, S. was not, according to English law, their lawful guardian, & should only be granted the custody of them up to seven years of age, & after that age the ct. would decide the right to custody according to what it thought best for the interest of the infants ; (2) the children had passed from the control & custody of S. into that of the guardians appointed by N.'s will, & the application by S. must be refused.—*Re* ULLEE, NAWAB NAZIM OF BENGAL'S INFANTS (1885), 53 L. T. 711 ; 1 T. L. R. 667 ; 54 L. T. 286 ; *affd.* 2 T. L. R. 8, C. A.

Annotation :—**Refd.** R. *v.* Barnardo, Jones' Case, [1891] 1 Q. B. 194, C. A.

PART V. SECT. 1.

199 i. *Mother's right to custody—Removal by agreement & with consent.*]—The ct. will not interfere on *habeas corpus* where the father obtained the child by agreement with & by the assent of the mother, & not by force or fraud.—R. *v.* ARMSTRONG (1850), 1 P. R. 6.—**CAN.**

204 i. —— *Primâ facie right.*]—The mother of an illegitimate child has the right to the custody & care thereof against the father. — O'ROURKE *v.* CAMPBELL (1887), 13 O. R. 563.—**CAN.**

204 ii. *S. P. Re* MAHER (1913), 28 O. L. R. 419 ; 4 O. W. N. 1009 ; 12 D. L. R. 492.—**CAN.**

204 iii. *S. P.* VAN ROOYEN *v.* WERNER (1892), 9 S. C. 425 ; 2 C. T. R. 295.—**SCOT.**

204 iv. —— —— *Notwithstanding marriage to man not child's father.*]—Where the mother of an illegitimate child marries a man other than the child's father, & there is a strong probability of issue of the marriage, she does not thereby lose her *primâ facie* right to the custody of the child.—*Re* BILLOWS (1900), 26 V. L. R. 390.—**AUS.**

205 i. —— —— *Benefit of child.*]—In determining who is to have the custody & control of an illegitimate child the ct. in exercising its jurisdiction with a view to the benefit of the child will primarily consider the interests of the mother.—*Re* SPINLOVE (1913), 25 O. W. R. 724 ; 5 O. W. N. 832.—**CAN.**

205 ii. *S. P. Ex p.* ROWLANDS (1895), 16 N. S. W. L. R. 239.—**AUS.**

205 iii. *S. P. Re* SLATER (1903), 14 Man. L. R. 523.—**CAN.**

205 iv. *S. P. Re* C. (AN INFANT) (1911), 20 O. W. R. 669 ; 25 O. L. R. 218 ; 3 O. W. N. 391.—**CAN.**

205 v. —— —— —— *Different religions.*]—A mother of illegitimate children is entitled to the guardianship of those children, unless where she is a Roman Catholic & the father was a Protestant, or unless her improper con-

Sect. 1.—*Right to custody.* *Sects.* 2 & 3.]

206. —— —— —— ——.]—A man had two children by a woman, who had been the wife of his deceased brother, & with whom he went through the form of marriage. He subsequently became engaged to his domestic servant, whom he seduced under promise of marriage, while still living with the mother of his children, & afterwards secretly married her. The mother thereupon left him, & made an application to the ct. for the custody of the children, a boy of just over fourteen & a girl of about eleven years of age. Both the children desired to remain in the custody of the father :—*Held :* having regard to the father's conduct & character, he was not a fit person to have the custody of the children, & it would not be for the interest or benefit of the children themselves to deprive the mother of their custody, to which she was *primâ facie* entitled.

Primâ facie, & in the absence of any strong reason to the contrary, the natural mother of children not in law legitimate has the right to their custody (LORD COLERIDGE, C.J.).—R. *v.* LEWIS (1893), 9 T. L. R. 226.

207. —— —— —— ——.] — In determining who is to have the custody of & control over an illegitimate child the ct., in exercising its jurisdiction with a view to the benefit of the child, will primarily consider the wishes of the mother.—BARNARDO *v.* MCHUGH, [1891] A. C. 388 ; 61 L. J. Q. B. 721 ; 65 L. T. 423 ; 55 J. P. 628 ; 40 W. R. 97 ; 7 T. L. R. 726, H. L. ; *affg.* S. C. *sub nom.* R. *v.* BARNARDO, JONES' CASE, [1891] 1 Q. B. 194, C. A.

Annotations :—**Follid.** R. *v.* Lewis (1893), 9 T. L. R. 226. **Apld.** R. *v.* New (1904), 20 T. L. R. 515. **Refd.** Humphrys *v.* Polak, [1901] 2 K. B. 385, C. A. **Mentd.** *Re* McGrath, [1892] 2 Ch. 496.

208. —— —— —— ——.] — An illegitimate child had been adopted when a few weeks old, by strangers to whom the child's grandmother had, without the mother's knowledge, paid a sum for the child's support. The child remained in the custody of his adoptive parents for about ten years, & they had become much attached to him. The parents of the child married, & as their circumstances had improved they were desirous of getting the child back, but the adoptive parents refused to give him up. The child was then over eleven years of age :—*Held :* (1) the real question to be decided was what was best for the benefit of the child, & on the evidence it would not be for his benefit to remove him from the custody of his adoptive parents ; (2) liberty should be given to either party to make a further application with respect to the education & maintenance of the child.—R. *v.* WALKER (1912), 28 T. L. R. 342, D. C. ; *subsequent proceedings*, 28 T. L. R. 375 ; 76 J. P. Jo. 196, C. A.

209. Child over seven—Allowed to choose—Former law.]—The mother of an illegitimate child of between eleven & twelve years of age obtained a *habeas corpus* directed to putative father, who had placed her at school, to bring her up before the ct. On the child being produced, in obedience to the writ, the ct. declared that she might use her own discretion as to where she would go, & the child being unwilling to go with her mother, the ct. would not permit the mother to take her by force.—*Re* LLOYD (1841), 3 Man. & G. 547 ; 4 Scott, N. R. 200 ; 133 E. R. 1259 ; *sub nom. Re* A. B., 11 L. J. C. P. 43 ; *sub nom.* ANON., 5 Jur. 1198.

Annotations :—**Consd.** R. *v.* Clarke (1857), 7 E. & B. 186. **Mentd.** R. *v.* Nash (1883), 10 Q. B. D. 454 ; Barnardo *v.* McHugh, [1891] A. C. 388, H. L. ; R. *v.* Barnardo, Jones' Case, [1891] 1 Q. B. 194, C. A. ; Humphrys *v.* Polak, [1901] 2 K. B. 385, C. A.

210. —— —— ——.]—The ct., on the application of the mother of an illegitimate child, refused to order it to be restored to her, where it appeared that it had been in the custody of the parties now possessing it seven years with the mother's consent, & that the child was well taken care of, & the child itself, who was eight years of age & very intelligent, wished to remain with its present protectors.—*Re* WHITE, *Ex p.* WHITE (1848), 10 L. T. O. S. 331, 349 ; 12 J. P. Jo. 87.

211. Mother's right to custody—Not transferable.]—The mother of an illegitimate child has a right to its custody, & she cannot by contract transfer her rights to another person ; & a contract between the mother of an illegitimate child & another person for the transfer to that person of the rights of the mother in respect of the child is invalid.—HUMPHRYS *v.* POLAK, [1901] 2 K. B. 385 ; 70 L. J. K. B. 752 ; 85 L. T. 103 ; 49 W. R. 612, C. A.

212. Death of mother—Right of maternal grandparents.]—Application for a writ of *habeas corpus* by the maternal grandparents of an illegitimate child, whose mother died at its birth. They had assumed rights of guardianship from the time of its birth & had placed it under the care of a person who

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duct disqualifies her.—*Re* CAIRNCROSS, 4 Ir. L. Rec. 1st Ser. 113.—**IR.**

205 vi. —— —— —— *Child over seven.*]—A contest arose between the father & mother of an illegitimate boy of nine years for the custody of the child. The mother caused some public disturbance while endeavouring to regain it, & during one of its periodical visits to her removed the child to a distant part of the country. The father having regained possession of the child, the mother approached a weekly paper, & allowed or caused an article to be published, in which the facts, & the circumstances of the child's birth, were disclosed :—*Held :* in the circumstances, having regard to the welfare of the child, the ct. should not remove it from the custody of the father to that of the mother.—HALL *v.* MCNULTY (1912), 14 W. A. R. 59.—**AUS.**

205 vii. —— —— —— *Child in another's custody.*]—The ct. will not transfer the custody of an illegitimate child to the mother, from that of a person with whom she has previously deliberately placed it, unless satisfied that it will be for the child's benefit, & that the mother is a person of good moral character.—*Re* AH KEE, *Ex p.* WALKER (1872), 3 . R. 38.—**AUS.**

205 viii. *S. P. Re* HOLESHED (1870), 5 P. R. 251.—**CAN.**

205 ix. *S. P.* R. *v.* DIGGENS, 4 J. R. N. S. 89.—**N.Z.**

205 x. —— —— —— *Father preferred.*]—The putative father of an illegitimate boy under seven, in whose custody the child was, allowed to retain the boy on an application for his possession by the boy's mother.—*Re* BESTWICK & AUSTIN (1909), 11 W. L. R. 73.—**CAN.**

211 i. —— *Whether transferable.*]—The mother of an illegitimate child may nominate some one else to have the same right as she herself has to take care of & have the control over it.—*Ex p.* ROWLANDS (1895), 16 N. S. W. L. R. 239.—**AUS.**

211 ii. —— ——.]—The mother of an illegitimate child cannot deprive herself of the right of absolute control over her child ; & an agreement to such effect is voidable.—*Re* C. (AN INFANT) (1911), 20 O W. R. 669 ; 25 O. L. R. 218 ; 3 O. W. N. 391.—**CAN.**

211 iii. —— —— *Revocation of agreement.*]—A contract by the mother of an illegitimate child under seven years of age with the reputed father for its custody by him & his wife, & not to interfere with the management of the child, & not to represent herself as its mother, is revocable at any time.—R. *v.* BAILEY, *Ex p.* CASSIN (1875), 3 C. A. 46.—**N.Z.**

212 i. *Death of mother—Right of maternal grandparents.*]—The putative father of an illegitimate child, the mother being dead, is *primâ facie* entitled to such custody as against the maternal grandfather.

A child was entrusted to the grandfather's care by the mother before her death, but was taken from his custody by the father by improper means. The arrangement made by the father for the maintenance of the child being one for the best interests of the child, the ct. refused to interfere with it.—*Re* BRANDON (1878), 7 P. R. 347.—**CAN.**

212 ii. —— ——.]—B. had an illegitimate child by A., whom she afterwards married, but she lived with her father until her death, when the child remained on in the custody of its maternal grandfather & uncle. B. was a Roman Catholic, but A., who was a labourer & lived with his father, mother, two brothers, & sister in his father's house, which consisted of a kitchen & one room, was a Protestant :—*Held :* A. was entitled to the custody of the child.—

had captured & sought to retain the child:—*Held:* appcts. were entitled to the interposition of the ct., & a rule absolute for a writ of *habeas corpus* granted.—*Re* DELLAR (1884), 28 Sol. Jo. 816.

213. —— Right of poor law guardians—Preferred to father.]—Guardians maintained an illegitimate child, a boy under twelve years of age. One day the putative father got over a fence & obtained possession of the boy & detained him. The father had previously declined to maintain the child on the ground of the illegitimacy, & the boy had been deserted by him, & had been at the school of the guardians ever since the mother's death. A writ of *habeas corpus* having been granted, & the father having produced the child:—*Held:* the guardians were entitled to recover the custody of the child.—ST. MARY ABBOTTS, KENSINGTON, GUARDIANS, *Re* AN ILLEGITIMATE CHILD (1887), 4 T. L. R. 63; *sub nom. Ex p.* ST. MARY ABBOTTS GUARDIANS, 51 J. P. Jo. 740.

See, further, No. 232, *post.*

214. Conviction of mother—Right of poor law guardians—Benefit of child.]—The mother of an illegitimate child in Oct., 1881, agreed with S. & his wife to let them have the custody of & educate & maintain the child, & they did so for seven years. The child being sent on a visit to its mother was, contrary to agreement, kept by her for two months, when the mother was convicted & sentenced to penal servitude. Mrs. S. then took charge of the child again for seven months, & then handed the child over to the guardians, who kept the child for nine months:—*Held:* as there was no desertion by the mother, the guardians could not dispose of the child, but as the mother was leading an immoral life, the child should be restored to Mrs. S.—R. *v.* BOLTON UNION (1892), 36 Sol. Jo. 255; 56 J. P. Jo. 149.

SECT. 2.—GUARDIANSHIP.

215. Whether father or mother has right of.]—Neither the putative father nor mother has legal right of guardianship (LORD MANSFIELD, C.J.).—R. *v.* FELTON & WENMAN (1758), 1 Bott's Poor Law, 5th ed., p. 478.

Annotation:—**Refd.** Barnardo *v.* McHugh, [1891] A. C. 388, H. L.

216. Whether mother has right of.]—*Re* ULLEE, NAWAB NAZIM OF BENGAL'S INFANTS, No. 205, *ante.*

217. Testamentary guardian—Right to appoint—Mother.]—A mother cannot legally appoint a testamentary guardian of her natural child, & such a guardian, if appointed, cannot have a *habeas corpus* to remove such child from the custody to which it was committed by the mother during her lifetime.—*Ex p.* GLOVER (1835), 4 Dowl. 291; 1 Har. & W. 508.

218. —— —— ——.]—Where a person was reported by a master to be a fit guardian to a natural child, yet such guardian was not allowed, but the child was placed with the father who owned her.—ORD *v.* BLACKETT (1724), 9 Mod. Rep. 116; 2 Eq. Cas. Abr. 487; 88 E. R. 351.

219. —— —— Father.]—A father of an illegitimate child has no power of appointing a guardian for the child.—HORNER *v.* HORNER (1799), 1 Hag. Con. 337.

220. —— —— ——.]—A testator cannot by will lawfully appoint any one to be the guardian of his illegitimate children.—SLEEMAN *v.* WILSON (1871), L. R. 13 Eq. 36; 25 L. T. 408; 20 W. R. 109.

221. Appointment by court.]—The question of guardianship of a bastard child belongs to the Lord Chancellor, representing the King in Ch.—R. *v.* HOPKINS (1806), 7 East, 579; 103 E. R. 224, L.C.

Annotations:—**Refd.** Barnardo *v.* McHugh, [1891] A. C. 388, H. L. **Mentd.** *Re* A. B. (1841), 11 L. J. C. P. 43; *Re* Lloyd (1841), 3 Man. & G. 547; R. *v.* Clarke (1857), 7 E. & B. 186; *Re* Race (1857), 26 L. J. Q. B. 169; *Re* Ullee, Nawab Nazim of Bengal's Infants (1885), 53 L. T. 711.

222. —— Persons appointed—Not necessarily mother.]—The mother of natural children being alive, another person appointed guardian with directions for intercourse between the infants & their mother.—COURTOIS *v.* VINCENT (1820), Jac. 268; 37 E. R. 852.

223. —— —— Father's testamentary guardian.]—When a father by his will names guardians for his natural child, the ct. will appoint them guardians without any reference to the master.—WARD *v.* ST. PAUL (1789), 2 Bro. C. C. 583; 29 E. R. 320.

Annotations:—**Folld.** Chatteris *v.* Young (1819), 1 Jac. & W. 106. **Refd.** *Ex p.* Glover (1835), 4 Dowl. 291.

224. —— —— ——.]—Persons nominated by a testator to be guardians of his natural children, & consenting to undertake the guardianship, appointed without a reference.—CHATTERIS *v.* YOUNG (1819), 1 Jac. & W. 106; 37 E. R. 316.

SECT. 3.—EDUCATION.

225. Religious education—Mother's right to decide.]—As between the mother of an illegitimate

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Re HYNDMAN (1905), 39 I. L. T. 191.—**IR.**

q. —— *Right of person having custody.*]—Illegitimate infants were removed from the custody of a person, to whom they had been committed by their mother at her death:—*Held:* the putative father had no *locus standi* to demand that the infants should be given up to him, they not having been taken out of his custody.—*Re* BATES (1875), 1 V. L. R. 178.—**AUS.**

r. —— ——.] — Except in special circumstances, the putative father is entitled, after the mother's death, to the custody of his illegitimate child, as against a person claiming to have been appointed guardian by its mother, & he is entitled, by any peaceful means, to take possession of it, or to ratify its being taken for him by others.—*Re* KERR (OTHERWISE M'ILWRATH) (1889), 24 L. R. Ir. 59; 24 I. L. T. 3.—**IR.**

s. —— *Right of stranger acting on mother's wishes.*]—An illegitimate child, aged about seven years, was, after the death of its mother, removed from the custody of its father by a stranger, acting upon a wish that had been expressed to him by the mother with reference to bringing up the child in her religion instead of in its father's. The custody of the child was transferred to the father.—*Re* CROWE (1883), 17 I. L. T. 72.—**IR.**

PART V. SECT. 2.

216 i. *Whether mother has right of.*]—The mother is entitled to the guardianship of her illegitimate children.—*Re* DARCYS (1860), 11 I. C. L. R. 298; 6 Ir. Jur. 36.—**IR.**

219 i. *Testamentary guardian—Right to appoint — Father.*] — *Held:* 14 & 15 Car. 2, c. 19, s. 6, which provided for the appointment of testamentary guardians, applied only to legitimate children, & the appointment of testamentary guardians for children of a void marriage was ineffectual.—*Re* DARCYS (1860), 11 I. C. L. R. 298; 6 Ir. Jur. 36.—**IR.**

223 i. *Appointment by court—Persons appointed—Father's testamentary guardians.*]—A natural child cannot have a guardian, except by appointment of the ct.

Testator, the reputed father, having named his exor. the guardian, the ct., without a reference to the master, appointed testator's nominee to be guardian.—BARRY *v.* BARRY (1828), 1 Mol. 210.—**IR.**

a. —— *Both parents alive.*] — The Supreme Ct. has no jurisdiction under Infants Guardianship & Contracts Act, 1887, to appoint a guardian to an illegitimate child, where both parents are alive.—*Re* R. *v.* W. (1906), 26 N. Z. L. R. 297.—**N.Z.**

b. *Right of mother to sue as next friend.*]—It is no part of the rules of practice of the Scottish cts. that the mother of an illegitimate child shall be entitled to sue on its behalf as next friend.—JONES *v.* SOMERVELL'S TRUSTEE, [1907] S. C. 545; 44 Sc. L. R. 390; 14 S. L. T. 759.—**SCOT.**

PART V. SECT. 3.

225 i. *Religious education — Mother's right to decide.*]—The father of an illegiti-

child & persons to whom a child has been entrusted, the mother has the right to decide the question as to the religious education that the child should receive.—R. *v.* NEW (1904), 20 T. L. R. 583, C. A.

226. —— —— Except in special circumstances.]—Circumstances in which the ct. complied with the wishes of the mother of a bastard child to deliver it into the custody desired by the mother, even though the result was to transfer its training from Protestant to Roman Catholic hands.

There may be cases where, in view of the age & past training of the child, the ct. might come to the conclusion that a transfer of it from one religious institution to another would be so prejudicial to its interests as to render it right to disregard the wishes of the parent.—BARNARDO *v.* MCHUGH, [1891] A. C. 388; 61 L. J. Q. B. 721; 65 L. T. 423; 55 J. P. 628; 40 W. R. 97; 7 T. L. R. 726, H. L.; *affg.* S. C. *sub nom.* R. *v.* BARNARDO, JONES' CASE, [1891] 1 Q. B. 194, C. A.

Annotations:—**Apld.** R. *v.* New (1904), 20 T. L. R. 583, C. A. **Refd.** *Re* McGrath, [1892] 2 Ch. 496; Humphrys *v.* Polak, [1901] 2 K. B. 385, C. A.

227. —— Death of mother—Mother's wishes decisive.]—The mother of an illegitimate child, who was a Roman Catholic, had caused the child to be baptised as a Roman Catholic. She died when the child was two years old. The child had been subsequently boarded out with foster parents who were Baptists. On an application to the ct. the custody of the child was given to a Roman Catholic guardian.—*Re* WHITE (1893), 9 T. L. R. 575.

228. Education—Mother deprived of custody—Mother's wishes decisive.]—The mother of an illegitimate child agreed with S. & his wife to let them have the custody of & educate & maintain the child, & they did so for seven years. The child was sent on a visit to its mother, when she was convicted & sent to penal servitude. Mrs. S. then took charge of the child again for seven months, & then handed it over to the guardians:—*Held:* as the mother was leading an immoral life, the child should be restored to Mrs. S. to be educated as the mother desired.—R. *v.* BOLTON UNION (1892), 36 Sol. Jo. 255; 56 J. P. Jo. 149.

SECT. 4.—**MAINTENANCE.**

229. Parish officers—Liability to maintain.]—Where a bastard child is born in a parish for whose sustenance the parents neglect to provide necessaries, the parish officers are obliged to do it, without an order of justices for that purpose.—HAYS *v.* BRYANT (1789), 1 Hy. Bl. 253; 126 E. R. 147.

See, further, POOR LAW.

230. Parents' liability—Present law.]—The sole obligation now cast upon the parents of an illegitimate child is that each may be compelled to bear his & her own fair share of the maintenance & education of the unfortunate offspring of their common failing (HAWKINS, J.).—HARDY *v.* ATHERTON (1881), 7 Q. B. D. 264; 50 L. J. M. C. 105; 44 L. T. 776; 45 J. P. 683; 29 W. R. 788.

Annotations:—**Refd.** Plymouth Grdns. *v.* Gibbs, [1902] 1 K. B. 177. **Mentd.** Davies *v.* Evans (1882), 9 Q. B. D. 238.

231. Mother—Death of—Liability of estate.]—Where the mother of a bastard child dies, leaving the child under the age of sixteen, her administrator is not bound to maintain such child out of the mother's assets, for there is no obligation at common law, & that which the poor law stats. create is personal to the mother, & dies with the person.—RUTTINGER *v.* TEMPLE (1863), 4 B. & S. 491; 3 New Rep. 34; 33 L. J. Q. B. 1; 9 L. T. 256; 28 J. P. 71; 9 Jur. N. S. 1239; 12 W. R. 9; 122 E. R. 544.

Annotation:—**Refd.** *Re* Harrington, Wilder *v.* Turner (1908), 99 L. T. 723.

232. Father—Right to maintain.]—The putative father of a bastard child has a right, as against the churchwardens & overseers of the parish, to maintain it himself.—NEWLAND *v.* OSOMOND (1753), Say, 93; 96 E. R. 814.

Annotations:—**Consd.** Horner *v.* Horner (1799), 1 Hag. Con. 337. **Dbtd.** Strangeways *v.* Robinson (1812), 4 Taunt. 498.

233. Father's liability—Bond to parish officers.]—Where the putative father of a bastard child gave a voluntary bond, & not under the compulsion of 6 Geo. 2, c. 31, to the parish officers conditioned for the payment of a sum certain every three months until the child should be deemed capable of

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mate girl entrusted her to the care of a Roman Catholic children's aid society. The mother, at that time, was misconducting herself. The mother afterwards reformed, & the father having died, a judge, being satisfied that the welfare of the child would be best served by placing her in her custody, made an order accordingly, without imposing any condition as to the faith in which the child should be brought up, although the mother was a Protestant.—*Re* MAHER (1913), 28 O. L. R. 419; 4 O. W. N. 1009; 12 D. L. R. 492.—**CAN.**

227 i. —— *Death of mother—Whether mother's wishes decisive.*]—A mother consigned her illegitimate child, seven years of age, whose reputed father was dead, to the custody of a Protestant institution, she being a Roman Catholic. Immediately before her death she signed a paper expressing her desire to have her child delivered up for nurture to a Roman Catholic institution:—*Held:* the ct. had not power to compel the delivery up of the child, & the express wish of the mother was no ground for interference.—*Re* SMITH (1879), 8 P. R. 23.—**CAN.**

PART V. SECT. 4.

d. *Mother's husband.*]—A man does not by marriage with the mother of an illegitimate child become liable for its maintenance under Neg ected Children's Act, 1890 (No. 1121), s. 58.—IRWIN *v.* SHOLL (1897), 22 V. L. R. 640.—**AUS.**

233 i. *Father's liability—After death—Liability of estate.*]—An action will lie against the representatives of a deceased father for the maintenance of his illegitimate child during his lifetime, under C. S. U. C., c. 77, s. 4.—MONOHAN *v.* OKE (1877), 1 A. R. 268.—**CAN.**

233 ii. —— *To third party.*]—The father of an illegitimate child is not liable to a third person for the expense of supporting such child, unless it has been incurred upon his authority, or he has contracted to pay for it.—FORREST *v.* MCREA (1843), 2 Kerr. 174.—**CAN.**

233 iii. ——————.]—Action of *assumpsit* for the support of an illegitimate child *held* to lie when the child was brought up & supported by a third person, & when the father knew it, & did not prohibit it.—CONNOLLY *v.* NUGENT, 1 Ir. L. Rec. 1st Ser. 235.—**IR.**

233 iv. —— *When discharged.*]—The circumstance that the father of an illegitimate child is sixteen years old only, & still studying at school, is not by itself a sufficient reason for holding him excused from the necessity of providing for his illegitimate offspring. The person on whom the order of maintenance is issued must have sufficient means to support the child.—R. *v.* ROSHUN LALL (1872), 4 N. W. 123.—**IND.**

e. —— —— *Adoption of child under Adoption of Children Act,* 1896 (60 *Vict. No.* 6).]—An order was made under Bastardy Laws Act, 1875 (39 Vict. No. 8), against the putative father. Subsequently, an order of adoption was made in favour of a third party, pursuant to Adoption of Children Act, 1896:—*Held:* the effect of the order of adoption was that the child ceased to be a bastard child, & was, in contemplation of law, the legitimate child of the adopting mother, to whom passed the duty of supporting it, & the order could not be enforced against the putative father for maintenance after the date of the order of adoption. *Semble:* the right of the child to support by the putative father would again revive in the event of the discharge of the order of adoption.—MADDOCKS *v.* ROBINSON (1913), 16 W. A. R. 4.—**AUS.**

f. —— —— *Deed of release.*]—To an action for the maintenance of illegitimate children, deft. pleaded a deed whereby pltf., the mother, in consideration of £50, released deft. from past claims, & covenanted to maintain the children thereafter without the assistance of deft.:—*Held:* the plea was bad because there might have been, subsequently to the deed, a binding contract for maintenance, for new & valuable consideration — *e.g.,* maintenance in a more expensive manner than pltf. was by the covenant bound to provide.—MAGEE *v.* FARRELL (1869), I. R. 3 C. L. 625; I. R. 5 C. L. 579.—**IR.**

g —— —— *Subsequent action for seduction.*]—Action for money due for

providing for herself :—*Held :* such bond was good, & the condition sufficiently certain.—MIDDLEHAM *v.* BELLERBY (1813), 1 M. & S. 310 ; 105 E. R. 116.

Annotations :—**Consd.** Clarke *v.* Johnson (1826), 11 Moore, C. P. 319. **Folld.** Pope *v.* Sale (1831), 7 Bing. 477. **Mentd.** Follitt *v.* Koetzow (1860), 24 J. P. 612.

234. —— —— Father ready to maintain—Plea.]—A bond, conditioned for payment to the overseers of a parish of a certain weekly sum so long as a bastard child shall continue chargeable, is not illegal or contrary to public policy.

To debt on bond, conditioned for payment of a weekly sum for maintenance of a bastard child, so long as it should be chargeable, it is no plea that after the child attained the age of seven years the putative father offered thenceforth to keep & maintain the child, & requested the overseers to deliver it to him, without showing that the child was within the power & custody of the overseers.—STRANGEWAYS *v.* ROBINSON (1812), 4 Taunt. 498 ; 128 E. R. 423.

235. —— —— —— ——.]—Debt on a bond voluntarily entered into by deft., the putative father of a bastard, to pay pltfs., parish officers, 2*s.* 6*d.* a week as long as the child should be provided for at the expense of the parish. Plea, that deft. was ready & willing to provide for the child, & requested pltfs. to deliver the child to him, but that the child had been provided for by pltfs. as parish officers, of their own wrong :—*Held :* ill.—POPE *v.* SALE (1831), 7 Bing. 477 ; 5 Moo. & P. 336 ; 1 Nev. & M. M. C. 240 ; 9 L. J. O. S. C. P. 150 ; 131 E. R. 185.

Annotation :—**Mentd.** Follit *v.* Koetzow (1860), 24 J. P. 612.

236. —— Voluntary Payments — Discontinuance.]—An action to recover compensation for the maintenance of a bastard was brought against the father of the child by pltf., who had married the mother of the child :—*Held :* if the father of an illegitimate child consented to pay an annual sum for his support, he was bound to continue to do so, or to provide for the child himself, or to give the most distinct notice of his intention to pay such annual sum no longer.—CAMERON *v.* BAKER (1824), 1 C. & P. 268, N. P.

237. —— —— ——.]—The supposed father of an illegitimate child made various payments for its maintenance & then refused to continue its support until the mother obtained an order of affiliation :—*Held :* no action would lie for arrears of maintenance at the suit of the mother.—FURILLIO *v.* CROWTHER (1826), 7 Dow. & Ry. K. B. 612 ; 4 Dow. & Ry. M. C. 1.

238. —— None without contract.]—No one is bound to pay another for maintaining his illegitimate children except he has entered into some contract to do so.—SEABORNE *v.* MADDY (1840), 9 C. & P. 497.

239. —— Necessaries—Supplied by mother—Father's request.]—A woman who, at the request of her seducer, had taken lodgings & laid out money in necessaries for her confinement & support of her child :—*Held :* entitled to sue him for money paid.—GORE *v.* HAWSEY (1862), 3 F. & F. 509.

240. —— —— Supplied by strangers—Adoption of child.]—The father of a bastard child, if he has adopted it as his own, though no order of bastardy has been made on him, is liable for the nursing & necessaries furnished for its use.—HESKETH *v.* GOWING (1804), 5 Esp. 131, N. P.

241. —— —— —— Father's consent.]—If a person know that his illegitimate daughter, of the age of sixteen, is boarded & clothed by pltf., & neither expresses dissent, nor takes his daughter away, he is liable to pay pltf. for such board & lodging without any express promise to do so ; & it lies on deft. to show that his daughter was boarded & lodged by pltf. against his consent, or that he has refused to be at the expense of maintaining her.—NICHOLE *v.* ALLEN (1827), 3 C. & P. 36, N. P.

Annotation :—**Dbtd.** Mortimore *v.* Wright (1840), 9 L. J. Ex. 158. That is only a *Nisi Prius* decision & I cannot assent to any such doctrine (LORD ABINGER, C.B.).

242. —— Contract with mother — Validity.]—The putative father of a bastard child contracted with the mother to pay her 5*s.* per week for the support of the child, & performed this contract for some time. He then paid the mother in advance for two years, & at the same time also paid her the further sum of £10, in consideration of which she agreed to release him from all further payments in respect of the child :—*Held :* the contract was not void in law.—FOLLIT *v.* KOETZOW (1860), 2 E. & E. 730 ; 29 L. J. M. C. 128 ; 2 L. T. 178 ; 24 J. P. 612 ; 6 Jur. N. S. 651 ; 121 E. R. 274 ; *sub nom.* TOLLIT *v.* KORTZOW, 8 W. R. 432.

Annotation :—**Mentd.** Griffith *v.* Evans (1882), 46 L. T. 417.

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the maintenance of deft.'s illegitimate child. After deft.'s promise to pay for such maintenance, pltf. sued & recovered damages from deft. for the seduction of his daughter :—*Held :* deft.'s promise was not invalidated by such subsequent proceeding.—QUINN *v.* QUINN (1843), 3 Craw. & D. 21.—**IR.**

h. —— —— *Mother's marriage with third party.*]—A woman had illicit intercourse with A. in summer, 1823, was pregnant before Sept. 18 of that year, & was married to B. on the 28th. She could not have had connection with B. earlier than the 18th :—*Held :* A. liable in aliment to the child.—JOBSON *v.* REID (1832), 10 Sh. (Ct. of Sess.) 594.—**SCOT.**

k. —— —— ——.]—Action for the maintenance of an illegitimate child, under C. S. U. C., c. 77, s. 4, by a married woman. The affidavit, filed by pltf., stated that deft. was the father of such child, not "really the father," as required by the Act :—*Held :* (1) pltf. could not sue, for it must be presumed that the necessaries furnished were her husband's ; (2) the omission in the affidavit was fatal.—JACKSON *v.* KASSEL (1867), 26 U. C. R. 341.—**CAN.**

238 i. —— *Contract — Promise to pay for nursing.*]—A promise by the father of an illegitimate child to pay for the nursing of the child does not imply a promise by him to pay for the continual maintenance of the child.—PURNIS *v.* M'BRIAN (1841), 2 Craw. & D. 226.—**IR.**

239 i. —— *Necessaries—Supplied by maternal grandmother.*]—Pltf., the maternal grandmother of an illegitimate female child, sued deft. for necessaries supplied to the child, at the mother's request ; deft. set up as a defence that he demanded the child from pltf. & from the mother, & informed them that he would support the child, & had always been ready & willing to do so, etc., yet pltf. & the mother refused to deliver up the child or allow deft. to support her : —*Held :* No answer to the action.—O'ROURKE *v.* CAMPBELL (1887), 13 O. R. 563.—**CAN.**

242 i. —— *Contract not in writing—Revocation.*]—A promise by the father to the mother of an illegitimate child to pay for its support so long as it should live discloses a good consideration, but is revocable at any time.—M'GREAVY *v.* CONOLLY (1876), 10 I. L. T. 162.—**IR.**

m. —— *Prescription.*]—The triennial prescription found not applicable to a claim of aliment against the father of a bastard child, he having gone abroad.—MACDOWALL *v.* M'LURG (1807), Fac. Coll. App. No. 6.—**SCOT.**

n. —— *Under Deserted Wives & Children Acts—Evidence of ability to support.*]—On the hearing of an affiliation summons, complainant swore that deft., who was under nineteen years of age & resided with his father, was "butchering" in a town. No other evidence was given as to his ability to maintain or contribute to the maintenance of the child. The magistrate ordered deft. to enter into a recognisance for the payment of a weekly sum for twelve months towards the child's support, & in default, that he be imprisoned for that period :—*Held :* (1) the evidence of deft.'s ability was insufficient ; (2) it was not necessary for complainant to prove affirmatively her inability to contribute ; (3) the order for imprisonment was not excessive.—RAVANNI *v.* ROBINSON, *Ex p.* ROBINSON (1897), 7 Q. L. J. 131.—**AUS.**

o. —— —— ——.]—Proof that a father is good & capable of working & earning wages is sufficient *primâ facie* evidence of his ability to contribute to the support of an illegitimate child, of which he is the father—SMITH *v.* GWYNNE, *Ex p.* GWYNNE (1906), S. R. Q. 251.—**AUS.**

p. —— —— —— *By mother.*]—The father cannot escape liability to maintain his illegitimate child merely by showing that the mother is able to support it. His duty to maintain his illegitimate child is absolute, if he has the ability to do so ; if he has not the ability, an order may be made requiring a mother possessed of means to contribute to the child's maintenance.—COX

Sect. 4.—*Maintenance. Part VI. Sect.* 1: *Subsects.* 1 & 2.]

243. —— —— **Consideration.**]—The reputed father of an illegitimate child promised to pay the mother an annuity, if she would maintain the child & keep secret their connection :—*Held :* the maintenance of the child was a sufficient consideration to sustain *assumpsit.*—JENNINGS *v.* BROWN (1842), 9 M. & W. 496 ; 12 L. J. Ex. 86 ; 152 E. R. 210.

Annotations :—**Consd.** Beaumont *v.* Reeve (1846), 8 Q. B. 483. **Folld.** Linnegar *v.* Hodd (1848), 5 C. B. 437. **Refd.** Hicks *v.* Gregory (1849), 8 C. B. 378.

244. —— —— ——.]—The father of an illegitimate child promised the mother that, if she would abstain from affiliating the child, he would pay her 2*s.* 6*d.* per week for its maintenance. The mother did so abstain, & suffered the time limited for obtaining an order of affiliation to expire :—*Held :* the promise bound the father, & *indebitatus assumpsit* lay, the consideration having been executed.—LINNEGAR *v.* HODD (1848), 5 C. B. 437 ; 136 E. R. 948 ; *sub nom.* LINEGAR *v.* HOOD, 17 L. J. C. P. 106 ; 10 L. T. O. S. 327.

245. —— —— ——.]—A written promise by the father of an illegitimate child to the mother to allow her an annuity in consideration of her behaving well, & bringing up the child properly, shows sufficient consideration, & constitutes, when it has been acted upon, a valid contract.—HICKS *v.* GREGORY (1849), 8 C. B. 378 ; 19 L. J. C. P. 81 ; 14 L. T. O. S. 202 ; 13 Jur. 1030 ; 137 E. R. 556.

Annotations :—**Refd.** Smith *v.* Roche (1859), 6 C. B. N. S. 223. **Mentd.** Parker *v.* Rolls (1854), 14 C. B. 691.

246. —— —— ——.]—S., the mother of two illegitimate children by R., agreed, at the request of R., & in consideration of giving up cohabitation, to take charge of the two children, & to supply them with all things necessary, & R. promised in consequence thereof to pay S. £50 a year. One of the children afterwards died :—*Held :* (1) there was sufficient consideration to support the promise, because whereas the mother was only bound by stat. to support the children if she was able, this was a contract to maintain them absolutely, which went further than the stat. ; (2) the death of one of the children was no answer to an action on the contract, for it did not appear that the promise was confined to the mere life of both children.—SMITH *v.* ROCHE (1859), 6 C. B. N. S. 223 ; 28 L. J. C. P. 237 ; 33 L. T. O. S. 123 ; 23 J. P. 312 ; 5 Jur. N. S. 918 ; 7 W. R. 413 ; 141 E. R. 440.

247. —— —— —— **Breach of condition.**]—The father of an illegitimate child shortly after its birth agreed with the mother to pay for its maintenance the sum of £45, part down, & the residue in four equal annual instalments. Before the first of such annual instalments became due, the mother applied for & obtained an affiliation order against the father, by which he was required to pay 2*s.* 6*d.* weekly for its maintenance :—*Held :* (1) the promise was void for want of consideration ; (2) if the agreement could be construed to mean that the mother should abstain from applying for an affiliation order, it would be good, but the mother having broken the condition, the promise was discharged. —CROWHURST *v.* LAVERACK (1852), 8 Exch. 208 ; 22 L. J. Ex. 57 ; 20 L. T. O. S. 102 ; 17 J. P. 249 ; 1 W. R. 56 ; 155 E. R. 1322.

248. —— —— **Bankruptcy.**]—Bkpcy. is not a discharge of a promise to the mother to allow her a weekly sum for the support of an illegitimate child. —MILLEN *v.* WHITTENBURY (1808), 1 Camp. 428, N. P.

249. —— —— **Death of mother.**]—By an agreement in writing the father of a bastard child agreed to pay to the mother a certain weekly sum until the child should attain a certain age, & in consideration of those payments the mother agreed not to apply to justices for a bastardy order & further agreed to maintain & bring up the child. On the death of the mother before the child had attained the stipulated age the father discontinued the payments. The administrator of the mother's estate brought an action against the father upon the agreement :—*Held :* the father's obligation came to an end with the mother's death & the action would not lie.—JAMES *v.* MORGAN, [1909] 1 K. B. 564 ; 78 L. J. K. B. 471 ; 100 L. T. 238 ; 73 J. P. 149 ; 25 T. L. R. 267 ; 53 Sol. Jo. 245, D. C.

250. —— **Contract for benefit of mother—Consideration.**]—B. bound himself to trustees in the penal sum of £8,000 to pay an annuity of £200 to them for C., a single woman, with whom he had cohabited, & by whom he had five children, in order to make a provision for her, & also in consideration of her giving up to him the sole custody of the children. The bond was to become void on due payment of the annuity during the life of C., or until she should claim the children : — *Held :* there was a sufficiently valuable consideration given for the bond to constitute it a specialty debt.—*Re* PLASKETT, BRYANT *v.* KNYVETT (1861), 30 L. J. Ch. 606 ; 4 L. T. 544 ; 9 W. R. 628.

251. —— **Contract not in writing—Whether to be performed within one year—Statute of frauds.**]—A. contracted with B. for the support of A.'s illegitimate child. At the time of the contract, it was contemplated that it should continue for more than a year. It was, however, agreed that B. should keep the child as long as A. pleased, & should be paid monthly :—*Held :* this was not a contract within the words, "not to be performed within the space of one year," in Stat. Frauds, s. 4.—SOUCH *v.* STRAWBRIDGE (1846), 2 C. B. 808 ; 15 L. J. C. P. 170 ; 9 J. P. 601 ; 10 Jur. 357 ; 135 E. R. 1161 ; *sub nom.* TOUCH *v.* STRAWBRIDGE, 7 L. T. O. S. 64.

Annotations :—**Folld.** Knowlman *v.* Bluett (1873), L. R. 9 Exch. 1. **Apld.** Davey *v.* Shannon (1879), 4 Ex. D. 81. **Apprvd.** McGregor *v.* McGregor (1888), 21 Q. B. D. 424 ; Lavalette *v.* Riches (1908), 24 T. L. R. 336. **Mentd.** Broom *v.* Batchelor (1856), 25 L. J. Ex. 299 ; Green *v.* Saddington (1857), 7 E. & B. 503 ; *Re* Pentreguinea Fuel Co. (1862), 4 De G. F. & J. 541 ; Pulbrook *v.* Lawes (1876), 45 L. J. Q. B. 178 ; Hanau *v.* Ehrlich, [1911] 2 K. B. 1056.

252. —— —— —— ——.]—Deft., the father of seven illegitimate children of pltf., agreed with

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v. SHORT, *Ex p.* SHORT (1909), S. R. Q. 112.—**AUS.**

q. —— *Under Marriage Act,* 1890 (*No.* 1166), *s.* 42—*Offer to provide home.*]—On a complaint against a father for leaving his illegitimate child without adequate means of support, the child being in the custody of the mother, a *bonâ fide* offer by the father to provide a home for the child is no answer to the complaint.

On the hearing of a complaint laid under s. 42 of the Act if it be proved that (1) the children are in fact without means of support, & (2) the father is able to contribute to their maintenance, the justices must make an order against him.—RUSS *v.* CARR, [1908] V. L. R. 78. —**AUS.**

r. —— —— *Effect of pre-maternity order.*]—An adjudication by justices of the paternity of an expected child, in proceedings by the expectant mother against the alleged father to obtain confinement expenses, does not operate as an estoppel in proceedings after the birth of the child by the mother against the same deft. for maintenance of the child, the real complainant in the maintenance proceedings being the child.—BAXTER *v.* BAXTER, [1914] V. L. R. 444. —**AUS.**

s. —— *Under Destitute Persons Act,* 1894.]—The affirmative provisions of s. 4 of the Act do not relieve the putative father of the obligation on his part under s. 9.—SPICER *v.* AYERS (1899), 18 N. Z. L. R. 504.—**N.Z.**

t. ——.—Evidence that the putative father has means is not a condition precedent to the making of an order under s. 9 of the Act. The above sect. creates an absolute liability on the part of the father to contribute towards the maintenance of such illegitimate child. If he does not discharge this duty voluntarily the Act may be appealed to, not to punish him, but to fix & define his liability. Inability to perform the order might be a reason for not enforcing it, but is not a ground for refusing it.—HOWARD *v.* DOIG (1899), 18 N. Z. L. R. 766.—**N.Z.**

Practice under above Acts.] — *See* Part VI., Sect. 2, *post.*

her verbally to pay her £300 per annum, by equal quarterly instalments, for so long as she should maintain & educate the children. At the time of the making of the promise the eldest child was about fourteen years old:—*Held:* this agreement was not one "not to be performed within a year from the making thereof," within Stat. Frauds, s. 4, & was binding, though made by parol only. *Semble:* the agreement was one which might at any time have been terminated by either party giving notice to the other (BRAMWELL & PIGOTT, BB.).—KNOWLMAN *v.* BLUETT (1873), L. R. 9 Ex. 1; 43 L. J. Ex. 29; 29 L. T. 462; 22 W. R. 77; *affd.* on another point (1874), L. R. 9 Ex. 307, C. A.

Annotations:—**Distd.** Eley *v.* Positive Government Security Life Assce. (1875), 1 Ex. D. 20. **Consd.** Davey *v.* Shannon (1879), 40 L. T. 628. **Mentd.** Pulbrook *v.* Lawes (1876), 45 L. J. Q. B. 178; McGregor *v.* McGregor (1888), 36 W. R. 470; Reeve *v.* Jennings, [1910] 2 K. B. 522.

Part VI.—Affiliation Proceedings and Kindred Proceedings under Colonial Statutes.

NOTE.—*The Acts referred to in this Part are Poor Law Amendment Act,* 1844 (*c.* 101), *Bastardy Act,* 1845 (*c.* 10), *Bastardy Laws Amendment Act,* 1872 (*c.* 65), *& Bastardy Laws Amendment Act,* 1873 (*c.* 9), *& are herein referred to as* 1844 *Act,* 1845 *Act,* 1872 *Act, &* 1873 *Act respectively.*

SECT. 1.—REQUISITES FOR JURISDICTION.

SUB-SECT. 1.—AS TO THE CHILD.

253. Birth alive.]—No order for affiliation or for payment of expenses can be made unless the child is born alive.—R. *v.* DE BROUQUENS (1811), 14 East, 277; 104 E. R. 607.

254. Birth "after passing of" 1872 Act.]—A child was born on Aug. 10, 1872, being the day on which 1872 Act received the royal assent:—*Held:* such child was born "after the passing of the Act," which in contemplation of law took place as soon as the clock began to strike twelve on the previous night, & an affiliation order might be made in respect of such child.—TOMLINSON *v.* BULLOCK (1879), 4 Q. B. D. 230; 48 L. J. M. C. 95; 40 L. T. 459; 43 J. P. 508; 27 W. R. 552, D. C.

Annotation:—**Distd.** Clarke *v.* Bradlaugh (1881), 44 L. T. 779.

255. Birth in England — Irish father.] — An applt. having been summoned before justices was adjudged to be the putative father of the bastard child of resp., & ordered to provide for its maintenance according to 1872 Act, s. 3. The child was born in Cornwall. Applt. was an Irishman & resp. an Englishwoman, & the connection, which resulted in the birth of the child, took place in Ireland. The summons was duly served on applt.:—*Held:* the child having become chargeable in England, the justices had juridsiction, & the order was good.—HAMPTON *v.* RICKARD (1874), 43 L. J. M. C. 133; 30 L. T. 636; 38 J. P. 646.

256. —— On English ship.] — A ship on the high seas is part of the territory of the State to which she belongs, & a bastard child of which a woman is delivered on board an English ship is to be deemed to be born in England, & the mother is entitled to an order of affiliation against the putative father resident in England.—MARSHALL *v.* MURGATROYD (1870), L. R. 6 Q. B. 31; 40 L. J. M. C. 7; 23 L. T. 393; 35 J. P. 153; 19 W. R. 72.

Annotation:—**Refd.** R. *v.* Humphrys, *Ex p.* Ward, [1914] 3 K. B. 1237.

257. Birth abroad — Foreign mother.]—A bastardy order cannot be made on the putative father in respect of a child born abroad of a foreign mother, although the mother became pregnant while domiciled & resident in England, & returned to England with the child shortly after its birth.—R. *v.* BLANE (1849), 13 Q. B. 769; 3 New Mag. Cas. 168; 3 New Sess. Cas. 597; 18 L. J. M. C. 216; 13 L. T. O. S. 257; 13 J. P. 825; 13 Jur. 854; 116 E. R. 1458.

Annotations:—**Apprvd. & Distd.** Marshall *v.* Murgatroyd (1870), 40 L. J. M. C. 7. **Distd.** R. *v.* Humphrys, *Ex p.* Ward, [1914] 3 K. B. 1237. In that case the mother was not a British subject; there was no evidence that she was domiciled in England (BANKES, J.).

258. —— English mother.] — The fact that a bastard, the child of English parents resident & domiciled in England, was born abroad is not a bar to bastardy proceedings, since there is no necessity to consider any but English law in order to ascertain the status of the child.—R. *v.* HUMPHRYS, *Ex p.* WARD, [1914] 3 K. B. 1237; 84 L. J. K. B. 187; 30 T. L. R. 698; *sub nom.* R. *v.* HUMFRYS, *Ex p.* WARD, 111 L. T. 1110; 79 J. P. 67; 24 Cox, C. C. 455, D. C.

SUB-SECT. 2.—AS TO THE MOTHER.

259. Marriage after birth— Liability of husband.]—An application for an affiliation order cannot be made where the mother has married since the birth of the child, & is at the time of the application living with her husband.

A woman who marries after the birth of her child ought not to be allowed to proceed against the putative father, inasmuch as her husband has become liable to support the child; & it could not have been the intention of the Legislature to establish a double liability for its maintenance (MELLOR, J.).—STACEY *v.* LINTELL (1879), 4 Q. B. D. 291; 48 L. J. M. C. 108; 40 L. T. 553; 43 J. P. 510; 27 W. R. 551, D. C.

Annotations:—**Folld.** Tozer *v.* Lake (1879), 4 C. P. D. 322, D. C.; Jones *v.* Davies, [1901] 1 K. B. 118, D. C. **Refd.** Healey *v.* Wright, [1912] 3 K. B. 249, D. C. **Mentd.** Hardy *v.* Atherton (1881), 7 Q. B. D. 264, D. C.; Pearson *v.* Heys (1881), 45 L. T. 680, D. C.; Sotheran *v.* Scott (1881), 29 W. R. 666, D. C.; Davies *v.* Evans (1882), 9 Q. B. D. 238, D. C.

260. —— Summons before marriage.]—An order cannot be made where the mother has married since the birth of the child & is at the time of the application living with her husband, although she took out a summons againt the putative father before her marriage, & was prevented from serving it by his default.—TOZER *v.* LAKE (1879), 4 C. P. D. 322; 41 L. T. 280; 43 J. P. 656.

Annotation:—**Folld.** Healey *v.* Wright, [1912] 3 K. B. 249, D. C.

PART VI. SECT. 1.

253 i. *Birth alive.*]—An order of affiliation cannot be made where the child is still-born, although the parish has been put to expense in the attendance on the mother.—R. *v.* MURPHY (1842), 1 Kerr, 524.—**CAN.**

PART VI. SECT. 1, SUB-SECT. 2.

x. *Mother under age.*] — A mother who sues for the maintenance of her illegitimate child under Infant Protection Act, 1904 (No. 27), s. 8, need not, if under age, proceed by her next friend. She herself in effect sues as next friend for her child.—*Ex p.* TOWNSEND (1906), 6 S. R. N. S. W. 260.—**AUS.**

Sect. 1.—*Requisites for jurisdiction: Sub-sect.* 2. *Sect.* 2.]

261. —— —— Summons amended after marriage.]—A bastardy summons issued upon an application by resp. (then a single woman) against applt. could not be served owing to applt. having left the neighbourhood. He subsequently returned, & resp. thereupon applied to the clerk to the justices to amend the date of hearing & to serve the summons. At the date of such application resp. was a married woman living with her husband. The summons, having been altered & served on applt., came on for hearing before the justices, who made an order against applt. to contribute to the maintenance of resp.'s bastard child:—*Held:* the alteration of the summons was equivalent to the issuing of a fresh summons, & as resp. was a married woman at the date of such alteration the justices had no power to make the order.—HEALEY *v.* WRIGHT, [1912] 3 K. B. 249; 81 L. J. K. B. 961; 107 L. T. 413; 28 T. L. R. 439; 23 Cox, C. C. 173, D. C.

See, also, No. 301, *post.*

262. —— Living separate from husband.]—A married woman cannot after marriage to another man obtain an order of affiliation against the putative father of her illegitimate child born before marriage, although she is living separate & apart from her husband, he having turned her out of doors & refused to maintain her or the child on first learning of the child's existence.—PEATFIELD *v.* CHILDS (1899), 63 J. P. 117.

263. Married woman—Living separate from husband.]—Affiliation proceedings may be taken by a married woman, where her child is shown to be a bastard, & she is living separate from her husband.

M. T. was delivered of a child, of which L. was found to be the father. J. T., the husband of M. T., had been beyond the seas, & had not had access to his wife till a fortnight before the child's birth:—*Held:* an order against the father was rightly made.

A child born of adulterous intercourse (where there is no access by the husband) is as much within the Act [6 Geo. 2, c. 31] as one which is born of a single woman (LORD ELLENBOROUGH, C.J.).—R. *v.* LUFFE (1807), 8 East, 193; 103 E. R. 316.

Annotations:—**Apld.** R. *v.* Collingwood (1848), 12 Jur. 750; R. *v.* Pilkington (1853), 2 E. & B. 546. **Refd.** Morris *v.* Davies (1837), 5 Cl. & Fin. 163, H. L.; Jones *v.* Davies, [1901] 1 K. B. 118, D. C. **Mentd.** R. *v.* Kea (1809), 11 East, 132; R. *v.* Hartington (1816), 4 M. & S. 559; Head *v.* Head (1823), 1 Sim. & St. 150; R. *v.* Sourton (1836), 2 Har. & W. 209; R. *v.* King's Lynn Recorder (1846), 3 Dow. & L. 725; Ormerod *v.* Chadwick (1847), 16 M. & W. 367; R. *v.* Shipperbottom (1847), 11 Jur. 520; R. *v.* Grafton (1848), 12 Jur. 539; Legge *v.* Edmonds (1855), 25 L. J. Ch. 125; *Ex v.* Baker (1857), 7 E. & B. 697; R. *v.* Baker (1857), 22 J. P. 53; Yates *v.* Chippindale (1862), 11 C. B. N. S. 512; Turnock *v.* Turnock & Turnock (1867), 36 L. J. P. & M. 85; *Re* Parson's Trust (1868), 18 L. T. 704; R. *v* Suffolk JJ. (1884), 12 J. P. 426.

264. —— ——.]—*Held:* A married woman, the mother of a bastard child, was a "single woman" within 1844 Act, s. 2 (repealed & re-enacted by 1872 Act, s. 3), & 1845 Act, s. 4.—R. *v.* COLLINGWOOD (1848), 12 Q. B. 681; 3 New Mag. Cas. 53; 3 New Sess. Cas. 252; 17 L. J. M. C. 168; 12 L. T. O. S. 105; 12 Jur. 750; 12 J. P. Jo. 309, 454; 116 E. R. 1025.

Annotations:—**Apld.** R. *v.* Pilkington (1853), 2 E. & B. 546. **Refd.** Jones *v.* Davies, [1901] 1 K. B. 118, D. C.

265. —— ——.]—A woman, whose husband had been for several years a convict in Van Diemen's Land, obtained an order in bastardy against a man in her husband's absence. On the return of the husband the putative father ceased to make the payments under the order. The husband deserted his wife after cohabiting with her for about six weeks. The putative father having refused to make any more payments a warrant was issued against him, but the justices refused to issue a warrant of distress against him on the ground that he was discharged by the return of the husband & his cohabitation with his wife:—*Held:* the justices had jurisdiction to make an order on the putative father under 1844 Act, s. 3, although the mother was a married woman living apart from her husband.—R. *v.* PILKINGTON (1853), 2 E. & B. 546; 21 L. T. O. S. 165; 17 Jur. 554; 1 W. R. 410; 17 J. P. Jo. 388; 1 C. L. R. 945; 118 E. R. 872; *sub nom. Ex p.* GRIMES, 22 L. J. M. C. 153.

Annotations:—**Consd.** Jones *v.* Davies, [1901] 1 K. B. 118, D. C. **Refd.** Stacey *v.* Lintell (1879), 27 W. R. 551; Marshall *v.* Malcolm (1917), 87 L. J. K. B. 491, D. C. **Mentd.** R. *v.* Dayman (1857), 26 L. J. M. C. 128; R. *v.* Paynter (1857), 21 J. P. 626.

266. —— —— Separation not bonâ fide.]—A married woman conceived a child during her husband's absence at sea. On his return, he became aware of her condition, but continued to live with her. Being advised by the solr. who was acting for his wife that it was necessary that she should be living apart from her husband in order that she should obtain an affiliation order, he separated from her & went to reside in another part of the county. The justices found that the separation was not a *bonâ fide* separation but colourable & for the purpose of the proceedings:—*Held:* the woman was not a single woman within 1872 Act, & was not entitled to lay an information against the putative father of the child.—JONES *v.* DAVIES, [1901] 1 K. B. 118; 70 L. J. Q. B. 38; 83 L. T. 412; 65 J. P. 39; 49 W. R. 136, D. C.

Annotation:—**Consd. & Apld.** Marshall *v.* Malcolm (1917), 87 L. J. K. B. 491.

267. —— —— Husband a seaman at sea.]—Resp., who in Oct., 1914, married a seaman in the Royal Naval Reserve, lived with him until Dec., 1914, when he joined the Navy, & between Dec., 1914, & Aug., 1916, was serving on his ship & never had access to his wife. In Mar., 1916, resp. was delivered of a child of which her husband could not have been the father. He, on hearing of the birth, stopped payment of his allotment to resp., & the separation allowance paid to her by the Govt. also ceased. In Aug., 1916, the husband returned home for a week on leave of absence, forgave his wife & lived with her, &, in Sept., 1916, went back to his ship, & the payments of the allotment & Govt. allowance were renewed. From that time, by reason of his duties on board ship, he had been unable to live with her, but she expected that, when he obtained leave of absence, he would return to her. In July, 1917, she applied for an affiliation order against applt., alleging that he was the father of her child, & that he had paid money for its maintenance, & the justices adjudged him to be the father of the child:—*Held:* resp. was not living separate & apart from her husband during his absence at sea, & she was not a "single woman" within 1872 Act, s. 3, & the affiliation order must be set aside.—MARSHALL *v.* MALCOLM (1917), 87 L. J. K. B. 491; 117 L. T. 752; 82 J. P. 77, D. C.

268. —— —— Subsequent to birth.]—A married woman, who gives birth to an illegitimate child & subsequently becomes separated from her husband, may obtain an order against the father of the child as a "single woman" within 1872 Act, s. 3.—WEBB *v.* MURREL (1904), 68 J. P. 104.

269. Death of mother—Before hearing.]—A bastardy order cannot be made without the mother of the child being examined as a witness on the hearing; & where the mother died after the issue of the summons, but before the hearing:—*Held:* there was no jurisdiction to make an order.—R. *v.* ARMITAGE (1872), L. R. 7 Q. B. 773; 42 L. J. M. C. 15; 27 L. T. 41; 20 W. R. 1015; *sub nom.* JESSOP *v.* BRIERLEY, 36 J. P. 488.

SECT. 2.—THE APPLICATION FOR A SUMMONS.

270. Form of application—Departure from official form.]—A departure from the forms provided by the Local Govt. Board is not necessarily fatal to proceedings.

A servile adherence to the forms is not required, for this may do infinite mischief, & make the forms traps instead of aids (WILLS, J.).—BELL *v.* CLUBBS (1892), 8 T. L. R. 296, D. C.

271. Time for application—When before birth—Mother's deposition.]—*Semble :* the deposition on oath required by 1844 Act, s. 2, to be made on application by a mother before the birth of the child should be in writing.—R. *v.* FLETCHER (1871), L. R. 1 C. C. R. 320 ; 40 L. J. M. C. 123 ; 24 L. T. 742 ; 35 J. P. 789 ; 19 W. R. 781 ; 12 Cox, C. C. 77, C. C. R.

Annotations :—**Mentd.** Blake *v.* Beech (1876), 1 Ex. D. 320, C. A. ; R. *v.* Hughes (1879), 4 Q. B. D. 614, C. C. R. ; Dixon *v.* Wells (1890), 6 T. L. R. 322 ; Pickavance *v.* Pickavance, [1901] P. 60.

272. —— When more than twelve months after birth—Payment by father for maintenance—Under mother's affiliation order.]—*Semble :* when a bastardy order is made & money paid under it within twelve months from the birth of the child, the mother at the end of the period mentioned in the order may come again for another order (MANISTY, J.).—PEARSON *v.* HEYS (1881), 7 Q. B. D. 260 ; 50 L. J. M. C. 124 ; 45 L. T. 680 ; 45 J. P. 730 ; 30 W. R. 156.

Annotation :—**Dbtd.** Williams *v.* Davies (1883), 11 Q. B. D. 74. Upon that point I entertain very great doubt indeed, & am inclined to think that that would not be a payment within 1872 Act (FIELD, J.).

273. —— —— —— Under guardian's affiliation order.]—Payment by a putative father of a bastard child of money in pursuance of an order obtained under 1873 Act, s. 5, by the guardians or parish of the union in which the mother becomes chargeable, is not such a payment under 1872 Act, s. 3, as entitles the mother to make an application on her own behalf for an order against the father more than twelve months after the birth of the child.—BILLINGTON *v.* CYPLES (1885), 52 L. T. 854 ; 49 J. P. 582.

274. —— —— Father ceasing to reside in England.]—The alleged father of a bastard child left England about a month before the child's birth, & did not return till the child was fifteen months old. The mother then took out a summons, which was dismissed for want of jurisdiction on the ground that the summons was out of time :—*Held :* the alleged father ceased to reside in England during the whole period of his absence, & he was a person who had "ceased to reside in England within the twelve months next after the birth of such child" within 1872 Act, s. 3, & the justices had jurisdiction to adjudicate upon a summons taken out within twelve months after his return.—R. *v.* EVANS, [1896] 1 Q. B. 228 ; 65 L. J. M. C. 29 ; 60 J. P. 39 ; 44 W. R. 271 ; 12 T. L. R. 133 ; 40 Sol. Jo. 195.

Annotation :—**Refd.** Heard *v.* Heard, [1896] P. 188.

See, also, Nos. 291 *et seq., post.*

275. "To any one justice"—Simultaneous applications to several justices.]—A bastard child having been born in Sept., 1896, the mother on Oct. 21, 1896, made three separate applications to three separate justices for a bastardy summons against deft., but as she was at that time unable to find him, the issue of the summons was suspended. In July, 1897, the mother, having found deft., procured one of the three justices to issue his summons upon the application so made to him on Oct. 21, 1896. On Nov. 3, 1897, that summons was heard & dismissed on the ground that the evidence was insufficient. On Nov. 17, 1897, she procured another of the three justices to issue a further summons against deft., which summons purported to be founded on the application to the justice of Oct. 21, 1896. The summons was heard & a bastardy order made :—*Held :* the three applications made on Oct. 21, 1896, were in substance but one application, & were exhausted by the hearing & dismissal of the summons on Nov. 3, 1897, & the order was made without jurisdiction.—R. *v.* ROBINSON, [1898] 1 Q. B. 734 ; 67 L. J. Q. B. 510 ; 78 L. T. 350 ; 62 J. P. 309 ; 46 W. R. 462 ; 14 T. L. R. 326 ; 42 Sol. Jo. 380.

276. —— Justice's clerk.]—An application for an affiliation order having been made, the summons was dismissed for want of corroborative evidence, & the mother applied on the same date to the justice's clerk for a second summons. A second summons was issued on such application, purporting to be granted by the justice to whom the original application was made, & on the hearing of the summons an order was made against the putative father :—*Held :* the order was bad, as 1872 Act, s. 3, required the application to be made to the justice himself, & the application to the justice's clerk was not sufficient.—STAPLES *v.* STAPLES (1879), 41 L. T. 347.

Annotation :—**Folld.** R. *v.* Robinson, [1898] 1 Q. B. 734.

277. Where mother resides—Temporary residence.]—If a woman goes to lodge at a place for the purpose of applying to the magistrates there for an order of affiliation, intending to leave the place as soon as she has got the order, she having at the time no other residence & not having gone there for any fraudulent or improper purposes, she is resident in the place within 1844 Act, s. 2.—R. *v.* HUGHES (1857), 1 Dears. & B. 188 ; 26 L. J. M. C. 133 ; 29 L. T. O. S. 115 ; 21 J. P. 293 ; 3 Jur. N. S. 448 ; 5 W. R. 526 ; 7 Cox, C. C. 286, C. C. R.

Annotations :—**Apld.** Myott *v.* Barber (1863), 1 New Rep. 477. **Refd.** Massey *v.* Burton (1857), 2 H. & N. 597 ; Dunstan *v.* Paterson (1858), 5 C. B. N. S. 267 ; Vevers *v.* Mains (1888), 4 T. L. R. 724.

278. —— ——.]—A woman who has no settled place of residence may make application to the

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PART VI. SECT. 2.

271 i. *Time for application — Under Destitute Persons Act,* 1894.]—A complaint under s. 9 of the Act, that the father of an illegitimate child has neglected or failed to provide for its maintenance may be made whenever he neglects or fails to maintain it at any time up to the age of fourteen years. It is not necessary to make such a complaint within six months from the birth of the child.—SUTHERLAND *v.* MCGIMPSEY (1898), 17 N. Z. L. R. 431.—**N.Z.**

271 ii. —— *Under Destitute Persons Act,* 1910—*When more than six years after birth—Payment by father for maintenance.*]—More than six years after the birth of resp.'s illegitimate child, applt., at the child's request, allowed it to spend six weeks of its Christmas holidays with him. A complaint having been made by resp. within twelve months thereafter :—*Held :* that in maintaining the child during the six weeks applt. had contributed to its maintenance within s. 8 (5) of the Act, & an affiliation order was rightly made against him.—M. *v.* R. (1916), 35 N. Z. L. R. 1061.—**N.Z.**

Liability to maintain under above Acts.]—*See* Part V., Sect. 4, *ante.*

y. *Affidavit — Where filed.*]—In an action for the maintenance of an illegitimate child, the affidavit was produced from the office of the city clerk, & purported to be sworn before the police magistrate of Toronto, where deponent resided :—*Held :* sufficient evidence to go to the jury that it was deposited by her in the proper office.—JACKSON *v.* KASSEL (1867), 26 U. C. R. 341.—**CAN.**

a. —— *Form of.*]—It was required by stat. that the mother should depose that the putative father was "really" the father of her child, but the affidavit omitted such word, although otherwise regular :—*Held :* a fatal objection & pltf. could not recover.—BRODERICK *v.* MCKAY (1917), 40 O. L. R. 318 ; 13 O. W. R. 46.—**CAN.**

Corroboration of mother's evidence on application for summons.]—*See* Sect. 4, *post.*

Sect. 2.—The application for a summons. Sect. 3: Sub-sect. 1.]

justices of the division in which for the time being she happens to be.—LAWRENCE *v.* INGMIRE (1869), 20 L. T. 391; 33 J. P. 630.

279. —— —— **Bona fides.**]—A woman applied on two occasions for an order of affiliation to the justices of the petty sessional division in which she had been residing with her parents, & was refused after a hearing on the merits. She then took lodgings in a neighbouring borough, "because," as she deposed, "people said if she came there she would have a better chance," & when she had been there nearly a month applied to the borough justices & obtained an order of affiliation:—*Held:* the object of the woman's removal was to obtain a new tribunal, & she did not reside within the borough so as to give the borough justices jurisdiction under 1844 Act, s. 2.—MYOTT *v.* BARBER (1863), 1 New Rep. 477; 27 J. P. 598; *sub nom.* R. *v.* MYOTT, 32 L. J. M. C. 138; 7 L. T. 785; 11 W. R. 424.

Annotation:—**Refd.** Vevers *v.* Mains (1888), 4 T. L. R. 724.

280. —— —— **Objection not taken.**]—A woman living in the P. petty sessional division had an illegitimate child in Aug., 1887. In May, 1888, she came overnight into the W. division where the putative father was resident, & next morning obtained a summons against him. Deft. appeared at the hearing, but took no objection to the jurisdiction of the justices, & an order was made against him, but it was not obeyed. The woman subsequently went to the magistrates of the W. division, & applied for a summons against deft. for disregard of the order. The objection was then taken that the original order was without jurisdiction, but the justices overruled the objection on the grounds that the woman was within their jurisdiction when the order was made, & that objection had not been taken when the order was applied for, & a warrant was issued, & the man arrested. On an application for a *habeas corpus* to discharge him from custody:—*Held:* the order was invalid as the woman was not resident in the division to the justices of which she had made the application, & the writ must issue.—VEVERS *v.* MAINS (1888), 4 T. L. R. 724.

281. Second application—After refusal of order.]—A refusal by justices to make an order for maintenance of a bastard, though on the merits, is no bar to a second application; & if justices refuse to entertain such second application on the mere ground of the first refusal, the ct. will order them by mandamus to hear.—R. *v.* MACHEN (1849), 14 Q. B. 74; 18 L. J. M. C. 213; 117 E. R. 29; *sub nom.* JONES *v.* MACHEN, 3 New Sess. Cas. 629.

Annotations:—**Consd.** Myott *v.* Barber (1863), 27 J. P. 598; R. *v.* Clark (1864), 28 J. P. Jo. 102; R. *v.* Herrington (1864), 3 New Rep. 468; R. *v.* Grant (1867), 36 L. J. M. C. 89. **Expld. & Folld.** R. *v.* Gaunt (1867), 8 B. & S. 365. **Distd.** R. *v.* Flintshire JJ. & Smith (1871), 20 W. R. 94. **Expld.** McGregor *v.* Telford, [1915] 3 K. B. 237, C. A. The true reason for the decision in *R.* v. *Machen* was that, inasmuch as the woman failed in her application because of the lack of sufficient corroborative evidence, there was no decision against her except in the sense that her application failed, & as the ct. held that that was in the nature of a nonsuit it did not disentitle her from applying again (LORD READING C.J.) **Refd.** *Ex p.* Westerman (1851), 16 L. T. O. S. 420; R. *v.* Glynne (1871), L. R. 7 Q. B. 16; Williams *v.* Davies (1883), 11 Q. B. D. 74; Stokes *v.* Stokes, [1911] P. 195; R. *v.* Seddon, *Ex p.* Hall (1916), 85 L. J. K. B. 806.

282. —— ——.]—A second application in bastardy can be made by the mother, under 1844 Act, after justices in petty sessions have dismissed the first.—R. *v.* GLOUCESTERSHIRE JJ. (1849), 3 New Mag. Cas. 198; 13 L. T. O. S. 507; 13 J. P. 535; 13 Jur. 765.

283. —— ——.]—A second application may be made for an order of affiliation, although the dismissal of the first application was not merely on the ground of insufficiency of evidence & in the nature of a nonsuit, but after a full hearing on both sides & notwithstanding a second application is in the nature of a new trial.—*Ex p.* WESTERMAN (1851), 16 L. T. O. S. 420.

284. —— ——.]—The mother of a bastard child whose application at petty sessions for a summons against the putative father is dismissed may, within twelve months of the birth of the child, renew such application any number of times, & a dismissal on the merits of an application is no bar to the jurisdiction of the justice to entertain a fresh application.—R. *v.* HALL & GILLESPIE (1887), 57 L. T. 306; 3 T. L. R. 705.

Annotation:—**Refd.** McGregor *v.* Telford (1915), 25 Cox, C. C. 1, D. C.

See, also, Nos. 331 *et seq.*, 347, *post.*

285. —— —— **Effect of Criminal Justice Administration Act, 1914 (c. 58), s. 37 (2).**]—The above sub-sect., which enables a woman to appeal to quarter sessions from a refusal by a ct. of summary jurisdiction to make an order for the maintenance of her bastard child, confers an additional remedy upon her, & does not impliedly take away her previously existing right to renew her application to the ct. of summary jurisdiction.—MCGREGOR *v.* TELFORD, [1915] 3 K. B. 237; 84 L. J. K. B. 1902; 113 L. T. 84; 79 J. P. 485; 31 T. L. R. 512; 25 Cox, C. C. 1, D. C.

286. —— **When summons withdrawn.**]—Justices have jurisdiction to hear a bastardy summons, issued within the time allowed by 1872 Act, s. 3, notwithstanding that a previous summons in respect of the same complaint has been withdrawn by the leave of the justices on the ground that there was no corroborative evidence.—R. *v.* SEDDON, *Ex p.* HALL (1916), 85 L. J. K. B. 806; 80 J. P. 208; 32 T. L. R. 279.

287. —— **After appeal to quarter sessions—Order quashed on merits.**]—When, on an appeal to quarter sessions, an order of affiliation is quashed on the ground of the insufficiency of the corroborative evidence, the order of quarter sessions is a decision on the merits & is final, & fresh proceedings cannot be taken before justices.—R. *v.* GLYNNE (1871), L. R. 7 Q. B. 16; 41 L. J. M. C. 58; 26 L. T. 61; *sub nom.* R. *v.* FLINTSHIRE JJ., 36 J. P. 406; 20 W. R. 94.

Annotations:—**Consd.** R. *v.* May (1880), 5 Q. B. D. 382; Anderson *v.* Collinson, [1901] 2 K. B. 107. **Refd.** Stokes *v.* Stokes, [1911] P. 195, D. C. **Mentd.** McGregor *v.* Telford, [1915] 3 K. B. 237, C. A.

288. —— —— ——.]—Upon the hearing of an appeal to quarter sessions against an order of affiliation, it appeared resp. & her witnesses were not present, having mistaken the day of hearing, & her counsel applied for an adjournment till the following morning, offering to pay the costs of the day. Applt. having declined to accede to this proposal, the sessions directed the case to proceed & quashed the order, no evidence having been adduced on the part of resp.:—*Held:* the order of quarter sessions was not a decision upon the merits & fresh proceedings in respect of same might be taken before justices.—R. *v.* MAY (1880), 5 Q. B. D. 382; 28 W. R. 918; *sub nom.* R. *v.* ESSEX JJ., 49 L. J. M. C. 67; 44 J. P. 538; *sub nom.* R. *v.* PHILLIPS, 42 L. T. 772.

289. Prior order—Allegation of—Evidence.]—Upon an application by a woman under 1844 Act, s. 2, for an order upon a person whom she alleged to be the father of a bastard child, of which she had been delivered within twelve calendar months before the application, an objection was raised that a prior order had been made on the same complaint, & that it was incumbent on appct. to show that such prior order had been quashed, not on the merits, in order to entitle her to apply again, under 1845 Act, s. 4. No evidence was given to show that

such prior order ever existed, but the justices at petty sessions decided that complainant was bound, notwithstanding, to prove that the order was quashed for a defect in form, &, on her failing to do so, refused to hear the application :—*Held :* they were not justified in assuming the existence of the former order, & a *mandamus* granted commanding them to entertain the complaint.—R. *v.* BRIDGMAN (1846), 2 New Sess. Cas. 232 ; 15 L. J. M. C. 44 ; 6 L. T. O. S. 353 ; 10 J. P. 187 ; 10 Jur. 159, 738.

Application by Poor Law Guardians.]—*See* POOR LAW.

SECT. 3.—THE SUMMONS.

SUB-SECT. 1.—ISSUE.

290. By whom issued—Justice to whom application made.]—The mother of a bastard child applied to a justice, within twelve months after the child's birth, for a summons against P., the alleged father. The summons was issued by the justices, but could not be served, P. having absented himself. On P.'s return, which was more than twelve months after the child's birth, & before which time the justice who had issued the first summons had died, the mother obtained from another justice a second summons against P., & upon its coming on for hearing, the justices in petty sessions made an order adjudging P. to be the putative father, & ordering him to pay a certain sum by way of maintenance :—*Held :* the order was bad, as by 1844 Act, s. 2, the jurisdiction to make the order was limited to the justice before whom the first application was made, & the second summons, not being issued by the same justices, could not be considered as part of the original process upon the first application.—R. *v.* PICKFORD (1861), 1 B. & S. 77 ; 30 L. J. M. C. 133 ; 4 L. T. 210 ; 25 J. P. 549 ; 7 Jur. N. S. 568 ; 121 E. R. 643.

Annotations :—**Expld.** *Ex p.* Fielding (1861), 25 J. P. 759. **Refd.** Staples *v.* Staples (1879), 41 L. T. 347, D. C. ; R. *v.* Fletcher (1884), 51 L. T. 334, D. C.

291. Time of issue—Not necessarily when application made.]—A single woman, having been delivered of a bastard child, applied, within twelve months of the birth, to a justice for a summons upon the putative father. She stated to the justice that she had learned that the putative father was in America, upon which the justice, without directly refusing the application, declined to issue the summons then. More than twelve months from the application she discovered that the putative father was in England, upon which she obtained & served a summons from the same justice ; & the justices upon this application made an order of maintenance upon him. The summons professed to be on a renewed application :—*Held :* the order was good under 1844 Act & 1845 Act, as the whole proceeding was in effect founded on the original application, & it was not necessary that the summons should issue at the time when the application was made.—POTTS *v.* CUMBRIDGE (1858), 8 E. & B. 847 ; 27 L. J. M. C. 62 ; 30 L. T. O. S. 257 ; 22 J. P. 594 ; 4 Jur. N. S. 72 ; 6 W. R. 214 ; 120 E. R. 316.

Annotations :—**Expld.** R. *v.* Thomas (1863), 27 J. P. 694. **Folld.** R. *v.* Chugg (1870), 22 L. T. 556. **Consd.** Staples *v.* Staples (1879), 41 L. T. 347, D. C. **Refd.** R. *v.* Pickford (1861), 1 B. & S. 77. **Mentd.** R. *v.* Chugg (1870), 34 J. P. 469.

292. —— ——.]—A summons may be issued at a date many months subsequent to the application for it, provided that the application is made within the proper time.—*Ex p.* HARRISON (1852), 19 L. T. O. S. 114 ; 16 J. P. 343 ; 16 Jur. 726.

Annotation :—**Mentd.** R. *v.* Glynne (1871), L. R. 7 Q. B. 16.

293. Several summonses—Issue allowed.]—The mother of a bastard child duly applied for a summons against F. & obtained it, but it was not served owing to the absence of F. A second summons was issued some months afterwards, but within the twelve months after the birth, by the same justice reciting the first information, & an order was made which stated the application as of the date of the summons :—*Held :* the order was regular, for, when an information was once laid in due time, several summonses might issue without a fresh information being laid for each successive summons. —*Ex p.* FIELDING (1861), 25 J. P. 759.

Annotations :—**Apld.** Brooks *v.* Bagshaw, [1904] 2 K. B. 798, D. C. ; Healey *v.* Wright, [1912] 3 K. B. 249.

294. —— ——.]—R. *v.* ROBINSON, No. 275, *ante.*

295. —— —— **After time for new application.**]—The mother of a bastard child, born on Mar. 20, 1868, laid an information before a justice on Apr. 18, 1868, against deft., the putative father, under 1844 Act. A summons was issued on the same day but never served, as deft. could not be found by the process server to whom the summons was given. On Jan. 14, 1870, about a fortnight after the mother had found out deft.'s address, she applied for & obtained another summons, which was served on deft., & he appeared thereto :—*Held :* the justices had jurisdiction to hear the complaint although at the time of service of the summons more than twelve months had elapsed from the birth of the child.—R. *v.* CHUGG (1870), 22 L. T. 556 ; 34 J. P. 469 ; 11 Cox, C. C. 558, C. C. R.

296. —— —— ——.]—A woman duly applied to a justice for a summons against a putative father, but the information & summons stated that the birth of the child, though itself properly stated, was after the passing of 1872 Act, whereas it should have been stated as before that Act. On the hearing, objection was taken by deft. that the child was born before the passing of the Act. The mother was sworn & admitted this was so, & the justices, instead of amending, dismissed the summons. Upon another summons, reciting the same application, but without the mistake therein, the justices made an order against deft. :—*Held :* the dismissal of the first summons was not such a hearing as to exhaust the application & a fresh summons might issue though the time limited for a new application had passed.—R. *v.* LANCASHIRE JJ. (1874), 29 L. T. 886 ; 38 J. P. 215 ; 22 W. R. 329.

Annotation :—**Distd.** R. *v.* Robinson, [1898] 1 Q. B. 734.

297. —— —— **Unless application spent—Hearing on merits.**]—On Mar. 26, 1860, a woman applied for a summons against a man in respect of a bastard child born on Nov. 15, 1859. The summons was heard on Apr. 30 following, & was dismissed on account of the want of sufficient corroborative evidence. Subsequently, in Dec., 1862, another summons was issued, & upon the hearing, on the 29th of that month, an order was made. The order itself purported to be founded upon the application made on Mar. 26, 1860 :—*Held :* the order was bad, for the application of Mar. 26 was spent by the hearing & judgment on Apr. 30, & that being so, there was no application to support the order within twelve months of the birth of the child.—R. *v.* THOMAS (1863), 8 L. T. 460 ; 27 J. P. 694.

Annotations :—**Folld.** Staples *v.* Staples (1879), 41 L. T. 347 ; R. *v.* Robinson, [1898] 1 Q. B. 734. **Refd.** R. *v.* Harrington (1864), 9 L. T. 721.

298. —— —— —— ——.]—A bastard child having been born on Nov. 3, 1877, application for

b. *Defendant out of jurisdiction —Issue of warrant valid.*]—*Ex p.* ATKINSON (1911), 11 S. R. N. S. W. 8 .—AUS.

Sect. 3.—*The summons: Sub-sects.* 1 & 2.]

an affiliation order was made by the mother on Oct. 11, 1878, & the summons was heard & dismissed for want of corroborative evidence on Oct. 25, 1878. A second summons purporting to be granted on the original application was issued on Nov. 6, 1878, & was heard by adjournment on Nov. 21, 1878, when an affiliation order was made: —*Held:* the order was bad, & must be quashed since the original application of Oct. 11 was spent & exhausted by the hearing & dismissal of the case on Oct. 25, & the second application for a summons could not be treated as a continuance of the original one.—STAPLES *v.* STAPLES (1879), 41 L. T. 347.

Annotations:—**Folld.** R. *v.* Robinson, [1898] 1 Q. B. 734. **Refd.** R. *v.* Seddon, *Ex p.* Hall (1916), 85 L. J. K. B. 806. *See, also,* Nos. 272—274, *ante.*

299. Form of summons—Immaterial error.]—An order of affiliation was made in Aug., 1850, in respect of a bastard child born in May, but was quashed on appeal. Deft. was subsequently served with another summons dated July 23, 1851. To this summons he appeared on the following Aug. 5, when the hearing was adjourned to Sept. 2, & on that day again adjourned to Sept. 11, when an order was made upon him:—*Held:* it sufficiently appeared on the face of the order that the complaint was made within twelve months from the birth, & a statement in the summons that the child was born within twelve months of its date was immaterial.—*Ex p.* HARRISON (1852), 19 L. T. O. S. 114; 16 J. P. 343; 16 Jur. 726.

Annotation:—**Refd.** R. *v.* Glynne (1871), L. R. 7 Q. B. 16.

300. —— Amendment.]—On Sept. 18, 1891, a summons was taken out in respect of a child born in July, 1890, stating that the birth was within twelve calendar months. As this statement was on the face of it incorrect the summons was dismissed. Another summons was then taken out for Sept. 28 on another charge, viz., that deft., within twelve calendar months from the birth, had paid money for the child's maintenance, but this summons still retained the statement that the birth was within twelve calendar months of the application. Objection was taken to the summons on this ground, but the justices amended it by striking out the words objected to:—*Held:* the justices had jurisdiction to make the amendment.—BELL *v.* CLUBBS (1892), 8 T. L. R. 296, D. C.

301. —— —— Mother married at date of amendment.]—A summons was issued in Apr., 1911, on the application of resp., a woman then unmarried. The summons could not be served upon applt. owing to his having left the neighbourhood, in order to avoid service. Resp. was married in Sept., 1911. In Jan., 1912, applt. returned to the neighbourhood & thereupon, on application of resp., the date of hearing in the summons was amended by the clerk to the justices, & the summons as amended was duly served on applt., and on the hearing of such summons the justices made an order against him: —*Held:* the amendment & issue of the summons in Jan., 1912, was equivalent to the issue of a second summons.

Qu.: whether the clerk to the justices had authority to amend the summons so as to make it effective.—HEALEY *v.* WRIGHT, [1912] 3 K. B. 249; 81 L. J. K. B. 961; 107 L. T. 413; 28 T. L. R. 439; 23 Cox, C. C. 173, D. C.

See, also, No. 261, *ante.*

SUB-SECT. 2.—SERVICE.

302. "Last place of abode"—Service at last known place of abode—Primâ facie good.]—If a summons is left at a place, which the person leaving it believes to be the last place of abode of the party summoned, & gives evidence of the serving of the summons before the justices at petty sessions, the latter have *primâ facie* jurisdiction to make the order of maintenance, but the party summoned is at liberty to show by affidavit that the summons was not served at his last place of abode, & if the fact be proved, the ct. will grant a *certiorari* to bring up the order to quash it as being made without jurisdiction.

Proof of the proper service of the summons is essential to give the justices jurisdiction, &, *semble,* an allegation in the order that such proof has been given, as averred in Form No. 8 in the sched. of 1845 Act (now superseded by Forms Nos. 11 & 12 issued by the Local Govt. Board by order of Mar. 13, 1915), is necessary to the validity of the order.—*Ex p.* PRICE JONES (1850), 1 L. M. & P. 357; 4 New Mag. Cas. 88; 15 L. T. O. S. 142; *sub nom.* R. *v.* EVANS & YALE, 4 New Sess. Cas. 191; 19 L. J. M. C. 151.

Annotations:—**Consd.** R. *v.* Lee (1888), 16 Cox, C. C. 404. **Apprvd.** R. *v.* Farmer, [1892] 1 Q. B. 637, C. A. **Refd.** *Re* Williams (1851), 21 L. J. M. C. 46; *Ex p.* Davis (1853), 21 L. T. O. S. 170; R. *v.* Higham (1857), 29 L. T. O. S. 105; R. *v.* Brown (1859), 24 J. P. 5; R. *v.* De Winton & Taylor (1888), 59 L. T. 382. **Mentd.** R. *v.* Simmons (1859), Bell, C. C. 168.

303. —— Departure of defendant—Acquisition of new abode.]—An affiliation summons was left at the abode of the putative father eight days after he had quitted it for Liverpool on his way to America. He remained at Liverpool four days before sailing. An order was made against him in his absence. On an application for a *certiorari* to bring up & quash the order, the putative father swore that he did not leave the country to avoid the service of the summons, but he did not deny the paternity:—*Held:* the summons had been left at his last place of abode, & as the order was regular & the truth of the charge not denied, the ct. would not interfere.—*Ex. p.* DAVIS (1853), Bail Ct. Cas. 191; 21 L. T. O. S. 170; 17 J. P. 423; 17 Jur. 577; 1 W. R. 450; 1 C. L. R. 530; *sub nom.* R. *v.* DAVIS, 22 L. J. M. C. 143.

Annotations:—**Consd.** R. *v.* Lee (1888), 16 Cox, C. C. 404. **Refd.** R. *v.* Lightfoot (1856), 2 Jur. N. S. 786.

304. —— —— ——.]—A summons was obtained by the mother on Oct. 3, 1866, & served on Oct. 4 at a farm house, where deft. had been lodging for some years, by leaving it with the wife of the occupier of the house. The order was made on Dec. 6, in the absence of deft., on proof of such service. Deft. afterwards made an affidavit that he left the house on Oct. 1 with the intention of going to America, & sailed in a steamship from Plymouth on Oct. 14, that he did not leave for the purpose of avoiding the summons, that he first heard of the summons & order when he had been in America two months, & that he was not the father of the child. The mother made an affidavit to the contrary:—*Held:* the summons was served at his last place of abode.

All we have to inquire is whether the summons was left at the last place of abode of the man. He left the house where he had been lodging for a long time for the express purpose of going to America; therefore, he had no other place of abode, & that was his last place of abode (COCKBURN, J.).—R. *v.* DAMARELL (1867), L. R. 3 Q. B. 50; 8 B. & S. 659; 37 L. J. M. C. 21; 32 J. P. 245.

Annotations:—**Consd.** R. *v.* Lee (1888), 16 Cox, C. C. 404. **Refd.** R. *v.* Webb, [1896] 1 Q. B. 487.

305. —— —— ——.]—A mother was delivered of a child on Apr. 18, 1887, & she applied to a justice for a summons against deft., the alleged putative father, which was served on May 18, 1887, at

the house of a baker at S. Deft. had been in the service of the baker from Sept. 25, 1886, till Apr. 20, 1887. When a constable left the summons the baker told him deft. had left the place & his place of residence was not known, though he had called on May 14 to fetch away some things. Deft. afterwards made an affidavit that he left S. on Apr. 20, 1887, to better himself, & that he went to Southampton & remained there till May 19, when he got a situation in a ship & sailed for the West Indies. The justices, at the hearing, having received evidence of the service of the summons at S., made an order on deft :—*Held :* the service was valid.—R. *v.* LEE (1888), 58 L. T. 384 ; 52 J. P. 344 ; 36 W. R. 415 ; 4 T. L. R. 263 ; 16 Cox, C. C. 404, D. C.

Annotations :—**Refd.** R. *v.* De Winton & Taylor (1888), 59 L. T. 382, D. C. ; R. *v.* Farmer (1891), 65 L. T. 736, D. C.

306. —— —— ——.]—At the hearing of an application for an affiliation order evidence was given that the summons had been served by being left at the house where the person alleged to be the father of the child resided. He did not appear, & the justices heard evidence & adjudged him to be the putative father of the child & made an order accordingly. He subsequently applied for a *certiorari* to bring up this order to be quashed, on the ground that the summons had not been properly served, & he established that at the date of the service of the summons he had left the house at which it was served & was resident in America :—*Held :* as the person served had at the date of the service of the summons a place of abode in America, that, & not the house at which the summons was served, was at that time his last place of abode within 1872 Act, s. 4, & the service was invalid.

If deft. went to America with the intention of returning, or for the mere purpose of avoiding service, he had no place of abode in America. In such a case it would be true to say his last place of abode was his father's house. Is there sufficient evidence on which we can safely say he went to America to live there ? I think that is the conclusion we must come to ; if so, he had a place of abode in America (LORD ESHER, M.R.).—R. *v.* FARMER, [1892] 1 Q. B. 637 ; 61 L. J. M. C. 65 ; 65 L. T. 736 ; 56 J. P. 341 ; 40 W. R. 228 ; 8 T. L. R. 159 ; 36 Sol. Jo. 123 ; 17 Cox, C. C. 413, C. A.

Annotation :—**Apld.** R. *v.* Webb, [1896] 1 Q. B. 487, D. C.

307. —— —— ——.]—Shortly after the birth of a bastard child the alleged father left the house where he had up to that time resided & went to America, but the evidence did not show that he had any place of abode in America. Ten days after the birth a summons was left at the house where he had resided :—*Held :* such house was his last place of abode & the service was sufficient.—R. *v.* WEBB, [1896] 1 Q. B. 487 ; 65 L. J. M. C. 98 ; 74 L. T. 428 ; 60 J. P. 280 ; 44 W. R. 527 ; 12 T. L. R. 293 ; 40 Sol. Jo. 375 ; 18 Cox, C. C. 312, D. C.

308. —— —— **Temporary new abode.**]—An affiliation summons against H. was served at the house of H.'s father. An attorney appeared to the summons before the justices for the petty sessional division of B. in the county of N., representing himself to be authorised to appear for H. In fact, he was retained & paid by H.'s father. H. deposed that a few days before the summons was served he, anticipating annoyance from the woman, left his father's house, which, up to that time, had been his abode, without any intention to return, & was not informed of the proceedings before the justices :—*Held :* the ct. would infer, in fact, that H., leaving his abode avowedly for a temporary motive, did intend to return when the motive ceased, notwithstanding his deposition to the contrary, & such being taken to be the fact, the summons was duly served.—R. *v.* HIGHAM (1857), 7 E. & B. 557 ; 26 L. J. M. C. 116 ; 29 L. T. O. S. 105 ; 22 J. P. 6 ; 3 Jur. N. S. 691 ; 5 W. R. 507 ; 119 E. R. 1352.

Annotations :—**Consd.** R. *v.* De Winton (1888), 53 J. P. 292, D. C. ; R. *v.* Lee (1888), 16 Cox, C. C. 404. **Mentd.** R. *v.* Wood, *Ex p.* Farwell (1918), 87 L. J. K. B. 913.

309. —— **Temporary absence.**]—An affiliation summons was served by leaving it at the place of abode of the putative father from which he was absent temporarily, without any notice of the proceeding, & his address was not known. The justices declined to adjourn the hearing & made an order—*Held :* the ct. could not interfere, the justices having jurisdiction.—R. *v.* BROWN (1859), 1 L. T. 29 ; 24 J. P. 5 ; 8 W. R. 60.

310. —— —— **Temporary new abode.**]—A woman had a child in May, 1887, & a bastardy summons was issued & served on B., the alleged father, at his father's house, where he was residing, & was heard & dismissed in July, 1887. In Sept. B. left his father's house & went to G. where he obtained employment. Subsequently another summons was granted to the mother which was left at the father's house. This summons was heard in Nov., when, in B.'s absence, an order was made against him :—*Held :* B.'s change of abode was merely for a temporary purpose in order to avoid proceedings & the service was good & the order of Oct. valid.—R. *v.* DE WINTON (1888), 59 L. T. 382 ; 53 J. P. 292 ; 16 Cox, C. C. 455, D. C. ; *affd., sub nom. Ex p.* BAGGOTT, 4 T. L. R. 671, C. A.

311. Limits of service—England & Wales.]—On Oct. 30, upon application made by the mother of a bastard child to a justice acting for the petty sessional division in which she resided, a summons was issued to L., the alleged father of the bastard, requiring him to appear at a petty sessions to be holden at P., for the division, on Nov. 17, to answer the complaint. L. was a British subject recently residing within the division, but then living in Scotland & having no place of abode in England. He was personally served with the summons in Scotland on Nov. 1, in time to have attended at P. on the 17th. He did not so appear, & the justices, being of the opinion that the summons had been duly served, &, on the evidence of the mother, corroborated in a material particular, made an order adjudging L. to be the putative father :—*Held* (LORD CAMPBELL, C.J., *diss.*) ; they had no jurisdiction to make the order, as the service of the summons beyond the limits of England & Wales was not due service.—R. *v.* LIGHTFOOT (1856), 6 E. & B. 822 ; 25 L. J. M. C. 115 ; 27 L. T. O. S. 235 ; 20 J. P. 677 ; 2 Jur. N. S. 786 ; 4 W. R. 655 ; 119 E. R. 1070.

Annotations :—**Apprvd.** Berkley *v.* Thompson (1884), 10 App. Cas. 45, H. L. **Refd.** R. *v.* Damarell (1867), 8 B. & S. 659. **Mentd.** Potts *v.* Cambridge (1858), 27 L. J. M. C. 62 ; R. *v.* Berry (1859), Bell, C. C. 46 ; R. *v.* Fletcher (1871), L. R. 1 C. C. R. 321 ; R. *v.* Flavell (1884), 52 L. T. 133, D. C.

312. —— ——.]—Summary Jurisdiction (Process) Act, 1881 (c. 24), s. 6, does not enable a bastardy summons to be issued by justices in England & served in Scotland upon the putative father, domiciled & resident in Scotland, & if a summons is served & the putative father does not appear before the justices, they have no jurisdiction to make a bastardy order against him.

It is impossible to read that provision [1872 Act, s. 3] without seeing that this legislation proceeds upon the footing that the presence of the putative father is necessary for the jurisdiction to attach, because the general principle of law is '*actor sequitur forum rei ;*' not only must there be a cause of action of which the tribunal can take cognisance, but there must be a deft. subject to the jurisdiction of that tribunal ; & a person resident abroad, & not brought by any special stat. or legislation within the jurisdiction, is *primâ facie* not subject to the process of a foreign ct. ; he must be found within the jurisdiction to be bound by it (LORD SELBORNE, C.).—

Sect. 3.—The summons: Sub-sect. 2. Sect. 4.]

BERKLEY *v.* THOMPSON (1884), 10 App. Cas. 45; 54 L. J. M. C. 57; 52 L. T. 1; 49 J. P. 276; 33 W. R. 525, H. L.

Annotations:—**Refd.** R. *v.* Farmer, [1892] 1 Q. B. 637; R. *v.* Webb, [1896] 1 Q. B. 487.

SECT. 4.—THE HEARING.

313. Parties—Mother present in person.]—The mother's presence at the hearing is essential, as she is a necessary witness.—R. *v.* ARMITAGE (1872), L. R. 7 Q. B. 773; 42 L. J. M. C. 15; 27 L. T. 41; 20 W. R. 1015; *sub nom.* JESSOP *v.* BRIERLEY, 36 J. P. 488.

314. —— —— Death after summons — Deposition—Former law.]—The examination of a pregnant woman, taken before a justice of the peace under 6 Geo. 2, c. 31, is admissible evidence on an application to make an order of affiliation on the putative father, if the woman die before such application can be made.—R. *v.* RAVENSTONE (INHABITANTS) (1793), 5 Term Rep. 373; 101 E. R. 209.

Annotations:—**Apld.** R. *v.* Clayton (1802), 3 East, 58. **Distd.** R. *v.* Leicestershire JJ. (1850), 4 New Sess. Cas. 124. **Refd.** A.-G. *v.* Davison (1825), M'Cle. & Yo. 160, Ex. Ch.

315. —— —— —— —— ——.]—An order of bastardy recited that it had appeared to the justices on the oath of T. that M. C. (referring to the title in which she was named as M. C. deceased) was delivered of a bastard child, etc., & further that, upon the examination of M. C. taken on oath, etc., dated, etc., in the presence of T., M. C. upon her oath charged deft. with being the father, etc., & adjudged that upon examination of the cause & circumstances of the premises, as well on the oath of M. C. before birth so taken & also upon the oath of T., that deft. was the father, & that he should pay so much, etc.:—*Held:* the ct. would intend (especially after appeal confirming the order) that M. C. was dead at the time of the order made, & that her examination on oath before taken in writing under 6 Geo. 2, c. 31, was verified on the oath of T. before the magistrates making the order, which examination was sufficient after the death of the mother to warrant a subsequent order of affiliation.—R. *v.* CLAYTON (1802), 3 East, 58; 102 E. R. 518.

Annotation:—**Refd.** R. *v.* Gilkes (1828), 2 Man. & Ry. K. B. 454.

316. —— Father or his attorney.]—An order in bastardy commencing "Whereas S." (the putative father) "having been duly served with the summons," etc., "& now appearing in pursuance thereof," proceeded as follows: "it being now proved to us in the presence," etc., "of the attorney attending on behalf of S." (that the child was born a bastard, etc.), "& to having in the presence," etc., "of the attorney," etc., "heard the evidence of" (the mother) "& no evidence having been tendered on behalf" of S. It then adjudged S. to be the putative father:—*Held:* sufficient since 1845 Act.—R. *v.* SHIPPERBOTTOM (1847), 10 Q. B. 514; 2 New Sess. Cas. 641; 16 L. J. M. C. 113; 9 L. T. O. S. 101; 11 J. P. 773; 11 Jur. 520; 116 E. R. 196.

Annotations:—**Consd.** R. *v.* Grafton (1848), 3 New Sess. Cas. 157. **Refd.** R. *v.* Suffolk JJ. (1848), 12 J. P. Jo. 426.

317. Mother's evidence—Paternity—Corroboration in material particular.]—On the hearing of an application for an affiliation order evidence was given by the woman's brother, who deposed to a conversation held between him & deft. Witness said to deft., "She says she is in the family way by you." He replied, "Well, I know she has got it."

PART VI. SECT. 4.

c. *Time of trial.*] — Consol. Stat., c. 103, s. 7, is imperative, unless the trial is postponed to a subsequent term, as therein provided.—*Ex p.* CURRIE (1887), 26 N. B. R. 576.—**CAN.**

313 i. *Parties—Defendant out of jurisdiction—Proceeding ex parte.*]—A warrant was issued by the magistrate under Infant Protection Act, 1904 (No. 27), s. 8, & an order was made against deft. in his absence. At the time the warrant was issued deft. was residing in another State, but there was no evidence of this fact before the magistrate:—*Held:* the warrant was validly issued.

Where a warrant has been issued under s. 8, a magistrate has jurisdiction to proceed *ex p.* against deft under s. 21 (2), although no summons has been issued.—*Ex p.* MCGREAL (1910), 10 S. R. N. S. W. 439.—**AUS.**

313 ii. —— —— ——.]—A complaint was made by the mother of an illegitimate child under Infant Protection Act, 1904, s. 8, & a warrant was issued in the first instance. Deft., whose home was in Queensland, was a student at a college in New South Wales, & whilst attending the college he seduced appct. In Dec. he returned to Queensland, where he remained. Evidence being given that after strict inquiry & search deft. could not be found, the magistrate proceeded *ex p.*, & made an order in his absence:—*Held:* the warrant & subsequent proceedings were valid.—*Ex p.* ATKINSON (1911), 11 S. R. N. S. W. 80.—**AUS.**

d. *Mother's evidence — Whether necessary—Marriage & Matrimonial Causes Act,* 1864 *(No.* 268), *Part III., ss.* 30, 31, 36, 37.]—HANLEY *v.* MCMASTERS (1889), 15 V. L. R. 322.—**AUS.**

e. —— *Not necessary—Deserted Wives & Children Act* (4 *Vict. No.* 5).]—*Ex p.* AUSTEN (1897), 18 N. S. W. L. R. 216.—**AUS.**

f. —— *Admissibility after death.*]—At the hearing of a complaint by the grandmother of an illegitimate child, a sworn statement of the mother, then deceased, made in support of a complaint by her in her lifetime, is admissible.—DORMER *v.* TAYLOR (1904), 23 N. Z. L. R. 810.—**N.Z.**

g. —— ——.]—A woman was delivered of a child. The child survived but the mother died. Shortly before her decease, & in contemplation of her approaching death, she made written & verbal statements, charging applt. with the paternity of the child:—*Held:* the statements were admissible in evidence in proceedings subsequently brought against applt. before the magistrate, & on appeal from his order to the Supreme Ct.—GANNON *v.* S. (1906), 26 N. Z. L. R. 126.—**N.Z.**

317 i. —— *Paternity—Corroboration.*]—In a complaint for the maintenance of an illegitimate child, evidence given by appct. & deft., that deft was the father of a former child of appct. is a corroboration of the mother's oath within Marriage Act, 1890 (No. 1166), s. 48.—GALBALLY *v.* WATKINS (1892), 18 V. L. R. 67.—**AUS.**

317 ii. —— —— ——.]—The only evidence to support appct.'s statement that deft. was the father of her two illegitimate children was that of her sister, who stated that deft. admitted to her he was responsible for appct.'s pregnancy with the second child:—*Held:* sufficient corroborative evidence to justify the magistrate in making an order against deft. as being the father of both children.—STOKES *v.* ROUGHAN (1894), 20 V. L. R. 288.—**AUS.**

317 iii. —— —— ——.]—In order to establish paternity under Marriage Act, 1900 (No. 1684), s. 8, it is not necessary that there should be direct independent evidence of the paternity or of acts of intercourse. Independent evidence of words or conduct of deft. more consistent with his being the father of the child than with his innocence is sufficient to justify the magistrates in making an order against him.—GROCOCK *v.* STEVENSON, [1905] V. L. R. 536.—**AUS.**

317 iv. —— —— ——.]—Appct. for a summons under Infant Protection Act, 1904 (No. 27), s. 8, gave evidence that she had kept company with resp. & used to meet him on Saturday nights, & that once her blouse was torn in a struggle with him. Her mother gave evidence that the girl had been in resp.'s company on various Saturday nights during the period in question, & had not kept company with any other man during that period, & that she remembered her daughter coming home one night with her blouse torn:—*Held:* sufficient evidence in corroboration.—*Ex p.* STUART (1906), 6 S. R. N. S. W. 468.—**AUS.**

317 v. —— —— ——.]—Evidence that a lodger at an hotel used to walk out with appct., a servant at the hotel, at night time in a quiet country town:—*Held:* corroborative evidence of appct.'s allegation that the lodger was the father of the illegitimate child.—COX *v.* SHORT, *Ex p.* SHORT (1909), S. R. Q. 112.—**AUS.**

317 vi. —— —— ——.]—Appct. stated that the putative father visited her business rooms on Sunday evening about nine o'clock. In corroboration two persons deposed to having seen deft. & appct. in the street on the previous Saturday evening. Deft. admitted that he met appct. in the street, & that by appointment he had gone to the door of her rooms on Sunday to supply her with certain information promised by him:—*Held:* there was no corroborative evi-

Witness said, "Yes, & you must keep it"; to which he replied, "No, I sha'n't; I would sooner go to America":—*Held:* this evidence was capable of being construed as an admission of paternity, & afforded sufficient ground for the decision of the justices that the mother's evidence

dence of paternity.—DAVIES *v.* D'ENNETT, *Ex p.* D'ENNETT (1909), S. R. Q. 140.—**AUS.**

317 vii. —— —— ——.]—*Held:* the evidence of the mother had not been corroborated within 1875 Act (No. 8), s. 5, by (1) a witness who said that she had once seen the parties together; (2) a writing of deft. containing merely his address, sworn by appct. to have been handed to her by him on a date almost a year after the birth of the child, with a question what amount per week she would take for the keep of the child, & a request to give the address to her solr. with the object of keeping the case out of ct.; (3) the fact that deft. did not give evidence denying the paternity.—MAXTED *v.* GRAY (1909), 11 W. A. R. 104.—**AUS.**

317 viii. —— —— ——.] — Appct. gave evidence of an admission of paternity by deft., & called his mother as a witness in support. After denying any admission of paternity by deft., deft.'s mother was, on the application of appct.'s solr., declared hostile, & examined as to statements in a letter admittedly written by her shortly after the interview mentioned by appct., & written as a general & true account of the whole affair:—*Held:* there was no evidence beyond the oath of the mother tending to prove that deft. was father of the child.—HARPER *v.* COUNTER, *Ex p.* COUNTER (1913), S. R. Q. 249.—**AUS.**

317 ix. —— —— ——.]—On an information laid under State Children Act, 1895, by A., a married woman, against B. for the maintenance of an illegitimate child, evidence was given by A. of the paternity of the child, & by a physician, who deposed that it was almost certain that C., A.'s husband, was impotent. Evidence was also given by A. that prior to her confinement B. had sent her money & by her husband that B. in conversations with him had offered to pay money:—*Held:* there was sufficient evidence to justify the magistrate's findings that (1) B. was the father of the child, & (2) the sending & promises to pay money constituted corroboration in a material particular, as required by State Children's Amendment Act, 1909, s. 29.—CARTHY *v.* COCK (1914), S. A. L. R. 1.—**AUS.**

317 x. —— —— ——.]—On a charge of deserting an illegitimate child, of which deft. was alleged to be the father, the mother gave evidence that on one occasion deft. had connection with her at night time, upstairs at a hotel, while a dance was being held in the rooms below, & on three other occasions in the day time at places which she stated. There was evidence from persons other than the mother that she had been to the dance, & that it was possible for her to have been with deft. on the occasions on which she said connection had taken place, but there was not evidence other than her own that she actually was alone with him on any of those occasions. Deft. denied paternity of the child, & explained his visits to the locality where the meetings were alleged to have occurred, & called a witness to prove that he was not at the dance:—*Held:* there was no evidence corroborating that of the mother, & deft.'s conviction must be quashed.—MATTHEWS *v.* COLLESS, *Ex p.* COLLESS (1915), S. R. Q. 159.—**AUS.**

317 xi. —— —— ——.]—Appct. called witnesses to prove that she & the putative father went to the home of her mother about 8 p.m. & stayed there talking with her till about 10 p.m., when they left together, & on the same evening sexual intercourse took place:—*Held:* no evidence in corroboration of appct.'s evidence in some material particular.—*Re* NANCARROW (1916), 16 S. R. N. S. W. 155.—**AUS.**

317 xii. —— —— ——.]—On an application for a summons under Infant Protection Act, 1904 (No. 27), s. 4, evidence given by the mother of admissions alleged to have been made to her by deft. is sufficient corroboration of the allegation of paternity.—*Ex p.* RIDLEY (1916), 16 S. R. N. S. W. 258.—**AUS.**

317 xiii. —— —— ——.]—When there was no clear admission on the part of the reputed father & no fact of intercourse sworn to except by the mother, whose evidence was shaken in many essential points, an affiliation order was quashed.—OVERSEERS OF POOR *v.* MCLELLAN (1872), 9. N. S. R. 95.—**CAN.**

317 xiv. —— —— ——.]—There is no rule of law requiring the evidence of the mother to be corroborated; but it is a matter of practical expediency & good sense that one should adopt the mother's evidence guardedly.—OVERSEERS OF POOR *v.* MCGILLIVRAY (1909), 7 E. L. R. 121.—**CAN.**

317 xv. —— —— ——.]—In an action *en déclaration de paternité* deft. admitted the connection with the mother, but assigned a date which disproved his paternity of the child. There was no evidence of improper conduct of the mother otherwise:—*Held:* the ct. would give weight to the declaration on oath that deft. was the father. Absolute certainty in such cases is not required; it is sufficient to establish a strong probability that deft. is the father.—DENAULT *v.* BANVILLE (1884), 7 L. N. 149.—**CAN.**

317 xvi. —— —— ——.]—The admission by deft. that he had intercourse with pltf. in the month of Mar., in a suit in which pltf. is seeking to have deft. declared the father of a child born in the following Dec., is sufficient evidence to sustain the prayer of pltf. There is a presumption, in similar cases, that deft. is father of the child when deft.'s parents paid the lying-in charges & are taking care of pltf., & when the child resembles deft.—SOUCY *v.* BEAUPRE (1913), 20 R. L. 80.—**CAN.**

317 xvii. —— —— ——.] — "Corroborative evidence," within 26 & 27 Vict. c. 21, s. 3, as to paternity of an illegitimate child, means evidence sufficient to establish moral probability of illicit intercourse, having regard to all the circumstances of the case.—SLIGO UNION GUARDIANS *v.* CURRAN (1899), 33 I. L. T. 181.—**IR.**

317 xviii. —— —— ——.] — In an action under Destitute Persons Act, 1894, for maintenance resp. swore that applt. was alone with her at about 9.30 p.m. in a photographic studio on two or three occasions about nine months before the birth of her child & there had connection with her. Another witness swore that she saw applt. & resp. alone together at the place & time mentioned by resp. Applt. denied that he was at the studio at the time sworn to & his brother swore that when applt. & resp. were present together in the studio he was there also:—*Held:* there was sufficient corroboration.—MEADS *v.* POLLOCK (1907), 26 N. Z. L. R. 516.—**N.Z.**

317 xix. —— —— ——.] — In an action under Destitute Persons Act, 1908, for maintenance a witness swore that she had seen applt. & resp. together in a secluded spot, & afterwards on two occasions at night, about the time at which the child must have been conceived. The mistress of resp. swore that when she charged applt. with being the cause of resp.'s pregnancy he did not deny it, but promised to see her mother, & instead of doing so he left for Sydney:—*Held:* there was sufficient corroboration.—COULSTON *v.* TAYLOR (1909), 28 N. Z. L. R. 807.—**N.Z.**

317 xx. —— —— ——.] — The corroboration required by Destitute Persons Act, 1909, in an affiliation case is evidence which amounts to corroborating the evidence of complainant on some material fact.

The falsity of the statements of deft.'s wife when called as a witness for appct. is not material evidence in corroboration of appct.'s testimony.

Appct.'s evidence cannot be taken as proof of the falsity of the denial of deft.; corroboration must be by evidence of independent witnesses.—HERRICK *v.* TANNER (1912), 31 N. Z. L. R. 282.—**N.Z.**

317 xxi. —— —— ——.] — *Held:* paternity proved by the evidence of the mother, corroborated only by the evidence of a woman who had twice seen the mother & defender meet & speak on the street.—M'BAYNE *v.* DAVIDSON (1860), 22 Dunl. (Ct. of Sess.) 738; 32 Sc. Jur. 296.—**SCOT.**

317 xxii. —— —— ——.] — In an action of filiation of a child born on Dec. 6, defender admitted connection with the pursuer in July previous, but denied that there was connection before that month:—*Held:* it being established that the parties had had previous opportunities for connection, pursuer's deposition that connection had taken place at the period of conception was sufficient to prove the case.—ROSS *v.* FRASER (1863), 1 Macph. (Ct. of Sess.) 783; 35 Sc. Jur. 473.—**SCOT.**

317 xxiii. —— —— ——.] — In an action of filiation & aliment statements made by pursuer to third parties a considerable time after the event spoken of occurred are inadmissible, but statements of improper attempts on her person made by her recently to persons to whom she had naturally occasion to make the communication are competent. The corroborations must not merely be such as support pursuer's general veracity, but such as to confirm her truth in the special matters alleged.—SEGGE *v.* BAIN (1869), 6 Sc. L. R. 544.—**SCOT.**

317 xxiv. —— —— ——.]—For some time before Oct. 29, 1873, the alleged date of conception (at which time pursuer & defender were aged respectively eighteen & sixteen years), the parties were considered sweethearts, but no familiarities had been observed between them. Once at pursuer's father's house the parties were left alone together in the kitchen for half an hour about midnight, when connection between them was alleged to have taken place, & a child was born eight & half months after. Defender deponed that on that occasion they merely talked together, & that he had never had connection with her:—*Held:* the paternity had been proved.—DUNN *v.* CHALMERS (1875), 3 R. (Ct. of Sess.) 236.—**SCOT.**

317 xxv. —— —— ——.] — In an action of filiation raised nearly four years after the birth of an illegitimate child:—*Held:* evidence of familiarities between the mother & defender of the action more than three years after the birth was admissible, although no notice was given on record.—SCOTT *v.* DAWSON (1884), 11 R. (Ct. of Sess.) 518; 21 Sc. L. R. 351.—**SCOT.**

317 xxvi. —— —— ——.]—Pursuer's evidence was consistent & uncontradicted, & witnesses spoke to seeing pursuer & defender together, but not in suspicious circumstances; defender had written a curiously expressed letter denying the paternity of the child:—*Held:* pursuer had failed to prove her case.

Corroboration of pursuer's evidence is as necessary in an action of filiation as

Sect. 4.—The hearing.]

was corroborated in a material particular.—R. *v.* PEARCY (1852), 17 Q. B. 902; 16 J. P. 87; 16 Jur. 193; *sub nom.* R. *v.* PIERCY, 18 L. T. O. S. 238; 117 E. R. 1527.

318. —— —— ——.]—Upon the hearing of a complaint in bastardy the statement of the mother as to the paternity of the child may be sufficiently corroborated by the evidence of acts of familiarity between her & deft., although these acts have taken place at a time before the child could have been begotten, for evidence of this is a corroboration of the mother "in some material particular" within in any other action, & the old doctrine of *semiplena probatio* entirely obsolete (LORD RAYNER).—M'KINVEN *v.* M'MILLAN (1892), 19 R. (Ct. of Sess.) 369; 29 Sc. L. R. 308.—**SCOT.**

317 xxvii. —— —— ——.]—Pursuer swore that defender was much in her company & often alone with her about the time of the alleged illicit intercourse, & there was corroboration of her evidence on this point. Pursuer's mother spoke to a confession made by defender to her. Defender denied being in pursuer's company, & while admitting the interview with pursuer's mother, denied the alleged confession. A friend of defender, who admitted being in defender's debt, spoke to his having been discovered by defender in the act of connection with pursuer about the time in question. This defender corroborated, while pursuer denied it:—*Held:* evidence sufficient to prove paternity.—YOUNG *v.* NICOL (1893), 20 R. (Ct. of Sess.) 768; 30 Sc. L. R. 696; 1 S. L. T. 57.—**SCOT.**

317 xxviii. —— —— ——.]—Pursuer gave evidence that defender had courted her, & had sexual intercourse with her in Nov. of 1894. She also averred that she sent a letter to defender by a messenger. Defender denied having courted pursuer & having received letters from her. Pursuer & defender had been seen walking together on several occasions during the period mentioned by pursuer. The messenger who had taken the letter to defender gave evidence that when she presented it to him he, on learning that it was from pursuer, refused to take it, saying that he had had enough of pursuer, & wanted no more of her messages:—*Held:* defender's denial, taken with the facts themselves, was sufficient corroboration.—HARPER *v.* PATERSON (1896), 33 Sc. L. R. 657.—**SCOT.**

317 xxix. —— —— ——.]—The denial by defender in an action of filiation of material facts & circumstances (although not believed) does not corroborate pursuer's statement, but if pursuer is corroborated as to the material statements made by her, & as to which she is contradicted by defender, defender's denial, if proved false or not credited, may give a complexion to the whole evidence adverse to him.—MACPHERSON *v.* LARGUE (1896), 23 R. (Ct. of Sess. 785; 33 Sc. L. R. 615; 4 S. L. T. 43.—**SCOT.**

317 xxx. —— —— ——.]—Pursuer deponed that the intercourse upon which conception followed had taken place at Inverness in the end of July or beginning of Aug., 1894, the child being born on Apr. 30, 1895. Defender was not at Inverness at that period, but he admitted that he had been in pursuer's company there on Aug. 30, 1894 (thus reducing the period of gestation, if he were the father of the child, to two hundred & forty-four days), & also that in the previous year he had had connection with her:—*Held:* the proof of paternity was sufficient.—M'DONALD *v.* MAIN (1897), 34 Sc. L. R. 332; 4 S. L. T. 252.—**SCOT.**

317 xxxi. —— —— ——.]—Where defender in an action of filiation admits an act of connection prior in date to the alleged act on which pursuer founds, very little corroboration of pursuer's evidence will be required; but where the act admitted by defender is subsequent in date to the alleged act founded on by pursuer, the corroboration of her evidence must be substantial.—HAVERY *v.* BROWNLEE, [1908] S. C. 424; 45 Sc. L. R. 312; 15 S. L. T 740.—**SCOT.**

317 xxxii. —— —— ——.]—In an action of filiation, in which the alleged intercourse was said to have been in a hayshed & opportunity was proved, defender denied ever having been in a certain byre alone with pursuer without his brother-in-law also being present. It was proved that on some occasions a farmer & not the brother-in-law had been the third party:—*Held:* as the contradiction of defender was not regarding a circumstance throwing suspicion on him, it did not amount to corroboration of pursuer's evidence.—M'WHIRTER *v.* LYNCH, [1909] S. C. 112; 46 Sc. L. R. 83; 16 S. L. T. 526.—**SCOT.**

317 xxxiii. —— —— ——.]—In support of pursuer's evidence it was proved that the parties were on terms of intimacy & that at a date corresponding to the time of conception they were in the same neighbourhood, though there was no proof of an actual meeting. It was also proved, though denied by defender, that the parties had connection at a subsequent date on which they admittedly met:—*Held:* there was sufficient corroboration.—FLORENCE *v.* SMITH, [1913] S. C. 978; 50 Sc. L. R. 776; 2 S. L. T. 33.—**SCOT.**

317 xxxiv. —— —— —— *Statements in letters.*]—Appct. for a summons under Infant Protection Act, 1904 (No. 27), s. 8, produced a letter which she swore she had received from deft. in answer to one written by her, charging him with being the father of the child. No other evidence was called to prove the handwriting. The letter stated "I know nothing of the matter; I only saw you once & that was June 9, 1907, when you asked me to see you home. You say the child was born Apr. 9, 1908, so if you reckon the dates you might possibly blackmail some one else":—*Held:* (1) the letter was rightly received by the magistrate as corroborative evidence without oath of a second witness; (2) the letter might be regarded by the magistrate as an admission of paternity. *Qu.*, whether the evidence would be sufficient corroboration on the hearing of the summons.—*Ex p.* MORAN (1908), 8 S. R. N. S. W. 569.—**AUS.**

317 xxxv. —— —— —— ——.]—Appct. put in letters written by deft. in reply to her application to him for assistance. The letters contained an emphatic denial of paternity, but also contained statements showing a degree of intimacy between the parties, & an offer of monetary assistance as a friend:—*Held:* the magistrate was at liberty to disregard the denial of paternity, & treat any other statement made in the letters as corroborative of appct.'s story.—*Ex p.* MOORE (1909), 9 S. R. N. S. W. 233.—**AUS.**

317 xxxvi. —— —— ——.]—Two letters, tendered in evidence to corroborate appct., were sworn to be in deft.'s handwriting. The letters appointed hours & places of meeting, & appct. gave evidence that by observing the directions in the letters, she met deft. in the appointed places at the appointed times. Deft. did not call any evidence:—*Held:* the letters furnished sufficient corroboration.—WENDT *v.* LIND, *Ex p.* LIND (1913), S. R. Q. 240.—**AUS.**

317 xxxvii. —— —— ——.]—Appct. for a summons under Infant Protection Act, 1904 (No. 27), s. 8, produced a letter which she swore was written to her by a third party, Mrs. W., stating that deft. had admitted his paternity to the writer & had given her a cheque for £5 to forward to appct. which she enclosed. The cheque was not produced before the magistrate, who issued a summons:—*Held:* the acceptance of inadmissible evidence in corroboration afforded no ground for a common law prohibition.—*Ex p.* NICHOLLS (1914), 14 S. R. N. S. W. 210.—**AUS.**

317 xxxviii. —— —— ——.]—It was proved that there were opportunities for the connection alleged by pursuer. Defender denied that he had written any letter to pursuer. Pursuer produced a letter expressed in familiar terms, & proved that she received it from defender:—*Held:* the letter was sufficient corroboration.—COSTLEY *v.* LITTLE (1892), 30 Sc. L. R. 87.—**SCOT.**

317 xxxix. —— —— —— *Admission of intercourse.*]—Pursuer & defender were fellow servants at a farm from Martinmas, 1881, till the summer of 1882, & were the only servants on the farm. Pursuer alleged intercourse with defender in Jan., Feb., & Mar., 1882. Defender admitted intercourse with pursuer on a single occasion in May, 1882, being six months before the birth of the child. There was some evidence of familiarity between the parties in the spring of 1882. Defender led evidence to show that pursuer & the farmer, in whose service the parties were, were on terms of improper intimacy in Mar., 1882. Pursuer did not accuse defender of the paternity till at least ten days after the birth, though she had an opportunity of seeing him:—*Held:* defender was rightly assoilzied.—MUIR *v.* TWEEDIE (1883), 21 Sc. L. R. 241.—**SCOT.**

317 xl. —— —— ——.]—Where defender admits connection during the term of pregnancy, & it is proved that he has had the same opportunity of intercourse with pursuer both before & after the date of the conception of the child, that admission, coupled with pursuer's oath, may be sufficient to induce the ct. to grant decree in an action of aliment in her favour.—M'DONALD *v.* GLASS (1883), 11 R. (Ct. of Sess.) 57; 21 Sc. L. R. 45.—**SCOT.**

317 xli. —— —— —— *After conception.*]—An admission by a person charged with being the father of an illegitimate child that he had connection with the mother some months after the conception of the child is not corroborative testimony of her story that he was the father of the child.—WHITAKER *v.* JOHNSTON (1899), 18 N. Z. L. R. 589.—**N.Z.**

317 xlii. —— —— —— ——.]—Pursuer deponed that she had connection with defender on various occasions from Dec., 1898, to Aug. 11, 1899, but deponed that he never had had connection with her on any other occasion. Defender admitted having had connection with pursuer on a date subsequent to the time of conception:—*Held:* such admission was not corroboration & pursuer had failed to prove defender was father of the child.—BUCHANAN *v.* FINLAYSON (1900), 3 F. (Ct. of Sess.) 245; 38 Sc. L. R. 152; 8 S. L. T. 315.—**SCOT.**

317 xliii. —— —— —— *Opportunity.*]—In an action of filiation & aliment:—*Held:* the mother's allegation of intercourse with defender was not established by her own testimony, & by evidence of opportunity during the course of an acknowledged courtship, no suspicious circumstances being proved.—GRAY *v.* MARSHALL (1875), 2 R. (Ct. of Sess.) 907.—**SCOT.**

317 xliv. —— —— ——.]—Opportunity alone will not amount to corroboration of pursuer's evidence unless it is of such a character as to bring in the element of suspicion, or has a com-

1872 Act, s. 4.—COLE *v.* MANNING (1877), 2 Q. B. D. 611 ; 46 L. J. M. C. 175 ; 35 L. T. 941 ; 41 J. P. 469, D. C.

Annotation :—**Refd.** Harvey *v.* Anning (1902), 87 L. T. 687, D. C.

319. —— —— ——.]—On the hearing of a summons for an order of affiliation the mother, a servant girl, gave evidence that she "walked out" with deft. on Feb. 22 & 25, 1894, & never afterwards, & found herself in the family way in Mar. Evidence was given by witnesses that, in the Sept. following, deft., a boy of nineteen, went with his mother to the house of complainant's stepmother "to clear it up," but when the stepmother asked if he was the father, he did not answer, & the complainant's step-sister, being then present, also asked him "if he had been out with her sister," & he said yes, he had. The child was born on Nov. 20 :—*Held :* this evidence was corroborative of the mother in a material particular.—HILL *v.* DENMARK (1895), 59 J. P. 345.

320. —— —— ——.]—On the hearing of an application for an affiliation order, in corroboration of the evidence of the mother, who was a servant to applt.'s grandfather, evidence was given that applt. & resp. were seen "out together evenings in the lanes," & that after the birth of the child applt. asked witness whether resp., whom he spoke of familiarly as "Till," was going "to swear the child" :—*Held :* this evidence was corroboration in some material particular within 1872 Act, s. 4.—HARVEY *v.* ANNING (1902), 87 L. T. 687 ; 67 J. P. 73, D. C.

Annotations :—**Distd.** Reffell *v.* Morton (1906), 70 J. P. 347, D. C. **Refd.** Burbury *v.* Jackson, [1917] 1 K. B. 16, D. C.

321. —— —— ——.]—The mother of a bastard child deposed that she went to stay at the alleged father's house to take charge of his children while his wife was away. She removed, as she alleged at the man's request, from the bedroom she first occupied to the room adjoining his, & from there she used to go to his room at night, returning in the morning :—*Held :* the change of room did not amount to corroboration in a material particular of the woman's evidence.

Corroborative evidence "in some material particular" within 1872 Act, s. 4, must be evidence having some relation to the conduct of the putative father, or at least have some relation to the probability of the person summoned being the father (LORD ALVERSTONE, C.J.).—REFFEL *v.* MORTON (1906), 70 J. P. 347 ; 50 Sol. Jo. 378, D. C.

322. —— —— ——.]—Upon the hearing of a complaint under 1872 Act, s. 4, the evidence adduced in corroboration of that of complainant was the evidence of a person who deposed that he had been present at the trial & conviction of the alleged father of complainant's child upon an indictment charging him with having had unlawful carnal knowledge of complainant, & who also deposed to the fact that when before the committing justices the alleged father gave evidence that complainant was a fast girl & that that was the cause of her then condition, & that on his trial at the assizes no suggestion was made that complainant was a fast girl, nor was the evidence of the alleged father to that effect repeated :—*Held :* (1) the conviction was not sufficiently proved, & the evidence as to it was not corroboration of complainant's evidence in a material particular as required by the Act ; (2) the evidence as to the conduct of the alleged father in giving evidence before the justices that complainant was a fast girl & in not giving evidence to that effect at the assizes was corroboration of complainant's evidence in a material particular.—MASH *v.* DARLEY, [1914] 3 K. B. 1226 ; 83 L. J. K. B. 1740 ; 111 L. T. 744 ; 79 J. P. 33 ; 30 T. L. R. 585 ; 58 Sol. Jo. 652 ; 24 Cox, C. C. 414, C. A.

323. —— —— ——.]—On the hearing of a bastardy summons evidence of mere opportunity is not sufficient corroboration of the evidence of the mother to satisfy 1872 Act, s. 4.—BURBURY *v.* JACKSON, [1917] 1 K. B. 16 ; 86 L. J. K. B. 255 ; 115 L. T. 713 ; 80 J. P. 455 ; 25 Cox, C. C. 555, D. C.

324. —— —— —— **Verdict in seduction action.**]—A verdict in an action for seduction against the alleged putative father of a bastard child is *res inter alios acta*, & inadmissible as corroborative evidence in an application for an order in bastardy by the party seduced. The consent of deft.'s attorney in the action to such verdict is admissible as evidence, but not as corroborative evidence, unless it is explained & shown to have been given with deft.'s concurrence, or not to have been repudiated by him.—LAWRENCE *v.* TYRWHITT (1851), 15 J. P. 310.

325. —— —— —— **Payment of money.**]—Payment of money for the maintenance of the child is corroborative evidence of paternity.

The mother's evidence as to the payment of money by the alleged father for the maintenance of the child does not need corroboration.—HODGES *v.* BENNETT (1860), 5 H. & N. 625 ; 29 L. J. M. C. 224 ; 2 L. T. 190 ; 24 J. P. 375 ; 8 W. R. 463 ; 157 E. R. 1329.

Annotation :—**Refd.** Bessela *v.* Stern (1877), 2 C. P. D. 265, C. A.

326. —— **Denial of connection with other men—Evidence in contradiction.**]—On the hearing of an application for an order of affiliation against H., in respect of a full-grown bastard child born in Mar., the mother, in answer to questions put to her in cross-examination, denied having had connection with G. in the Sept. previous to the birth. G. was called to contradict her. The justices admitted his evidence :—*Held :* the evidence of G. ought not to have been admitted to contradict the mother on a matter which went only to her credit.—R. *v.* GIBBONS (1862), Le. & Ca. 109 ; 31 L. J. M. C. 98 ; 5

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plexion put upon it by statements made by defender which are proved to be false.—DAWSON *v.* M'KENZIE (1908), 45 Sc. L. R. 473 ; 15 S. L. T. 951.—**SCOT.**

317 xlv. —— —— —— ——.]—Mere proof of opportunity does not amount to corroboration within Destitute Persons Act, 1910, s. 10 (2), but the opportunity may have a different complexion put upon it by statements made by deft. which are proved to be false, & so amount to sufficient corroboration under the sect.—HOXMAN *v.* BARNDEN (1914), 33 N. Z. L. R. 957.—**N.Z.**

317 xlvi. —— —— *Premature birth—Effect of.*]—Pursuer of an action of filiation alleged intercourse with defender two hundred & twenty-eight days before the birth of her child. There was no evidence that the child was prematurely born, & no allegation of previous intercourse :—*Held :* although the alleged intercourse had taken place, that was not sufficient to raise against defender a presumption of paternity.—RITCHIE *v.* CUNNINGHAM (1857), 20 Dunl. (Ct. of Sess.) 35 ; 30 Sc. Jur. 19.—**SCOT.**

317 xlvii. —— —— —— ——.]—Admission by defender of intercourse with pursuer two hundred & thirty-seven days before the birth of the child, coupled with medical evidence that the child was small :—*Held :* sufficient to prove the paternity.—PITCAIRN *v.* SMITH (1872), 9 Sc. L. R. 608.—**SCOT.**

317 xlviii. —— —— *Mother's intercourse with other men.*]—It is not incumbent on pursuer of an action of filiation to prove that no other man than defender had intercourse with her at the time corresponding to the birth of her child.—SCRIMGEOUR *v.* STEWART (1864), 2 Macph. (Ct. of Sess.) 667.—**SCOT.**

317 xlix. —— —— ——.]—Intercourse with defender about the time of conception was proved, but, in spite of pursuer's denial, intercourse with another man about the same time was also proved :—*Held :* pursuer, not being a credible & reliable witness, had failed to establish her case.—BUTTER *v.* M'LAREN (1909), 46 Sc. L. R. 625 ; 1 S. L. T. 349.—**SCOT.**

325 i. —— —— —— *Offer of payment with denial of paternity.*]—An offer to pay, while denying paternity, is not corroboration.—HARVEY *v.* CHURCH (1898), 17 N. Z. L. R. 19.—**N.Z.**

Sect. 4.—The hearing.]

L. T. 805 ; 8 Jur. N. S. 159 ; 10 W. R. 350 ; 9 Cox, C. C. 105, C. C. R.

Annotations :—**Refd.** Garbutt *v.* Simpson (1863), 32 L. J. M. C. 186 ; R. *v.* Wheeler, [1917] 1 K. B. 283, C. C. R. **Mentd.** R. *v.* Mullany (1865), 10 Cox, C. C. 97, C. C. R. ; R. *v.* Baker, [1895] 1 Q. B. 797, C. C. R.

327. —— —— ——.]—At the hearing of an affiliation summons obtained by S. against G., S., during her cross-examination, denied that T. had had connection with her in June, 1861, which was about the time when the bastard child was begotten. M. was called on behalf of G. to prove that S. had had connection with T. in June, 1861. The justices refused to hear M.'s evidence, on the ground that it only went to contradict S. upon matters put to her in cross-examination, & going only to her credit :—*Held :* the evidence was wrongly rejected, as it went to prove that G. was not the father of the child.—GARBUTT *v.* SIMPSON (1863), 2 New Rep. 276 ; 32 L. J. M. C. 186 ; 8 L. T. 423 ; 27 J. P. 502 ; 11 W. R. 751.

328. Defendant—Competency as witness.]—A summons in bastardy is entirely of a civil nature, viz., the obligation to maintain a child, & deft. may be examined as a witness on his own behalf.—R. *v.* LIGHTFOOT (1856), 6 E. & B. 822 ; 25 L. J. M. C. 115 ; 27 L. T. O. S. 235 ; 20 J. P. 677 ; 2 Jur. N. S. 786 ; 4 W. R. 655 ; 119 E. R. 1070.

Annotations :—**Refd.** R. *v.* Berry (1859), Bell, C. C. 46, C. C. R. ; R. *v.* Fletcher (1871), L. R. 1 C. C. R. 320, C. C. R. **Mentd.** Potts *v.* Cumbridge (1858), 27 L. J. M. C. 62 ; R. *v.* Damarell (1867), 8 B. & S. 659 ; Berkley *v.* Thompson (1884), 10 App. Cas. 45, H. L. ; R. *v.* Flavell (1884), 52 L. T. 133, D. C.

329. —— ——.]—Upon a proceeding under the bastardy laws, the mother proceeds against the putative father, not with a view to punish him, but to compel him to pay towards the support of her bastard child ; the putative father is admitted as a witness in his own case.—CATTELL *v.* IRESON (1858), E. B. & E. 91 ; 27 L. J. M. C. 167 ; 31 L. T. O. S. 80 ; 22 J. P. 672 ; 4 Jur. N. S. 560 ; 6 W. R. 469 ; 120 E. R. 441.

Annotations :—**Mentd.** Legg *v.* Pardoe (1860), 9 C. B. N. S. 289 ; Morden *v.* Porter (1860), 7 C. B. N. S. 641 ; Parker *v.* Green (1862), 2 B. & S. 299.

330. —— —— **Liability to committal.**]—On the hearing of a bastardy summons, the alleged putative father went into the witness-box & denied the statement of the mother. In cross-examination he declined to answer a question, considered by the justices to be material, & offered to withdraw from the case & consent to an order being made against him. The justices committed him to prison for refusing to answer the question :—*Held :* the justices had jurisdiction to commit, for the power to commit under 1844 Act, s. 70, extended to any witness, & was not confined to witnesses who appeared in answer to a summons or warrant.—R. *v.* FLAVELL (1884), 14 Q. B. D. 364 ; 52 L. T. 133 ; 49 J. P. 406 ; 33 W. R. 343 ; 1 T. L. R. 160 ; 15 Cox, C. C. 660, D. C.

331. Second application—Effect of previous dismissal.]—The justices, on a second hearing for an order for maintenance of a bastard, may take into consideration, with a view to forming their decision, the fact & circumstances of the former hearing.

We are far from saying the dismissal is to have no weight, but we think the justices cannot refuse to hear a second application. If it should appear to them the matter was fully inquired into on the first occasion, they will reasonably view any new evidence with suspicion & sift it accordingly, but

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328 i. *Defendant—Competency as witness.*]—A proceeding to obtain an order of affiliation under 1 R. S., c. 57, is not a criminal proceeding on which the party charged is punishable on summary conviction & he is a competent witness by 19 Vict. c. 41.—*Ex p.* COOK (1860), 4 All. 506.—**CAN.**

328 ii. —— ——.]—On the hearing of a complaint under Destitute Persons Act, 1894, & Justices of the Peace Act, 1882, that deft. is the father of an illegitimate child, & has refused, neglected, or failed to provide for its maintenance, deft. is compellable to answer questions relevant to the paternity of the child.—RHODES *v.* COOPER (1904), 23 N. Z. L. R. 562.—**N.Z.**

k. *Defence of impotence.*] — In an action for filiation & aliment the defence was a general denial of pursuer's statements, & an allegation of physical incapacity. The fact of connection was proved, but defender maintained that he was incapable of having fruitful connection, & a proof of three medical men was allowed :—*Held :* the medical evidence was insufficient to verify the defence.—M'DONALD *v.* GILRUTH (1874), 12 Sc. L. R. 43.—**SCOT.**

l. *Evidence of likeness to supposed parent — Refused.*] — ROUTLEDGE *v.* CARRUTHERS (1810), Jan. 20, Fac. Coll. —**SCOT.**

m. *Long period of gestation — Presumption arising from.*]—In an action of filiation it was proved that the only possible opportunity of intercourse occurred three hundred & twelve days before the birth of the child :—*Held :* assuming that intercourse had taken place, the lapse of time between it & the birth, with other circumstances in the case, negatived the presumption of defender's paternity.—GIBSON *v.* M'FAGAN (1874), 1 R. (Ct. of Sess.) 853. —**SCOT.**

n. —— ——.] — Defender assoilzied in an action of filiation, in which it was admitted on both sides that the last occasion on which intercourse had taken place was three hundred & eleven days before the birth of the child.—HENDERSON *v.* SOMERS (1876), 3 R. (Ct. of Sess.) 997 ; 13 Sc. L. R. 643.—**SCOT.**

o. —— ——.] — In an action of filiation intercourse was proved to have taken place at an unascertained date between two hundred & eighty-seven & three hundred & fourteen days prior to the birth of pursuer's child :—*Held :* the fact that pursuer herself deponed to a date which gave the lengthened period of gestation of three hundred & five days was not enough to overcome her testimony that the child which was born was the fruit of the intercourse which had then taken place.—COOK *v.* RATTRAY (1880), 8 R. (Ct. of Sess.) 217 ; 18 Sc. L. R. 128.—**SCOT.**

p. —— ——.] — *Held :* that two hundred & ninety-seven days was not an impossible period of gestation.—WHYTE *v.* WHYTE (1884), 11 R. (Ct. of Sess.) 710.—**SCOT.**

q. —— ——.] — Three hundred & six days had elapsed between the last act of intercourse between the parties & the birth of the child :—*Held :* not an impossible period of gestation.—WILLIAMSON *v.* M'CLELLAND, [1913] S. C. 678 ; 50 Sc. L. R. 469 ; 1 S. L. T. 289. —**SCOT.**

r. *Former maintenance orders — Admissible in subsequent proceedings—Though invalid.*]—HANLEY *v.* MCMASTERS (1889), 15 V. L. R. 322.—**AUS.**

s. —— ——.] — A pre-maternity order made under Marriage Act, 1900, s. 5, against deft. for the payment of confinement expenses to a woman, who subsequently gives birth to an illegitimate child, in addition to her statement on oath that deft. is the father of the child, is sufficient evidence to justify an order against deft. for the maintenance of the child under Marriage Act, 1890, s. 43.—MCKINLEY *v.* DELANEY (1915), 19 C. L. R. 525.—**AUS.**

331 i. *Second application — Effect of previous dismissal.*]—The dismissal of a complaint or information against the father of an illegitimate child for maintenance is a bar to a second application only when followed by a certificate, which certificate is in the discretion of the magistrates.—*Ex p.* ROSE (1859), 2 Legge, 1163.—**AUS.**

331 ii. —— ——.] — Where a complaint for maintenance of a bastard has been dismissed for want of corroborative evidence, a fresh complaint may be entertained when such evidence is procured.—R. *v.* MCCORMICK, *Ex p.* BRENNAN (1878), 4 V. L. R. 36.—**AUS.**

331 iii. —— ——.]—The fact that an order made by justices against a father for maintenance of his illegitimate child has been quashed on appeal is no bar to the making of a subsequent order by justices compelling the father to pay for the maintenance of the same child as a neglected child, provided there is evidence to satisfy the justices that he had recognised the child as his.—BUSWELL *v.* WHITE (1898), 24 V. L. R. 486.—**AUS.**

331 iv. —— ——.]—A complaint by the mother of an illegitimate child, claiming contribution towards the support of the child from the father, was dismissed & a certificate of dismissal was given. Subsequently, another complaint was made, the breach of duty being laid as of a later date, & was dismissed on the ground that the certificate of dismissal given in the first case constituted a bar of all subsequent proceedings :—*Held :* the certificate of dismissal was no bar.—BURTON *v.* TUCKEY, [1903] S. R. Q. 331. —**AUS.**

331 v. —— ——.]—Resp. was charged with leaving his illegitimate child without means of support. The magistrate dismissed the charge without stating the ground of his decision. Resp. was subsequently charged with the same offence in a different State :—*Held :* (1) the evidence given in the first case could not be looked at to show on which of the issues before him the first magistrate's decision was based ; (2) leaving without support being a continuous offence the

we do not think the dismissal can operate as a bar to further inquiry (LORD DENMAN, C.J.).—R. *v.* MACHEN (1849), 14 Q. B. 74; 18 L. J. M. C. 213; 117 E. R. 29; *sub nom.* JONES *v.* MACHEN, 3 New Sess. Cas. 629.

Annotations:—**Folld.** *Ex p.* Westerman (1851), 16 L. T. O. S. 420. **Distd.** Myott *v.* Barber (1863), 27 J. P. 598; R. *v.* Clark (1864), 28 J. P. Jo. 102. **Folld.** R. *v.* Harrington (1864), 9 L. T. 721; R. *v.* Grant (1867), 36 L. J. M. C. 89. **Consd.** R. *v.* Gaunt (1867), 8 B. & S. 365. **Expld.** Stokes *v.* Stokes, [1911] P. 195, D. C. **Consd. & Expld.** McGregor *v.* Telford, [1915] 3 K. B. 237, D. C. **Consd.** R. *v.* Seddon, *Ex p.* Hall (1916), 85 L. J. K. B. 806, D. C. **Refd.** R. *v.* Glynne (1871), L. R. 7 Q. B. 16; R. *v.* Flintshire JJ. (1872), 36 J. P. 406; Williams *v.* Davies (1883), 11 Q. B. D. 74, D. C.

332. —— ——.]—The justices who hear an application for an order on the putative father of a bastard child, have no power to adjudicate finally against the mother, & if they dismiss the application, that dismissal is not a ground for dismissing a second application in the same matter, but is in the nature of a non-suit in a civil action.—R. *v.* GLOUCESTERSHIRE JJ. (1849), 3 New Mag. Cas. 198; 13 L. T. O. S. 507; 13 J. P. 535; 13 Jur. 765.

333. —— —— **Dismissal on merits.**]—Where the affiliation summons obtained by the mother of a bastard child has been dismissed for want of corroboration, that is not a final decision on the merits of the case, but is rather in the nature of a non-suit. The mother can within the twelve months go and make a fresh application to the justices of her petty sessional division.

If the case were heard on its merits and gone into & a decision come to, & then the mother made a fresh application, then it would be a sufficient answer to the fresh application, that the matter had been heard & determined and the principle of *res judicata* would apply.

Whether or no a dismissal for want of corroborative evidence is a dismissal on the merits, still, that defence must be plainly raised before the justices as a reason for not going on with the second application. If such fact is brought before the justices & they think the former decision went on the merits, it will be an answer to the second application; if not so raised there is nothing to prevent justices going on with the second hearing.—R. *v.* CLARK (1864), 28 J. P. Jo. 102.

334. —— —— ——.]—An application for an order in bastardy was made to certain justices of the county of S., & dismissed by them on the ground that there was no sufficient corroborative evidence of the mother's story. The mother afterwards renewed her application before other justices who made an affiliation order. It was not objected before the justices on this second hearing that the case had been disposed of on the merits on the former occasion & that they were bound by that decision. In these circumstances the ct. refused to issue a writ of *certiorari* to bring up the order with a view to its being quashed.—R. *v.* HERRINGTON (1864), 3 New Rep. 468; 12 W. R. 420; *sub nom.* R. *v.* HARRINGTON, 9 L. T. 721; 28 J. P. 485.

Annotation:—**Consd.** R. *v.* Glynne (1871), L. R. 7 Q. B. 16.

335. —— —— ——.]—A bastardy summons having been heard & dismissed on its merits, one of the chief witnesses for deft. was afterwards convicted of perjury on the evidence he had given. A fresh application was then made, & on the hearing of the summons it was objected for deft. that the justices had no jurisdiction, by reason of the previous dismissal on the merits. The justices

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principle of *res judicata* did not apply.—FELETTIE *v.* GOLDIE (1903), 3 S. R. N. S. W. 292.—**AUS.**

331 vi. ——.]—The dismissal of a complaint for the support of an illegitimate child under Deserted Wives & Children Act is not a bar to further proceedings against the father of the child for the same cause of complaint. *Qu.*, as to the effect of a summons dismissed under Infants Protection Act, 1904.—*Ex p.* SHUSLER (1905), 5 S. R. N. S. W. 656.—**AUS.**

331 vii. ——.]—Upon an application for preliminary expenses under Infants Protection Act, 1904 (No. 27), s. 4, the magistrate refused to make an order, but stated no grounds for his decision. After the birth of the infant the mother applied under s. 8, for maintenance of the infant:—*Held:* the refusal of the magistrate to make an order upon the application under s. 4 did not estop appct. from applying under s. 8.—*Ex p.* BRYANT (1906), 6 S. R. N. S. W. 712.—**AUS.**

Father's liability to maintain, *see* Part V., Sect. 4, *ante*.

331 viii. ——.]—Applt. was summoned under Bastardy Laws Act, 1875, 39 Vict. No. 8. The magistrate dismissed the application, & issued to applt. a certificate of dismissal under Justices Act, 1902 (2 Edw. 7, No. 11), s. 142. Resp. shortly afterwards made another application of the same nature; & justices made an order for maintenance issued against applt.:—*Held:* (1) apart from Justices Act, the justices had jurisdiction to hear the second application, & if they thought fit to adjudicate thereon; (2) a certificate of dismissal under s. 142 could not be issued in respect of an application under Bastardy Act against the putative father of an illegitimate child, or if issued was no bar to an adjudication upon a second application.—REED *v.* LYNCH (1909), 11 W. A. R. 127.—**AUS.**

331 ix. ——.]—A. was charged as the reputed father of a bastard child, of which B. was then pregnant, but the charge was dismissed as B. did not understand the nature of an oath. After the birth of the child, A. was again charged before a subsequent sessions with being the father, & pleaded *autrefois acquit*:—*Held:* A. could not again be tried for the same offence.—*Ex p.* ESTABROOKS (1859), 4 All. 273.—**CAN.**

331 x. ——.]—An information was laid under Illegitimate Children's Act, R. S. M., 1913 (c. 92), but the charge was dismissed, & a certificate of dismissal granted:—*Held:* the dismissal of the charge & production of certificate of dismissal were a bar to any further proceedings upon a second information.

The English authorities on this point are distinguishable, the Manitoba & English stats. being different.—DAVIS *v.* FEINSTEIN (1915), 31 W. L. R. 635; 8 W. W. R. 1003; 24 D. L. R. 798; 25 Man. L. R. 507.—**CAN.**

331 xi. —— —— *& previous settlement.*]—Pltf., the mother of two illegitimate children, after the birth & death of the second child, laid a charge against deft. under Illegitimate Children's Act, R. S. M., 1913 (c. 92), s. 16, & deft. agreed to pay certain sums to pltf. Subsequently pltf. commenced proceedings against deft. as putative father of the first child, but the charge was dismissed on the grounds of lack of corroborative evidence, & lack of evidence that pltf. was not a married woman. Pltf. subsequently brought an action in the cty. ct. against deft. in respect of both children, under s. 34:—*Held:* there was no order made against deft. as to either child & s. 42 of the Act provided no defence to pltf.'s action.—BONSCHOWSKY *v.* WHITLEDGE (1916), 34 W. L. R. 1077; 30 D. L. R. 489; 26 Man. L. R. 577.—**CAN.**

333 i. —— —— *Dismissal on merits.*]—The dismissal, even though on the merits, of a complaint on behalf of an illegitimate child against the putative father for maintenance is not a bar to a fresh complaint.—TRIGG *v.* KETTLE, [1915] V. L. R. 167.—**AUS.**

333 ii. ——.]—A certificate of dismissal on the merits under Justices of the Peace Act, 1882, s. 70, of a bastardy summons under Destitute Persons Relief Act, 1877, is a bar to fresh proceedings.—BROSNAN *v.* STEWART & MCCULLOCH (1885), 3 N. Z. L. R. 408.—**N.Z.**

a. —— *Effect of previous arrest in another county.*]—It is no objection to an order of affiliation that the putative father had been previously arrested upon the charge in another county.—*Ex p.* BEALES (1866), 6 All. 515.—**CAN.**

b. —— *Effect of previous order.*]—Under Destitute Persons Act, 1894, s. 9, applt. was in 1903 declared to be the putative father of the son of resp., & was ordered to pay for his maintenance till he attained the age of fourteen. The order expired on July 22, 1915, & on Sept. 7, 1915, upon the application of resp., the magistrate made a new order under Destitute Persons Act, 1910, ss. 8 & 85 (3), for the maintenance of the boy up to the age of sixteen:—*Held:* the original order was a final order on the merits, & that the matter, being *res judicata* could not be reopened.—KLEIN *v.* TUTTY (1915), 34 N. Z. L. R. 1084.—**N.Z.**

c. *Effect of previous decree refusing to enforce agreement for maintenance.*]—A decision of the civil ct., refusing to enforce a contract or agreement against a man for the maintenance of a woman, cannot conclude either the woman from applying, or a magistrate from making an order, under Code of Criminal Procedure, 1861, s. 316, for the maintenance of their illegitimate daughter.—*Re* MEISELBACK PETITION (1872), 17 W. R. 49.—**IND.**

d. *Before single justice—By consent.*]—By consent of counsel, a single justice tried a bastardy case alone, & made an order of affiliation:—*Held:* a ct. could not be constituted by consent, & proceedings quashed.—R. *v.* WESTMORLAND JJ. (1869), 1 Han. 472.—**CAN.**

determined to hear the application, saying the previous dismissal was obtained by false evidence, & having heard appct. & corroborative evidence made an order of affiliation:—*Held:* the justices had jurisdiction & the order was valid.

When the dismissal is upon the merits, the justices, on any subsequent application, ought to defer so much to the former decision as to treat the matter as *res judicata*, unless it be shown that what may be called the first trial was, for some reason or other, not fair (BLACKBURN, J.).—R. *v.* GAUNT (1867), L. R. 2 Q. B. 466; 8 B. & S. 365; 16 L. T. 379; 31 J. P. 612; 15 W. R. 1172; *sub nom.* R. *v.* GRANT, 36 L. J. M. C. 89.

Annotations:—**Expld. & Distd.** R. *v.* Glynne (1871), L. R. 7 Q. B. 16. **Apprvd.** Staples *v.* Staples (1879), 41 L. T. 347. **Consd.** McGregor *v.* Telford, [1915] 3 K. B. 237, D. C. **Refd.** *Re* May (1883), 25 Ch. D. 231; Williams *v.* Davies (1883), 52 L. J. M. C. 87, D. C.; Stokes *v.* Stokes, [1911] P. 195, D. C.

See, also, Nos. 281 *et seq.*, *ante*, 347, *post.*

336. Guardians' application — Failure of — Whether bar to mother's application.]—Where the mother of a bastard child made an application within twelve months after the birth of the child to petty sessions for an order on the putative father, & the justices refused to hear the application, on the ground that proceedings having been taken by the guardians of the poor against the putative father, & the quarter sessions to which that inquiry had been moved by the putative father had refused to make an order, a mandamus was granted to compel the justices to hear the application.—R. *v.* WALKER (1845), 3 Dow. & L. 131; 1 New Mag. Cas. 600; 2 New Sess. Cas. 49; 14 L. J. M. C. 120; 10 J. P. 22; 9 Jur. 799; *sub nom.* R. *v.* LANCASHIRE JJ., 5 L. T. O. S. 202.

337. Contract with father for maintenance—Whether bar to application.]—A putative father, before the mother's applying for an affiliation order, contracted with the mother to pay her 5*s.* per week for the support of the child, & paid two years' amount in advance, & afterwards contracted with her to pay, & did pay her, £10 to release him from all future payments:—*Held:* (1) no bar to the mother afterwards applying for, & the magistrate making, an affiliation order; (2) the magistrate was bound to consider such contract along with all the other circumstances to guide his discretion in adjudicating.—FOLLIT *v.* KOETZOW (1860), 2 E. & E. 730; 29 L. J. M. C. 128; 2 L. T. 178; 24 J. P. 612; 6 Jur. N. S. 651; 121 E. R. 274; *sub nom.* TOLLIT *v.* KORTZOW, 8 W. R. 432.

Annotation:—**Apld.** Griffith *v.* Evans (1882), 46 L. T. 417, D. C.

338. Waiver of irregularity—Payment within twelve months from birth—Omission to prove.]—The mother of a bastard child, more than twelve months old, applied to a justice for a summons against the putative father, alleging, but not proving on oath, that he had paid money for the maintenance of the child within twelve months from the birth. The summons was issued in the form given by the sched. to 1845 Act (superseded by form issued by the Local Govt. Board by order dated Mar. 13, 1915), except that it stated the woman alleged that the man had paid money within the twelve months, instead of saying that she had given proof of the fact. The father appeared, & took no objection to the summons or the proceedings on which it was founded, but denied the paternity, & falsely swore he had not paid any money as alleged. On the trial of the father for perjury it was objected that the magistrates had no jurisdiction, as proof on oath that the money had been paid as alleged was necessary, under 1844 Act & 1845 Act, to give the justices authority to issue the summons, & that it was immaterial at the hearing whether the money had been paid, as proof of that fact was only necessary prior to the issuing of the summons:—*Held:* had the objection of the want of proof on oath of payment of the money & of the variation of the summons from the form given by stat. been taken before the magistrates, it probably ought to have prevailed, but this was a mere irregularity in process to bring deft. into ct. in a proceeding in the nature of a civil suit, & the father waived it by not taking an objection at the hearing, & by then going into the merits of the case.—R. *v.* BERRY (1859), Bell, C. C. 46; 28 L. J. M. C. 86; 32 L. T. O. S. 324; 23 J. P. 86; 5 Jur. N. S. 320; 7 W. R. 229; 8 Cox, C. C. 121, C. C. R.

Annotations:—**Folld.** R. *v.* Simmons (1859), Bell, C. C. 168, C. C. R.; R. *v.* Fletcher (1871), L. R. 1 C. C. R. 321, C. C. R. **Refd.** Smith *v.* Roche (1859), 28 L. J. C. P. 237. **Mentd.** R. *v.* Proud (1867), 15 W. R. 796, C. C. R.; R. *v.* Hughes (1879), 48 L. J. M. C. 151, C. C. R.

339. —— —— ——.]—A summons after the birth of a bastard child was issued against the putative father, on the application of the mother, & alleged that proof had been given of payment of money by the father, within the twelve months next after the birth of the child, for its maintenance. The father appeared to answer the summons at the petty sessions, & made no objection to the jurisdiction of the justices or otherwise, but was sworn on his own behalf, & gave evidence, in respect of which he was afterwards indicted for perjury. On the trial of the indictment for perjury, the jury found deft. guilty, & found also that deft. had not within the twelve months next after the birth of the child paid any money for its maintenance:—*Held:* the justices had jurisdiction to hear the summons, & deft. had waived the objection, the summons to the putative father to appear at petty sessions being a matter of process only, & not of substance essential to the jurisdiction of the petty sessions.—R. *v.* SIMMONDS (1859), 33 L. T. O. S. 153; 8 Cox, C. C. 190; *sub nom.* R. *v.* SIMMONS, Bell, C. C. 168; 28 L. J. M. C. 183; 23 J. P. 309; 5 Jur. N. S. 578; 7 W. R. 439, C. C. R.

Annotations:—**Mentd.** R. *v.* Proud (1867), 15 W. R. 796 C. C. R.; R. *v.* Hughes (1879), 4 Q. B. D. 614, C. C. R.

340. —— Appearance of defendant.] — The mother of a bastard child applied to T., a justice of the petty sessional division, who issued a summons against B., the putative father. At the petty sessions the service was not proved, & her solr. issued a fresh summons issued by F., another justice, & this was duly served. At the hearing, B. appeared through his solr., who took no objection to the process, & cross-examined the witnesses & addressed the justices, who made an order on B. to pay a weekly sum from the date of the first summons. The order being objected to, the mother abandoned that part of the order as to the weekly sums preceding the hearing, & another was drawn up correcting the mistake:—*Held:* the order was made with jurisdiction, the appearance of B. at the hearing waiving all irregularities of process.—R. *v.* FLETCHER (1884), 51 L. T. 334; 48 J. P. 407; 32 W. R. 828, D. C.

SECT. 5.—THE ORDER.

341. Date of order—Formal order.]—An order in bastardy is made when the judgment of the justices

e. Jurisdiction to make.] — Under Marriage Act, 1890, s. 43, & Justices Act, 1896 (No. 1458), s. 4, two justices have jurisdiction to make a maintenance order, when the summons directed deft. to appear before a ct. of petty sessions at the same time & place.]

is pronounced orally in ct., & the formal written order is merely the record of the adjudication & may be drawn up afterwards & signed at any time. —*Ex p.* JOHNSON (1863), 3 B. & S. 947; 2 New Rep. 111; 32 L. J. M. C. 193; 27 J. P. 661; 9 Jur. N. S. 1128; 11 W. R. 620; 122 E. R. 354; *sub nom.* R. *v.* ESSEX JJ., 8 L. T. 275.

Annotations:—**Consd.** R. *v.* Lanyon (1872), 27 L. T. 355. **Mentd.** R. *v.* Tabrum, *Ex p.* Dash (1907), 23 T. L. R. 474.

342. Amount of maintenance—Former limit.]—A single woman made application on May 22, 1872, under 1844 Act, ss. 2 & 3, for a summons in bastardy against K. The child was born on July 26. 1872 Act was passed on Aug. 10, which repealed ss. 2 & 3 of 1844 Act, & itself applied only to a child born after Aug. 10. On Sept. 3 the summons was issued; on Sept. 11 K. appeared to the summons, & an order was made adjudging him to be the putative father, & ordering him to pay 3*s.* a week for its maintenance from the birth till it should attain the age of thirteen years. On Apr. 24, 1873, 1873 Act was passed, & by s. 8, all orders made before the passing of that Act upon the father of a bastard child born before Aug. 10, 1872, for any payment in respect of such child, which would have been valid if 1872 Act had not passed, were to be deemed to have been valid to all intents:—*Held:* the above order must be quashed, for it was not made valid by s. 8, as it was for 3*s.* a week, whereas 1844 Act, s. 3, only authorized an order for 2*s.* 6*d.*, & the order would not have been valid if 1872 Act had not passed.—R. *v.* KAY (1873), L. R. 8 Q. B. 324.

343. Period of maintenance—From date of application.]—An order of affiliation made under 1844 Act:—*Held:* good, although it directed payment from the time of the application, a period of more than thirteen weeks, & not vitiated by reason of its having been made more than forty days after service of the summons, the delay having been occasioned by adjournments.—*Ex p.* HARRISON (1852), 19 L. T. O. S. 114; 16 J. P. 343; 16 Jur. 726.

Annotation:—**Expld.** R. *v.* Glynne (1871), L. R. 7 Q. B. 16.

344. —— ——.]—A woman applied to justices in 1863 for a summons against B., as the father of her bastard child, born within two months. B. having absconded, he was not served, but having returned in 1868, he was duly served, & upon the hearing the justices made an order, & directed that B. should pay the sum of 2*s.* 6*d.* per week from the date of the woman's application in 1863, amounting to the sum of £18 18*s.*:—*Held:* they were justified in so doing, & the order was good.—R. *v.* CURME (1868), 18 L. T. 559; 32 J. P. Jo. 404.

345. —— —— Abandonment of earlier payments.]—An order of affiliation ordered a person as putative father to pay a weekly sum for the maintenance of a bastard child from the birth of the child. As the application for the order was not made until more than two months after the birth, the order was clearly bad as to the period between the date of the birth & the time of applying for the order. Notice of abandonment of all claim under the order for payment anterior to the date of the order had been served on the putative father:—*Held:* the order was valid, & might be enforced against the putative father in respect of the weekly payments which became due after the date of the application to the magistrates.—*Ex p.* COLEY (1851), 4 New Sess. Cas. 507; 16 L. T. O. S. 419; 15 J. P. 420; 15 Jur. 128; *sub nom.* R. *v.* GREEN, 20 L. J. M. C. 168.

Annotations:—**Refd.** R. *v.* Robinson (1851), 17 Q. B. 466; *Re* St. Giles-in-the-Fields & St. George, Bloomsbury, R. *v.* Poor Law Comrs. (1851), 15 Jur. 841.

346. —— Less than maximum period.]—The justices have a discretion under 1872 Act, to order weekly payments for the maintenance of a bastard child for a less period than the maximum period given by s. 5 of the Act.

Justices made an order for weekly payments until the child attained the age of sixteen, or the mother married:—*Held:* such order was not to be in force after the marriage of the mother.—PEARSON *v.* HEYS (1881), 7 Q. B. D. 260; 50 L. J. M. C. 124; 45 L. T. 680; 45 J. P. 730; 30 W. R. 156.

Annotation:—**Consd.** Williams *v.* Davies (1883), 11 Q. B. D. 74.

347. —— —— No further order.]—Upon the hearing of an affiliation summons, the justices made an order under 1872 Act, for the payment of a weekly sum until the child should attain the age of thirteen, or die, or the mother should marry. The mother married & her husband died before the child attained the age of thirteen. The mother took out a fresh summons upon which the justices made an order for payment of a weekly allowance:—*Held:* the matter was *res judicata*, & the second order was bad.—WILLIAMS *v.* DAVIES (1883), 11 Q. B. D. 74; 52 L. J. M. C. 87; 47 J. P. 581.

See, also, Nos. 281 *et seq.*, 331 *et seq.*, *ante.*

348. Form of order—Presumption of validity.]—Every reasonable intendment will be made in favour of an order of justices.—R. *v.* CLAYTON (1802), 3 East, 58; 102 E. R. 518.

Annotation:—**Mentd.** R. *v.* Gilkes (1828), 2 Man. & Ry. K. B. 454.

349. —— Statement of jurisdiction — Justice granting summons.]—An order of affiliation recited the application for a summons on the putative father of the child had been made by the mother to M., one of Her Majesty's justices of the peace usually acting in the division:—*Held:* the jurisdiction of the justice sufficiently appeared as the words "in" & "for" were used synonymously in 1844 Act, sched.—R. *v.* MILNER (1845), 3 Dow. &

—SHEE *v.* LARKIN, [1906–7] V. L. R. 295.—**AUS.**

f. *Amount of maintenance — Sums not separated.*]—An order of affiliation adjudging the father of the child to pay £10 12*s.* 9*d.* for the lying-in expenses of the mother, & for the support of the child up to the date of the order, is substantially good, though it does not follow the form given in 1 R. S. c. 57.—R. *v.* KENNEDY (1866), 6 All. 335.—**CAN.**

g. —— *No evidence of payment of lying-in expenses.*]—Where an order of affiliation directed the payment of a sum of money for the lying-in expenses of the mother, & there was no evidence of the payment, a *certiorari* issued to bring up the order.—*Ex p.* BEALES (1866), 6 All. 515.—**CAN.**

348 i. *Form of order.*]—An order for maintenance of a bastard is sufficient if it follows the general form of order given by Justices of the Peace Act, 1865; it is not objectionable in omitting to make its duration contingent upon the life of the child. But it will be bad if it include the costs in the amount for which surety is required, or if it order the costs to be paid to the mother, when another person, *e.g.*, grandmother, is complainant.—R. *v.* BINDON, *Ex p.* FITZPATRICK (1877), 3 V. L. R. 3.—**AUS.**

348 ii. —— *Power to order imprisonment in default of payment.*]—*Held:* justices had no power, under Deserted Wives & Children Act, to order imprisonment in default of compliance with an order for maintenance, but the ct. had power, under Justices Act, 1886, to amend the order, & strike out the order for imprisonment.—SMITH *v.* GWYNNE, *Ex p.* GWYNNE (1906), S. R. Q. 251.—**AUS.**

348 iii. —— *Whether retrospective—Expenses of birth.*]—An order for the support of an illegitimate child under Destitute Persons Relief Act, 1877, ss. 6, 7, & 8, cannot be made retrospective. No order for expenses of & incidental to the birth of the child can be made except where there has been a refusal to support, & an order for support is sought & can be made in consequence of such refusal. A refusal to support must be a refusal after request.—GREAVES *v.* SUTHERLAND (1890), 8 N. Z. L. R. 556.—**N.Z.**

349 i. —— *Statement of jurisdiction.*]—Where a stat. authorised a justice of the peace to make a filiation order:—*Held:* it was no objection to an order made by a judge having the jurisdiction of a justice of the peace, that the order did not indicate the capacity in which the judge was acting.—*Re* HOLMES (1918), 2 W. W. R. 883.—**CAN.**

Sect. 5.—The order. Sect. 6.]

L. 128 ; 2 New Sess. Cas. 54 ; 14 L. J. M. C. 157 ; 10 J. P. 822 ; 10 Jur. 334.

350. —— —— Petty sessions.]—An order of affiliation purported on its face to be made by justices of the county of L. "at a petty sessions holden in & for the petty sessional division of H. at H. aforesaid." H. was one of several places within the petty sessional division of B. where the petty sessions were usually holden, & the justices who made the order usually acted for the townships in the neighbourhood of H. including the place where the mother resided :—*Held :* the order showed no jurisdiction, as it did not appear to be made at a petty sessions holden in & for the petty sessional division where the mother resided.—R. *v.* WHITTLES (1849), 13 Q. B. 248 ; 3 New Mag. Cas. 102 ; 3 New Sess. Cas. 397 ; 18 L. J. M. C. 96 ; 12 L. T. O. S. 447 ; 13 J. P. 365 ; 13 Jur. 403 ; 116 E. R. 1258.

Annotations :—**Refd.** *Ex p.* Higham (1856), 28 L. T. O. S. 127 ; Lawson *v.* Reynolds, [1904] 1 Ch. 718.

351. —— —— ——.]—The caption of an order adjudicating a party to be the father of a bastard child stated that it was made "at a petty session of Her Majesty's justices of the peace for the riding," etc., "holden before us, C. & E., Her Majesty's justices of the peace for the riding & a majority of the justices now present." The order was signed by C. & E. On a motion to quash the order which had been brought up by a *certiorari :*—*Held :* it must be taken in effect to state that C. & E. were justices of the peace & a majority of those present.—*Ex p.* BOYNTON (1850), 1 L. M. & P. 12.

352. —— Time of application.]—An order in bastardy must show on the face of it that it was applied for within forty days of the service of the summons on the putative father.—R. *v.* ROSE (1845), 3 Dow. & L. 359 ; 2 New Sess. Cas. 166 ; 15 L. J. M. C. 6 ; 6 L. T. O. S. 160.

353. —— ——.]—An order in bastardy made under 1844 Act showed neither that the application for the summons had been made within two calendar months after the birth of the child, nor that the order itself had been applied for at petty sessions within forty days from the service of the summons after the birth of the child :—*Held :* the order was bad.—R. *v.* MEES (1849), 13 J. P. 120.

354. —— Corroborative evidence.]—An order for maintenance is bad if it allege that the sessions heard the corroboration of the mother's statement without adding that corroboration was in some material particular.—R. *v.* READ (1839), 9 Ad. & El. 619 ; 1 Per. & Dav. 413 ; 2 Will. Woll. & H. 94 ; 8 L. J. M. C. 19 ; 3 J. P. 97 ; 112 E. R. 1346.

Annotation :—**Consd.** R. *v.* Pearcy (1852), 17 Q. B. 902.

355. —— Presence of defendant.]—An order of affiliation stated the appearance of the putative father, but the words "in the presence & hearing of the said," as provided for by 1845 Act, sched. [superseded by forms issued by the Local Govt. Board by Order dated Mar. 13, 1915) were struck out :—*Held :* the order was bad for such omission. —R. *v.* GRAFTON (DUKE) (1848), 5 Dow. & L. 568 ; 3 New Sess. Cas. 157 ; 17 L. J. M. C. 125 ; 11 L. T. O. S. 156 ; 12 Jur. 539 ; *sub nom.* R. *v.* SUFFOLK JJ., 12 J. P. 426.

Annotations :—**Consd.** R. *v.* Pearcy (1852), 17 Q. B. 902. **Refd.** *Ex p.* Higham (1856), 28 L. T. O. S. 127.

356. —— —— Defendant's attorney.]—R. *v.* SHIPPERBOTTOM, No. 316, *ante.*

357. —— Evidence on oath.]—An order in bastardy made under 1844 Act did not state that the evidence of the mother was given on oath, but substantially followed the form given in 1845 Act, sched., which was passed for the purpose of curing defects of form in orders under the former Act :—*Held :* as the latter Act rendered valid all orders made according to the form given in the sched., or to the like tenour & effect, the above omission was immaterial, & the words on oath were not required to be inserted in the form given in the sched.—R. *v.* CHESHIRE JJ. (1845), 3 Dow. & L. 337 ; 2 New Sess. Cas. 161 ; 15 L. J. M. C. 3 ; 6 L. T. O. S. 131 ; 9 J. P. 759 ; 10 Jur. 311.

358. —— ——.]—*Held :* the form of the order given to 1845 Act, sched., did not require it to be set out that the evidence was given on oath.—R. *v.* SHIPPERBOTTOM (1847), 10 Q. B. 514 ; 2 New Sess. Cas. 641 ; 16 L. J. M. C. 113 ; 9 L. T. O. S. 101 ; 11 J. P. 773 ; 11 Jur. 520 ; 116 E. R. 196.

Annotation :—**Consd.** R. *v.* Grafton (1848), 3 New Sess. Cas. 157.

359. —— Application of maintenance.]—An order of maintenance made under 1872 Act, but in the form to 1845 Act, sched., directing payment to the mother, without any provision for its application to maintenance & education of the child, is invalid.—R. *v.* PADBURY (1879), 5 Q. B. D. 126 ; 49 L. J. M. C. 55 ; 44 J. P. 361 ; 28 W. R. 182.

See Bastardy Orders Act, 1880 (c. 32), s. 1.

360. Costs—Unsuccessful Application.]—There is no power to order an unsuccessful appct. to pay costs to a successful deft. (LORD DENMAN, C.J.).—R. *v.* MACHEN (1849), 14 Q. B. 74 ; 18 L. J. M. C. 213 ; 117 E. R. 29 ; *sub nom.* JONES *v.* MACHEN, 3 New Sess. Cas. 629.

Annotations :—**Mentd.** *Ex p.* Westerman (1851), 16 L. T. O. S. 420 ; Myott *v.* Barber (1863), 27 J. P. 598 ; R. *v.* Clark (1864), 28 J. P. Jo. 102 ; R. *v.* Harrington (1864), 9 L. T. 721 ; R. *v.* Grant (1867), 36 L. J. M. C. 89 ; R. *v.* Glynne (1871), L. R. 7 Q. B. 16 ; Williams *v.* Davies (1883), 11 Q. B. D. 74 ; Stokes *v.* Stokes, [1911] P. 195, D. C. ; McGregor *v.* Telford, [1915] 3 K. B. 237 ; R. *v.* Seddon, *Ex p.* Hall (1916), 85 L. J. K. B. 806.

361. Abandonment of order—Re-hearing—Payment of costs.]—A woman applied at petty sessions for an order of affiliation. The case was adjourned & an order made at the adjourned petty sessions on the putative father, who appealed to quarter sessions. Before those sessions were held, the attorney for the mother gave notice of abandoning his order & tendered to applt.'s attorney thirty shillings for costs, which he accepted supposing the sum to be offered in discharge only of the costs of the adjournment, the sum being, in fact, much below the whole amount of costs. The residue being unpaid, the mother's attorney requested the justices in petty sessions to re-hear the case for the purpose of making another order. A writ for *mandamus* to the justices to re-hear the case was refused, because the abandonment had not been completed by replacing applt. in his original situation & the order was still in force.—R. *v.* HINCHLIFF (1847), 10 Q. B. 356 ; 2 New Mag. Cas. 106 ; 16 L. J. M. C. 78 ; 8 L. T. O. S. 515 ; 11 J. P. 312 ; 11 Jur. 514 ; 116 E. R. 138.

Annotations :—**Distd.** R. *v.* Lanyon (1872), 27 L. T. 355. **Refd.** R. *v.* Brisby (1849), T. & M. 109.

362. Defective order—Supersedeas—Second order.]—An order of affiliation, void for defects appearing on the face of it, is altogether a nullity & may be treated just as if the justices who made the

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362 i. *Defective order—May be quashed in part—If severable.*]—R. *v.* SIMPSON (1867), 1 Han. 32.—**CAN.**

362 ii. —— —— ——.]—A provision in a filiation order requiring the putative father to pay certain expenses, but without stating the amount thereof, may be struck out without the entire order being set aside.—*Re* HOLMES (1918), 2 W. W. R. 883.—**CAN.**

362 iii. —— *Second order.*]—Deft. was convicted before two magistrates, who made an order of filiation against him, & he entered into a bond to abide that order. The order was such as was not warranted by stat. A second order was obtained, from which deft. appealed. The jury, although instructed by the judge not to confirm this second order

order had never heard the case at all, & it is not necessary to proceed either by way of appeal or writ of *certiorari* in order to quash it.

The justices had on Jan. 1 made an order against deft. which order stated the appearance of the putative father in pursuance of the summons to appear, but omitted to state that the evidence had been heard by the justices "in his presence & hearing." The order was served, but no payment was made under it, & on Apr. 25 the same justices indorsed upon the order a *supersedeas* under their hands & seals, by which in terms they absolutely & irrevocably annulled & made void the order upon the ground that it was invalid according to law, by reason of certain errors therein & omissions therefrom. The *supersedeas* was served on deft., & on the next day a fresh complaint was lodged & a fresh summons issued by the justices. Deft. protested against the jurisdiction of the justices, who made a second order on May 6:—*Held:* the justices had jurisdiction to make the second order, although the first had not been got rid of on appeal or by writ of *certiorari*, & an indictment for disobedience of it was maintainable.—R. *v.* BRISBY (1849), 2 Car. & Kir. 962; 1 Den. 416; T. & M. 109; 3 New Mag. Cas. 167; 3 New Sess. Cas. 591; 18 L. J. M. C. 157; 13 L. T. O. S. 266; 13 J. P. 365; 13 Jur. 520; 3 Cox, C. C. 476, C. C. R.

Annotations:—**Expld.** R. *v.* Glynne (1871), L. R. 7 Q. B. 16. **Distd.** R. *v.* Lanyon (1872), 27 L. T. 355. **Refd.** R. *v.* Cook, R. *v.* Hickling (1852), 21 L. J. M. C. 136, C. C. R.

363. Mistake in order—Correction.]—Justices signed two orders intended to be duplicates, but by mistake the order served upon the father ordered the mother instead of the father to pay one shilling & sixpence a week. Afterwards a correct copy of the order was drawn up & served upon the father:—*Held:* as there was only one order made, the service of an incorrect copy of it could not vitiate the order, & a correct copy might afterwards be drawn up, served, & enforced.—WILKINS *v.* HEMSWORTH (1838), 7 Ad. & El. 807; 3 Nev. & P. K. B. 55; 1 Will. Woll. & H. 10; 7 L. J. M. C. 28; 2 Jur. 94, 301; 112 E. R. 674.

Annotations:—**Consd.** R. *v.* Lanyon (1872), 27 L. T. 355. **Refd.** Newbould *v.* Coltman (1850), 16 L. T. O. S. 488; Foster *v.* Dodd (1867), L. R. 3 Q. B. 67, Ex. Ch.

364. —— ——.]—Two justices, on Jan. 30, 1872, adjudicated deft. to be the father of a bastard child & ordered him to pay 2*s.* a week from the date of its birth towards its maintenance. An order, in writing, was drawn up by the clerk & signed by the justices who adjudicated upon the summons, & served on deft., but it was subsequently ascertained that in this document the sum of 2*s.* 6*d.* had been inserted whereas the sum of 2*s.* only ought to have appeared, & that the date of the birth of the child had been altogether omitted. No proceeding was taken to enforce it, & deft. refused to make & did not make any payment to complainant. Complainant in May, 1872, applied to the justices for a proper order, & an order dated Jan. 30, 1872, embodying correctly the verbal adjudication of that date, was thereupon made out & signed by the same justices & served on deft., who refused to obey it, & the payments under it being in arrear, he was committed to prison pursuant to 1844 Act. On an application for a writ of *habeas corpus:*—*Held:* the same justices were entitled to cause a second order to be drawn up & enforced embodying correctly the terms of their adjudication, notwithstanding the first order had not been quashed, & there had been no fresh summons or hearing or tender of costs.—R. *v.* LANYON (1872), 27 L. T. 355.

365. —— ——.]—R. *v.* FLETCHER, No. 340, *ante.*

366. Effect of order—Seduction action—Estoppel.]—In affiliation proceedings against deft. he appealed to quarter sessions against an order of justices adjudging him to be the father of A.'s illegitimate child, & the ct. of quarter sessions quashed the order on the ground that he was not the father. Subsequently an action for damages for the seduction of A. was brought by her mother against deft.:—*Held:* pltf. in the action was not estopped by the order of the ct. of quarter sessions from alleging that deft. was the father of the child, as it was not a judgment *in rem*, but merely *inter partes.*—ANDERSON *v.* COLLINSON, [1901] 2 K. B. 107; 70 L. J. K. B. 620; 84 L. T. 465; 49 W. R. 623; 17 T. L. R. 425; 45 Sol. Jo. 447.

Order quashed on merits — Effect on second application.]—*See* Nos. 333 *et seq., ante.*

SECT. 6.—ENFORCEMENT OF ORDER.

367. Recovery of arrears—Six months' limit—Former law.]—*Held:* the effect of Summary Jurisdiction Act, 1848 (c. 43), s. 11, prevented an order in bastardy being made in respect to more than six months' arrears.—MATTHEWS *v.* MATTHEWS, [1912] 3 K. B. 91; 81 L. J. K. B. 970; 107 L. T. 56; 76 J. P. 315; 28 T. L. R. 421; 23 Cox, C. C. 65.

Annotation:—**Mentd.** Adams *v.* Adams, [1914] P. 155, D. C

See, now, Criminal Justice Administration Act, 1914 (c. 58), s. 32 (1).

Proof in bankruptcy for arrears.]—*See* BANKRUPTCY & INSOLVENCY.

368. Arrest—Production of warrant.]—A police constable, who makes an arrest under a warrant from a justice of the peace for disobedience to a bastardy order, is bound to have the warrant in his possession, although the officer making the arrest was not asked to produce it.—GALLIARD *v.* LAXTON (1862), 2 B. & S. 363; 31 L. J. M. C. 123; 5 L. T. 835; 26 J. P. 230; 8 Jur. N. S. 642; 10 W. R. 353; 9 Cox, C. C. 127; 121 E. R. 1109.

Annotations:—**Consd.** Codd *v.* Cabe (1876), 1 Ex. D. 352. **Refd.** *Ex p.* Smith (1897), 61 J. P. Jo. 410.

369. —— **Illegal warrant—Issue of fresh warrant.**]—Though justices commit a putative father against whom an affiliation order has been made upon an illegal warrant, from which he is discharged at the next sessions, still they may afterwards issue a fresh warrant, founded on the original order; but if the case falls within 49 Geo. 3, c. 68, s. 3, as an order unappealed from, the commitment for non-payment of maintenance must be for three months, unless the money is sooner paid. A general commitment until the putative father pays two several sums, one for maintenance, & the other for costs, is bad *in toto.*—*Re* ADDIS (1822) 2 Dow. & Ry. K. B. 167.

370. —— **Pending appeal.**]—The jurisdiction given to a single justice of the peace by 1844 Act, s. 3, to issue a warrant against the putative father for the purpose of enforcing payment under an affiliation order, is not suspended by an appeal by the father to quarter sessions against the order, & the confirmation of the order by the sessions subject to a special case.

An affiliation order was confirmed upon appeal, &

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by their verdict, found against deft.—*Held:* their verdict must be set aside.—ST. PATRICK'S OVERSEERS OF THE POOR *v.* FOYLE (1868), 7 N. S. R. 197.—**CAN.**

366 i. *Effect of order—Conclusive.*]—A judgment on *scire facias* on a recognisance in bastardy proceedings, under 1 R. S. c. 57, is conclusive while it stands, & deft. cannot object to the amount of costs taxed by the Sessions. If the costs are excessive, application should be made to the Sessions to reduce them.—R. *v.* CARSON (1864), 6 All. 138.—**CAN.**

subject to a special case. Two days after the hearing of the appeal, & before the special case came on for hearing, a justice granted his warrant to bring the putative father before two justices for the purpose of enforcing the order:—*Held:* the justice had jurisdiction to issue the warrant, although the case was then pending.—KENDALL *v.* WILKINSON (1855), 4 E. & B. 680; 24 L. J. M. C. 89; 24 L. T. O. S. 309; 19 J. P. 467; 1 Jur. N. S. 538; 3 W. R. 234; 3 C. L. R. 668; 119 E. R. 251.

Annotations:—**Refd.** R. *v.* Willmott (1861), 1 B. & S. 27. **Mentd.** R. *v.* Staffordshire JJ. (1857), 7 E. & B. 935.

371. Imprisonment—Effect—Discharge of arrears.]—Imprisonment for non-payment of arrears due under an affiliation order discharges deft. from all liability in respect of the sums for which he has been imprisoned.—ROBSON *v.* SPEARMAN (1820), 3 B. & Ald. 493; 106 E. R. 742.

Annotations:—**Refd.** R. *v.* Richardson, *Ex p.* Sherry (1909), 79 L. J. K. B. 13. **Mentd.** Jones *v.* Simpson (1830), 1 Cr. & J. 174; Griffith *v.* Harries (1837), 2 M. & W. 335.

372. Distress—Justices' discretion.] — Justices have a discretion as to enforcing an order of affiliation by distress; but where they declined to issue their warrant, on the ground that the putative father was discharged from the order by reason of the husband of the mother having returned & cohabited with her:—*Held:* the justices must issue the distress warrant.—*Ex p.* GRIMES (1853), 22 L. J. M. C. 153.

Annotations:—**Mentd.** Stacey *v.* Lintell (1879), 27 W. R. 551; Jones *v.* Davies, [1901] 1 K. B. 118; Webb *v.* Murrel (1904), 68 J. P. 104.

373. Enforcement by guardians—Absence of mother.]—The mother of an illegitimate child, who had obtained an affiliation order, allowed the child to become chargeable to a union, & went to reside permanently in America. The putative father objected that since the mother was alive, & of sound mind, & not in any gaol or prison, nor under sentence of transportation, she was the only person who could enforce the order against him, & that the guardians of the union could not enforce it in her absence:—*Held:* 1872 Act, s. 7, empowered the guardians to enforce the order against the putative father, & to recover the weekly payments & arrears under it where the mother was living abroad.—JONES *v.* MERTHYR TYDFIL UNION (1911), 105 L. T. 203; 75 J. P. 390; 22 COX, C. C. 551; 9 L. G. R. 767.

374. Cessation of liability—Release by mother.]—An order had been obtained by resp. ordering applt. to contribute to the support of her bastard child. Subsequently to the making of the order, resp., in consideration of a sum of money, agreed to release & indemnify applt. for ever from all actions, suits, & proceedings in respect of the child:—*Held:* this agreement was no bar to the jurisdiction of the justices to enforce the order on the application of resp.—GRIFFITH *v.* EVANS (1882), 46 L. T. 417; 30 W. R. 427, D. C.

375. —— Death of father.]—The liability of the putative father under a bastardy order is purely personal, & if the father dies, the mother has no right to claim against his estate either arrears or future payments.—*Re* HARRINGTON, WILDER *v.* TURNER, [1908] 2 Ch. 687; 78 L. J. Ch. 27; 99 L. T. 723; 72 J. P. 501; 25 T. L. R. 3; 52 Sol. Jo. 855; 21 Cox, C. C. 709.

Annotation:—**Distd.** *Re* Stillwell, Brodrick *v.* Stillwell, [1916] 1 Ch. 365.

376. —— Return of mother's husband.]—The liability of the putative father under an affiliation order does not cease upon the return of the woman's husband & his cohabitation with her.—*Ex p.* GRIMES (1853), 22 L. J. M. C. 153.

Annotations:—**Refd.** Jones *v.* Davies, [1901] 1 K. B. 118. **Mentd.** Stacey *v.* Lintell (1879), 27 W. R. 551; Webb *v.* Murrel (1904), 68 J. P. 104.

377. —— Marriage of mother.]—Where the mother has obtained an order for the maintenance of a bastard child, it can be enforced against the putative father after the marriage of the mother.—SOTHERON *v.* SCOTT (1881), 6 Q. B. D. 518; 44 L. T. 522; 45 J. P. 423; 29 W. R. 666; *sub nom.* SOUTHERAN *v.* SCOTT, 50 L. J. M. C. 56.

Annotations:—**Consd.** Hardy *v.* Atherton (1881), 7 Q. B. D. 264; Davies *v.* Evans (1882), 9 Q. B. D. 238. **Refd.** Healey *v.* Wright, [1912] 3 K. B. 249.

378. —— ——.]—An order obtained by a single woman for the maintenance of a bastard child can be enforced against the putative father after the marriage of the mother, although her husband is able to maintain the child.—HARDY *v.* ATHERTON (1881), 7 Q. B. D. 264; 50 L. J. M. C. 105; 44 L. T. 776; 45 J. P. 683; 29 W. R. 788.

Annotations:—**Follid.** Davies *v.* Evans (1882), 9 Q. B. D. 238. **Refd.** Plymouth Grdns. *v.* Gibbs, [1903] 1 K. B. 177.

379. —— ——.]—An affiliation order was obtained by a woman while single. Subsequently she married & sought to enforce the order against the putative father:—*Held:* (1) (GROVE, J.) the justices were not bound to enforce the order, but had a discretion in the matter; (2) (HUDDLESTON, B.) the justices were so bound, & had no discretion.—DAVIES *v.* EVANS (1882), 9 Q. B. D. 238; 51 L. J. M. C. 132; 46 L. T. 418; 46 J. P. 471; 30 W. R. 548.

Annotation:—**Refd.** *Re* Woodall (1888), 57 L. J. M. C. 71, C. A.

PART VI. SECT. 6.

371 i. *Imprisonment—On failure to find surety for compliance of order.*]—*Held:* "forthwith," in Justices Act, 1904 (No. 1059), s. 20, meant immediately, without the lapse of any interval of time, & there was no necessity to serve deft. with a copy of the order before committing him to gaol.—ADAMS *v.* ROGERS (1907), V. L. R. 245.—**AUS.**

375 i. *Cessation of liability—Death of father.*]—An order upon the father of a bastard for its maintenance is a personal order, & cannot be enforced upon his representatives after his death, nor can a supplemental order be made upon them.—R. *v.* STUART (1868), 5 W. W. & A'B. 174.—**AUS.**

375 ii. —— ——.]—An order was made under Marriage Act, 1890 (No. 1166), Part IV., by which X. was ordered to pay a weekly sum for the maintenance of an illegitimate child born. X. having failed to obey the order, an action was brought after his death against his exors. for the arrears due on the order:—*Held:* the action would not lie.—HENRY *v.* HARPER (1904), 29 V. L. R. 667.—**AUS.**

k. —— *Adoption of child.*]—*Held:* an order under Bastardy Laws Act, 1875 (39 Vict. No. 8), against the putative father for maintenance could not be enforced after the date of an order of adoption by a third party under Adoption of Children Act, 1896 (60 Vict. No. 6), s. 7.—MADDOCKS *v.* ROBINSON (1913), 16 W. A. L. R. 4.—**AUS.**

l. *Order made on appeal—Failure to pay lump sum.*]—The judge who makes a filiation order upon appeal may commit for default in complying with the order & may impose costs upon the putative father. *Semble:* the putative father may be committed for default in complying with an order for payment of a lump sum to the mother.—*Re* SIGURDSON (1916), 34 W. L. R. 53; 10 W. W. R. 159; 28 D. L. R. 376; 26 Man. L. R. 209.—**CAN.**

m. *Against surety.*]—The liability of the surety on a filiation bond cannot be extended beyond that fixed by stat.—OVERSEERS OF THE POOR *v.* CHASE (1896), 28 N. S. R. 314.—**CAN.**

n. ——.]—A bond, given before the birth of an illegitimate child, was conditioned upon the putative father surrendering himself to custody, in the event of a warrant being issued commanding his appearance upon the hearing of an application for a filiation order against him. The putative father failed to appear at the hearing, so that no order could be made against him:—*Held:* there was a breach of the condition of the bond, & the sureties were liable.—DOW *v.* PARSONS (1917), 51 N. S. R. 41.—**CAN.**

SECT. 7.—**APPEALS.**

SUB-SECT. 1.—TO QUARTER SESSIONS.

See, now, Summary Jurisdiction Act, 1879 (c. 49).

380. Time for appealing—Reckoning of.]—The twenty-four hours within which the notice is required to be given by 1844 Act, s. 4, runs from the time when the verbal adjudication is made.—R. *v.* HUNTINGDONSHIRE JJ. (1850), 1 L. M. & P. 78 ; 4 New Mag. Cas. 60 ; 4 New Sess. Cas. 101 ; 19 L. J. M. C. 127 ; 14 L. T. O. S. 491 ; 14 J. P. Jo. 94, 223.

381. —— ——.]—The time for appeal runs from the time when the judgment of the justices is orally pronounced in ct. & not from the time of the signing or serving of the order.—*Ex p.* JOHNSON (1863), 3 B. & S. 947 ; 2 New Rep. 111 ; 32 L. J. M. C. 193 ; 27 J. P. 661 ; 9 Jur. N. S. 1128 ; 11 W. R. 620 ; 122 E. R. 354 ; *sub nom.* R. *v.* ESSEX JJ., 8 L. T. 275.

Annotations :—**Apld.** R. *v.* Lanyon (1872), 27 L. T. 355. **Mentd.** R. *v.* Tabrum, *Ex p.* Dash (1907), 23 T. L. R. 474.

382. —— ——.]—An order in bastardy was made at 5 p.m. on Saturday & a written notice of appeal under 1844 Act, s. 4, was served on the mother at 9 p.m. on Monday :—*Held :* (1) notice of appeal was in the nature of process, & could not be legally served on a Sunday ; (2) the notice was given within twenty-four hours after the order appealed against, & was in time.—R. *v.* MIDDLESEX JJ. (1848), 3 New Mag. Cas. 1 ; 3 New Sess. Cas. 152 ; 2 Saund. & C. 271 ; 17 L. J. M. C. 111 ; 11 L. T. O. S. 132 ; 12 Jur. 434 ; 12 J. P. Jo. 392.

Annotations :—**Apld.** Milch *v.* Frankau, [1909] 2 K. B. 100, D. C. **Refd.** Mumford *v.* Hitchcocks (1863), 14 C. B. N. S. 361. **Mentd.** R. *v.* Lancashire JJ. (1849), 13 J. P. 519.

383. Notice of appeal—Form of.]—Applt. appealed against a bastardy order, complying with 1844 Act & 1845 Act, but he had not given the clerk to the justices notice, stating the grounds of his appeal, pursuant to Summary Jurisdiction Act, 1879 (c. 49), s. 31. Quarter Sessions on this ground dismissed the appeal :—*Held :* applt. was entitled to follow the procedure of the old Acts & rule for *mandamus* to Quarter Sessions justices to hear the appeal made absolute.—R. *v.* MONTGOMERYSHIRE JJ. (1882), 51 L. J. M. C. 95 ; 46 J. P. 518, D. C.

Annotation :—**Apld.** R. *v.* Shingler (1886), 17 Q. B. D. 49.

384. —— ——.]—The notice of appeal against an affiliation order must state the grounds of appeal as required by Summary Jurisdiction Act, 1879 (c. 49), s. 31 (2).—R. *v.* SHINGLER (1886), 17 Q. B. D. 49 ; *sub nom.* SHINGLER *v.* SMITH, 54 L. T. 759 ; 51 J. P. 152 ; 34 W. R. 490 ; 2 T. L. R. 532, D. C.

Annotation :—**Refd.** R. *v.* London JJ., [1895] 1 Q. B. 616.

385. —— **Verbal notice.**] — A verbal notice of appeal against a bastardy order, given to the mother by the attorney of the alleged father in his presence, immediately after the verbal adjudication & order of the justices & before the formal order has been drawn up & agreed by them, is a good notice of appeal under 1844 Act, s. 4.—R. *v.* HUNTINGDONSHIRE JJ. (1850), 1 L. M. & P. 78 ; 4 New Mag. Cas. 60 ; 4 New Sess. Cas. 101 ; 19 L. J. M. C. 127 ; 14 L. T. O. S. 491 ; 14 J. P. Jo. 94, 223.

386. —— **Sufficiency of—Jurisdiction to decide.**]—If a party against whom an order of affiliation has been made applies to a justice stating that he has given notice of appeal, & requires the justice to take his recognisance to appear & try the appeal, & to pay costs, if awarded, the justice has no jurisdiction to decide whether the notice of appeal be sufficient, for that is a question for the sessions on hearing the appeal.—*Ex p.* CARTER (1855), 24 L. T. O. S. 264 ; 1 Jur. N. S. 89 ; *sub nom. Re* CARTER & HASTINGS CORPN., 24 L. J. M. C. 72 ; *sub nom.* R. *v.* HASTINGS CORPN., *Ex p.* CARTER, 19 J. P. 71 ; *sub nom.* R. *v.* GINNER (MAYOR OF HASTINGS), 3 C. L. R. 293.

387. —— **Service of—At place of abode.**]—Service of notice of appeal to Quarter Sessions under 1844 Act, s. 4, need not be made personally on the mother. It is sufficient if it is left at her usual place of abode.—R. *v.* CHESHIRE JJ. (1846), 1 New Mag. Cas. 602 ; 2 New Sess. Cas. 420 1 Saund. & C. 164 ; 15 L. J. M. C. 114 ; 11 J. P. 6 ; 10 Jur. 808.

388. —— —— **By registered post.**]—A notice of appeal against an affiliation order was sent by registered post to the mother's address as set out in the summons, but the notice was returned through the dead letter office, a wrong address having been entered by mistake of the justices' clerk in the summons :—*Held :* the notice was insufficient.—R. *v.* ESSEX JJ. (1895), 43 W. R. 378 ; 11 T. L. R. 187, D. C.

389. —— —— **On solicitor.**]—A solr. represented the mother in a successful application for an affiliation order. Subsequently a notice of appeal was given to the solr., who accepted service of it on behalf of the mother :—*Held :* the solr.'s authority to represent the mother terminated when the order was obtained, & service of the notice of appeal was invalid.—R. *v.* OXFORDSHIRE JJ., [1893] 2 Q. B. 149 ; 62 L. J. M. C. 156 ; 69 L. T. 368 ; 57 J. P. 712 ; 41 W. R. 615 ; 9 T. L. R. 520 ; 37 Sol. Jo. 580 ; 4 R. 482, C. A.

Annotation :—**Refd.** Godman *v.* Crofton, [1914] 3 K. B. 803.

390. —— **Proof of—Evidence of mother.**]—On an appeal under 1845 Act, s. 6, against an order for the maintenance of a bastard child, the mother is a competent witness for either party & may be called by applt. to prove notice of appeal under 1844 Act, s. 4.—R. *v.* MIDDLESEX JJ. (1848), 3 New Mag. Cas. 1 ; 3 New Sess. Cas. 152 ; 2 Saund. & C. 271 ; 17 L. J. M. C. 111 ; 11 L. T. O. S. 132 ; 12 J. P. 392 ; 12 Jur. 434.

Annotations :—**Mentd.** R. *v.* Lancashire JJ. (1849), 13 J. P. 519 ; Mumford *v.* Hitchcocks (1863), 14 C. B. N. S. 361 ; Milch *v.* Frankau, [1909] 2 K. B. 100, D. C.

391. Recognisances—Court of summary jurisdiction.]—*Held :* the recognisance mentioned in Summary Jurisdiction Act, 1879 (c. 49), s. 31 (3), might be entered into before any ct. of summary jurisdiction, whether acting for the same county as the ct. from whose order the appeal was brought or not.—R. *v.* DURHAM JJ., [1895] 1 Q. B. 801 ; 64 L. J. M. C. 187 ; 72 L. T. 465 ; 59 J. P. 264 ; 43 W. R. 423 ; 39 Sol. Jo. 383 ; 18 Cox, C. C. 120 ; 15 R. 319, D. C.

392. —— **Deposit—Settling amount.**]—A putative father, on an order of affiliation being made against him, at once said he would appeal, &, on application, he was allowed to deposit £20 in lieu of entering into a recognisance. Four days later a formal notice of appeal was served. On the hearing of the appeal at Quarter Sessions objection was taken that no recognisance had been regularly entered into, & the ct. refused to hear the appeal :—*Held :* before settling recognisances & the amount of deposit, the notice of appeal should have been before the justices, & the quarter sessions had rightly refused to hear the appeal.—R. *v.* ANGLESEY

PART VI. SECT. 7, SUB-SECT. 1.

o. *From order made under Infant Protection Act,* 1904 (*No.* 27).]—Parties have the right to appeal to a ct. of Quarter Sessions from the ct. constituted by virtue of the above Act.—*Ex p.* STARK (1905), 5 S. R. N. S. W. 458.—**AUS.**

p. ——.] — On the hearing of a complaint under s. 8 of the above Act the magistrate refused to make any order :—*Held :* this amounted to a dismissal of the complaint & appct. had the right to appeal to Quarter Sessions under s. 26.—*Ex p.* WOODLANDS (1905), 5 S. R. N. S. W. 450.—**AUS.**

Sect. 7.—Appeals: Sub-sects. 1 & 2.]

JJ., [1892] 2 Q. B. 29; 61 L. J. M. C. 143; 67 L. T. 322; 56 J. P. 552; 8 T. L. R. 561; 36 Sol. Jo. 525; 17 Cox, C. C. 563, D. C.

Annotations:—**Folld.** R. *v.* Cheshire JJ. (1896), 60 J. P. 585, D. C. **Refd.** R. *v.* Durham JJ., [1895] 1 Q. B. 801.

393. —— Notice of.]—Upon an appeal against an affiliation order it is not necessary for applt. to give notice in writing of having entered into a recognisance to prosecute the appeal.—R. *v.* WEST RIDING JJ. (1882), 46 J. P. 517, D. C.

394. —— —— Twin children.]—Justices at petty sessions, after verbally adjudging B. to be the putative father of twin bastard children, & ordering him to pay 1*s.* a week for the maintenance of each, drew up a separate order in respect of each child. B. gave notice of appeal, & entered into a separate recognisance to prosecute in each case. One notice of recognisance only was served on the mother by the attorney of B., & it stated, "We hereby give you notice that B. has entered into a recognisance to try an appeal," etc., "against an order of affiliation made on," etc., "whereby B. was adjudged to be the father of two bastard children of which you had lately been delivered." It was objected that the notice was insufficient, as there was no such recognisance as that stated in the notice, & no such order as an order adjudging B. to be the father of two children:—*Held:* the notice of recognisance was sufficient as, putting a reasonable construction upon it, it gave the mother sufficient information that B. had entered into recognisances to appeal in respect of each child.—R. *v.* LEEDS RECORDER (1852), 21 L. J. M. C. 171; 19 L. T. O. S. 126; 16 J. P. 665; 16 Jur. 451.

395. —— —— Death of mother.]—After an order in bastardy had been made, the putative father, intending to appeal, entered into a recognisance, according to 1845 Act, & on the same day sent notice of his having done so by post to the woman. When the appeal came on to be tried, it was proved that the woman had died before the notice to her was posted. The sessions, being of opinion that a condition imposed by the Act as preliminary to an appeal had not been complied with, refused to hear the appeal:—*Held:* performance of the condition imposed by law having by the act of God become impossible, its performance was excused, & a peremptory *mandamus* to enter continuances & hear the appeal was awarded.—R. *v.* LEICESTERSHIRE JJ. (1850), 15 Q. B. 88; 4 New Mag. Cas. 83; 4 New Sess. Cas. 124; 19 L. J. M. C. 209; 15 L. T. O. S. 132; 14 J. P. 542; 14 Jur. 550; 117 E. R. 391.

Annotation:—**Refd.** Tipperary Case (1875), 3 O'M. & H. 19.

396. Hearing of appeal—Opening.]—*Held:* Upon an appeal to the sessions against an order of filiation, resps. should begin by supporting their order, as in all other cases.—R. *v.* KNILL (1810), 12 East, 50; 104 E. R. 20.

397. —— Examination of mother—Corroboration.]—*Held:* under 1845 Act, the mother need not be examined on the trial of an appeal against an order in bastardy, but, if tendered as evidence, she must be corroborated in some material particular by other testimony.—R. *v.* BUCKINGHAMSHIRE JJ. (1849), 3 New Sess. Cas. 500; 18 L. J. M. C. 113; 13 Jur. 1053.

Annotations:—**Refd.** R. *v.* Armitage (1872), 42 L. J. M. C. 15. **Mentd.** R. *v.* Brisby (1849), 1 Den. 416, C. C. R.

398. Order quashed—Costs—Distress for—Imprisonment.]—Upon appeal to quarter sessions against an affiliation order, the order was quashed with costs, & resp. in default of distress committed to prison:—*Held:* the right to the costs must be taken to be a right to a sum of money recoverable summarily before a justice of the peace within the exception in Debtors Act, 1869 (c. 62), & resp. was not protected from imprisonment.—R. *v.* PRATT, *Ex p.* COLE (1870), L. R. 5 Q. B. 176; 39 L. J. M. C. 73; 21 L. T. 750; 34 J. P. 150; 18 W. R. 626.

Annotations:—**Apld.** Buckley *v.* Crawford, [1893] 1 Q. B. 105. **Refd.** *Re* Edgcombe, *Ex p.* Edgcombe (1902), 87 L. T. 108, C. A.

399. Mandamus to hear appeal — Rule nisi — Service.]—On an application for a *mandamus* to the sessions to hear an appeal against an affiliation order, a copy of the rule *nisi* should be served on resp. as well as the justices; but where this had not been done, the ct. allowed the rule to be made absolute on terms.—R. *v.* DERBYSHIRE JJ. (1844), 1 New Sess. Cas. 461; 9 Jur. 181.

SUB-SECT. 2.—OTHER MODES OF APPEAL.

400. Certiorari—When granted—Defect in jurisdiction.]—B., the alleged father of a bastard, resided with his parents, & had set out for a month's tour, which he took annually at the same season of the year, leaving word he would be back in a month, but leaving no address where he might be found in

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PART VI. SECT. 7, SUB-SECT. 2.

400 i. *Certiorari—When granted—Delay.*]—An order of affiliation was made in Jan., 1865. In Jan., 1866, the Sessions adjudged deft. to be imprisoned for not obeying the order:—*Held:* too late to apply for a *certiorari* to remove the proceedings for an alleged defect in the order of affiliation.—R. *v.* KENNEDY (1866), 6 All. 335.—**CAN.**

q. *Mandamus — When granted — Wrong decision at law.*]—On an application for a maintenance order against the father of an illegitimate child under Deserted Wives & Children Act (4 Vict. No. 5), a magistrate erroneously decided that he could not make an order without the evidence of the mother:—*Held:* the decision was merely a wrong decision at law, & not a refusal to exercise jurisdiction, & a *mandamus* should not be granted to compel him to hear & determine the case.—*Ex p.* AUSTEN (1897), 18 N. S. W. L. R. 216.—**AUS.**

r. —— —— *Infants Protection Act,* 1904 (*No.* 27), *ss.* 8, 26.]—No appeal lies under s. 26 from the refusal of a magistrate to adjudicate on an application under s. 8, & a *mandamus* must be granted where the magistrate's refusal was wrong.—*Ex p.* BRYANT (1906), 6 S. R. N. S. W. 712.—**AUS.**

s. *Prohibition — When granted — Infants Protection Act,* 1904 (*No.* 27).]—The ct. constituted by virtue of the above Act is not a ct. of Petty Sessions & there is no appeal by way of statutory prohibition under Justices Act, 1902, but parties have the right to appeal (*inter alia*) by way of a common law prohibition, if the ct. has exceeded its jurisdiction.—*Ex p.* STARK (1905), 5 S. R. N. S. W. 458.—**AUS.**

t. —— —— *Evidence wrongly admitted.*]—Even if a judge of an inferior ct. errs in over-ruling objections made to a resp. being compelled to give evidence against himself on an appeal from an order made under Illegitimate Children's Act (Man.), & in receiving & considering the evidence, that does not furnish a ground for prohibition, if it is admitted that he has jurisdiction to entertain the appeal.—*Re* PALL SIGURDSON (1916), 33 W. L. R. 325; 9 W. W. R. 940; 28 D. L. R. 375; 25 Man. L. R. 832.—**CAN.**

x. *Action for declaration of paternity —Amount of claim—Future rights.*]—In an action *en déclaration de paternité* pltf. claimed an allowance of $15 per month until the child (then a minor aged four years & nine months), should attain the age of ten years, & for an allowance of $20 per month thereafter "until such time as the child should be able to support & provide for himself":—*Held:* (1) apart from the contingent character of the claim, the *demande* was for less than the sum or value of two thousand dollars, & the case was not appealable under Supreme & Exch. Cts. Act, s. 29; (2) the nature of the action & *demande* did not bring the case within the exception as to "future rights" mentioned in the sect.—MACDONALD *v.* GALIVAN (1898), 28 S. C. R. 258.—**CAN.**

y. *To county court judge — When jurisdiction arises.*]—A cty. ct. judge has no jurisdiction to hear & determine an appeal from a filiation order made by justices of the peace, until the order of filiation, & all the papers connected therewith, have been sent by the justices to the proper clerk of the cty. ct. to be filed by him, as required by Cty. Cts. Act, R. S. N. S. c. 156. s. 69.—OVER-

the meantime. During his absence an affiliation summons was served at his father's house. At the hearing his mother attended before the justices & explained that her son was from home & knew nothing of the summons, but if the hearing was adjourned for a fortnight, he would then have returned home. The justices refused to adjourn the hearing & made the order, which was regular *ex facie* :—*Held :* although the justices would have exercised a wise discretion in adjourning the hearing, still, as they had complied with 1844 Act, the ct. had no right to grant a *certiorari* according to the recognised rule of only granting it in case of defective jurisdiction appearing *ex facie*.—R. *v.* BROWN (1859), 1 L. T. 29 ; 24 J. P. 5 ; 8 W. R. 60.

401. —— —— ——.]—On the hearing of a bastardy summons the magistrates ordered all the witnesses out of ct. until examined, & refused to hear a witness who had remained in ct. Upon an application for a *certiorari* to quash the order made on the summons :—*Held :* there was no ground for the application, & the ct. had no jurisdiction to direct the justices to rehear the case, the remedy being by appeal to the quarter sessions. —*Ex p.* WRIGHT (1875), 39 J. P. Jo. 85.

402. —— —— **Order obtained in breach of good faith.**]—Where an affiliation order was obtained in breach of good faith, the ct. granted a rule *nisi* for a *certiorari*.—*Ex p.* EVANS (1872), 36 J. P. Jo. 759.

403. —— —— —— **Service of summons.**]—At the hearing of an application for an affiliation order evidence was given that the summons had been served by being left at the house where the person alleged to be the father of the child resided. He did not appear, and the justices heard evidence & adjudged him to be the putative father of the child & made an order accordingly. He subsequently applied for a *certiorari* to bring up the order to be quashed, on the ground that the summons had not been properly served, and he established that at the date of the service of the summons he had left the house at which it was served & was resident in America :—*Held :* as the jurisdiction of the justices only attached a proof that the summons was duly served the ct. had power to enquire into the validity of the service & would grant a *certiorari*, if it were shown that the service was invalid.—R. *v.* FARMER, [1892] 1 Q. B. 637 ; 61 L. J. M. C. 65 ; 65 L. T. 736 ; 56 J. P. 341 ; 40 W. R. 228 ; 8 T. L. R. 159 ; 36 Sol. Jo. 123 ; 17 Cox, C. C. 413, C. A.

Annotation :—**Mentd.** R. *v.* Webb, [1896] 1 Q. B. 487.

404. —— **Amendment of order—Omission supplied.**]—An order of affiliation omitted to state that the mother's residence was within the petty sessional division, but the summons, a copy of which was in evidence, alleged this fact which was not otherwise proved :—*Held :* the justices had sufficient grounds before them to draw up the order without the omission, & on a *certiorari* to quash the order the ct. might amend it.—R. *v.* HIGHAM (1857), 7 E. & B. 557 ; 26 L. J. M. C. 116 ; 29 L. T. O. S. 105 ; 22 J. P. 6 ; 3 Jur. N. S. 691 ; 5 W. R. 507 ; 119 E. R. 1352.

Annotations :—**Consd.** R. *v.* De Winton (1888), 53 J. P. 292. **Mentd.** R. *v.* Lee (1888), 58 L. T. 384 ; R. *v.* Wood, *Ex p.* Farwell (1918), 87 L. J. K. B. 913.

405. —— —— **Substantial error.**]—The mother of a bastard child obtained a summons against deft. in Aug., 1870, but withdrew it when the hearing came on. She obtained another summons, in which the complaint was stated to have been that day made, in Mar., 1871, & upon the hearing of that summons the justices ordered deft., as putative father, to pay for the support of the child from the date of the first summons in Aug., 1870. The order having been brought up on *certiorari*, an application was made by the complainant to amend the date in the order by inserting instead the date of the second summons :—*Held :* the ct. had no power to make such an amendment, as the adjudication was wrong in a point of substance.—R. *v.* TOMLINSON (1872), L. R. 8 Q. B. 12 ; 42 L. J. M. C. 1 ; 27 L. T. 544 ; 37 J. P. 678 ; 21 W. R. 170.

Annotation :—**Folld.** R. *v.* Key (1873), 37 J. P. Jo. 309.

SEERS OF THE POOR *v.* BURBINE (1913), 12 E. L. R. 443 ; 11 D. L. R. 580.—**CAN.**

z. *New trial—When granted—Point not raised at first hearing.*]—On appeal to the cty. ct. from an order of affiliation made by a stipendiary magistrate, the only matter in controversy was the question of paternity, & the only evidence given before the jury was confined to that point. Deft. applied for a new trial on the ground that the amount which the magistrate ordered deft. to pay had not been put before or passed upon by the jury :—*Held :* it was incumbent upon deft. to have raised the point when the case was being given to the jury, &, having failed to do so at that time, he was estopped from doing so afterwards. —SHEET HARBOUR OVERSEERS OF THE POOR *v.* KENNEDY (1915), 48 N. S. R. 258 ; 21 D. L. R. 119.—**CAN.**

a. *To magistrates—Notice of appeal.*]—Formal notice of an appeal from a decision under Illegitimate Children's Act (Man.), R. S. M. 1913, c. 92, is not necessary.—*Re* PALL SIGURDSON (1916), 33 W. L. R. 325 ; 9 W. W. R. 940 ; 28 D. L. R. 375 ; 25 Man. L. R. 832.—**CAN.**

b. *From preliminary suit at quarter sessions.*]—A preliminary suit at quarter sessions for maintenance of an illegitimate child was dismissed. On appeal, which was tried by a jury, a verdict was found for applt.—FITZGERALD *v.* PORTARLINGTON, 1 Ir. L. Rec. 1st Ser. 503.—**IR.**

c. *What evidence admissible — Mother's evidence.*]—On appeal from an order under Destitute Persons Act, 1894, s. 9, the evidence of the mother of an illegitimate child is not indispensable. The intention is to provide that the appellate ct. may take the mother's evidence, but if it does it must have corroborative evidence.

The provision in s. 42 that in all proceedings under the Act the magistrate may receive any evidence as to him may seem fit, whether the same be strictly legal evidence, or not, is applicable to proceedings on appeal, & is not confined only to the hearing before the magistrate.—DORMER *v.* TAYLOR (1901), 23 N. Z. L. R. 810.—**N.Z.**

d. *Power of magistrate to cancel order—Under Destitute Persons Act, 1894, s. 32.*]—SHIEL *v.* HOOK (1907), 26 N. Z. L. R. 878.—**N.Z.**

BATHS AND WASHHOUSES.

See Public Health and Local Administration.

BATTERY.

See Criminal Law and Procedure; Trespass.

BENEFICE.

See Ecclesiastical Law.

BENEFIT SOCIETY.

See Building Societies; Friendly Societies; Industrial, Provident, and Similar Societies.

BETTING.

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